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# ASIAN YEARBOOK OF INTERNATIONAL LAW

## VOLUME 16 2010

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

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

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

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

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## The Asian Yearbook of International Law

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

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

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

In keeping with DILA's commitment to encouraging scholarship in international law as well as in disseminating such scholarship, its Governing Board has decided to make the Yearbook open access from this volume (2010 volume 16) onwards.



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## PREFACE

### **Transitions**

The publication of this 16th volume of the Asian Yearbook of International Law, signals a new phase in the life of this venerable publication. Several transitions have occurred in the interim that have necessitated a reorganisation of the Yearbook's editorial team and mode of publication.

Between the publication of the last Yearbook and this, we have seen the retirement from the editorial committee of Professors Masahiro Miyoshi and Bhupinder Singh Chimni, untiring and indefatigable stalwarts of the Yearbook and of DILA. Both Professors Miyoshi and Chimni have been editors of the Yearbook since 1998 and have between them, racked up close to 30 years of service to the publication. We wish them both an enjoyable and productive retirement.

The old structure of the Yearbook's editorial committee – of having only three General Editors – was a legacy of DILA's history. At the time of its inception, the Yearbook had but three editors, and even after the change over of editors in 1998/1999, this structure was maintained. This placed a tremendous burden on the editors and often led to delays in the Yearbook's publication. In 2012, the structure of the Editorial Committee was revamped with two key objects: first, to bring more members onto the Committee; and second, to clear the backlog that has accumulated in the interim. Professor Javaid Rehman, who bravely stood up to the plate in 2009 after the resignation of Professor Li-ann Thio, helmed the Yearbook as Coordinating Editor till 2012, when I succeeded him as Editor-in-Chief.

### **Collaborations**

Thanks to the very active leadership of Professor Seokwoo Lee, DILA has forged several important collaborations, most notably with the Korean Society of International Law, the Haesung Institute for Ethics in International Affairs, and the Northeast Asian History Foundation. Through these collaborations, DILA has managed to hold a small annual conference focused on themes like the history of international law in Asia, the law of the sea, territorial disputes and maritime delimitation. The Yearbook has thus profited indirectly from these collaborations in that several of

the most important papers presented at these meetings were revised and published in its pages.

On 17 October 2012, as Editor-in-Chief of the Yearbook and representing DILA, I signed a Memorandum of Understanding with Dean Eric Enlow of the Handong International Law School under which Handong International Law School to work closely with DILA to publish the Yearbook, including assigning student editors to work on the Yearbook under the supervision of Professor Hee Eun Lee.

I am very pleased to report the great success of this collaboration. With additional hands on deck, we were able to get through the process of cite checking and copy-editing much more quickly and thoroughly than were able to do in the past, thanks to the hard work of the students from Handong. This Yearbook is the first fruit of that collaboration.

### **Open Source and Free Electronic Distribution**

From the early 2000s, the Governing Board of DILA had expressed its concern about the distribution of the Yearbook. Collating the figures provided by the two publishers who published and distributed the Yearbook – Brill and Routledge – left us wondering if our publishing objective had been met. Circulation numbers were in the low hundreds, and the pricing of the Yearbook made it next to impossible for individual scholars or students to readily afford their own copies.

At the Governing Board meeting in Singapore in 2012, I proposed that we take the radical step of moving the journal onto an online platform and making it open source. It was already clear to many of us that the more widely circulated an article is, the more likely it is to have an impact on subsequent scholarship and accordingly, be cited. The quickest, cheapest and most efficient way of doing this is by making the Yearbook free as a portable document format (PDF) download.

The proposal was met with some skepticism and opposition. Some members felt that much prestige would be lost if we were no longer published by a reputable publisher, and most members of the Board felt that it was important that a physical copy of the Yearbook still be published. The palpability of holding a physical copy of a book or journal cannot be replaced.

One major concern shared by everyone was the impression that might be created by having a publication made available for free. Would quality and standards suffer as a consequence?

Quality is uppermost in the minds of those who consider themselves serious scholars and at no time should this ever be compromised. Quality in journals and other publications is assured by a double-blind peer review process undertaken by like-minded scholars willing to give their time to review pieces sent to them. This is part and parcel of a scholar's life and has nothing to do with professional book production costs. Quality will thus not suffer so long as rigorous standards of review are adhered to. On our part, we have every intention to ensure that such rigorous standards of review continue to be part of our standard operating processes.

Free electronic distribution of the Yearbook will greatly enhance its reach and impact but this does not mean that hard copies will not be available to those who prefer such copies. With the great strides made in print-on-demand technology, readers of the Yearbook can choose to either download a PDF copy and print it out on their own printers, or click to Amazon.com and order a print copy which will be shipped to them just as any other traditionally-produced volume. Versions for mobile and portable devices like the iPad will also be made available in ePub format.

It is our fervent hope that these changes will allow the work of our contributors to be better served and that their work will reach a much larger audience, especially in the countries of Asia.

KEVIN YL TAN  
Editor-in-Chief

# Positivism in International Law: State Sovereignty, Self-Determination, and Alternative Perspectives

*Hee Eun Lee<sup>1</sup> and Seokwoo Lee<sup>2</sup>*

## I. INTRODUCTION

Contemporary international law and its jurisprudence appear to be taking on a more self-reflective attitude in coming to terms with some of the core assumptions that have dominated international law since the age of European imperialism. One such assumption is that international law is concerned primarily with the actions of states and that those state acts have been and continue to be the basis for the content of international law. Part of the historical narrative of international law is that this positivistic approach departed from an earlier notion that international law emanated from natural law that found its source not necessarily from the purposeful action of states, but from obligations that existed beyond the states themselves.<sup>3</sup> Accordingly, what can be found in Article 38 of the Statute of the International Court of Justice (“ICJ”) in what law the Court will apply to disputes between states, namely treaties and international custom, supports the sense that international law has had a strong positivist strand.<sup>4</sup>

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1 Of the Board of Editors; Associate Professor of Law, Handong International Law School (Pohang, Korea)

2 Professor of International Law, Inha University Law School (Incheon, Korea)

3 See Harold Koh, *Review Essay: Why Do Nations Obey International Law?*, 106 *YALE L.J.* 2599, 2607-14 (1997).

4 Even the reference to “general principles of law” in Article 38 which seems to support the notion of an obligation emanating beyond the state such as natural law is moderated by the phrase that direct follows it, “recognized by the civilized nations.” This appears to support the notion that international law is subject to change as general principles are subject to recognition by states. John W. Head,

State action in the form of treaty making and the state practice element of international custom confirm the sense that international law is made by the states themselves, a product of sovereign will. However, it is from that very point of positivism in international law that has been under attack not only from other legal philosophical schools in terms of methodological approaches in deducing the content of international law and explaining why states observe international rules, but it has also come under suspicion from others who question the very content of international law and its checkered history.

Third World Approaches to International Law (“TWAIL”) have pointed to the period of colonial expansion when colonialism was viewed as a legitimate exercise of state power as to when the contemporary rules of international law took shape. Given the impact of this period on international law, TWAIL scholars look upon the colonial era with a great deal of skepticism on an international system that saw powerful states exploit weaker entities through colonialism utilizing existing concepts of international law to justify their activities. TWAIL views the colonial period as the critical moment in understanding the proliferation of international law as a transnational phenomenon because of the expansive nature of the colonial project.<sup>5</sup> By focusing on European colonialism, TWAIL desires to permit the expansion of the forum in which the history of repression can be reflected and criticized upon international law.<sup>6</sup>

One of TWAIL’s major contributions to the study of international law is that it has brought to light how the practice of powerful states shaped the content of contemporary international law. It posits that through an examination of European colonialism, international law today can be better understood if seen in light of the European states and their historical encounter with what was then the uncivilized world. This can be seen in how the present rules that govern the disposition of international disputes

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*Supranational Law: How the Move Toward Multilateral Solutions is Changing the Character of “International” Law*, 42 KAN. L. REV. 605, 619 (1994).

- 5 See Obiora Chinedu Okafor, *Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective*, 43 OSGOODE HALL L.J. 171, 176-77 (2005).
- 6 Jean Allain, *Orientalism and International Law: The Middle East as the Underclass of the International Legal Order*, 17 LEIDEN J. INT’L L. 391, 394 (2004); Karin Mickelson, *Rhetoric and Rage: Third World Voices in International Legal Discourse*, 16 WIS. INT’L L.J. 361-62 (1998).

that deal with fundamental concepts of state sovereignty such as territorial integrity along with the conspicuous failure during the colonial period to recognize self-determination as a legitimate legal principle. By relying on legal positivism as its philosophical base, international lawyers of that time helped to lay the groundwork for an approach to international law that reflected the European experience of statecraft and international relations.<sup>7</sup> As one TWAIL scholar put it, the “sovereignty doctrine is understood as a stable and comprehensive set of ideas that was formulated in Europe and that extended inexorably and imperiously with empire into darkest Africa, the inscrutable Orient, and the far reaches of the Pacific, acquiring control over these territories and peoples and transforming them into European possessions.”<sup>8</sup> As such, it is in that sense that there is a felt unfairness because of the absence of any meaningful contribution from other non-European states in the development of international law and skewed international law in the favor of hegemonic states.

The positivism that marked this earlier generation of international law that conveniently justified the colonial activities of European states, continued to make its marks on the very principle that was supposed to remedy the injustice caused by international law’s non-recognition of nations as states – self-determination. With the end of World War II and the advent of the United Nations (“UN”), the former colonial holdings of the imperial powers had their opportunity to participate in the international system as legally equal players. The principle of self-determination enshrined in the UN Charter,<sup>9</sup> International Covenant on Civil and Political Rights,<sup>10</sup> and International Covenant on Economic, Social, and Cultural Rights<sup>11</sup> gave

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7 See Dakas C.J. Dakas, *Dokdo, Colonialism and International Law: Lessons from the Decision of the ICJ in the Land and Maritime Dispute between Cameroon and Nigeria*, in *DOKDO: HISTORICAL APPRAISAL AND INTERNATIONAL JUSTICE* (Seokwoo Lee & Hee Eun Lee eds., 2011)

8 Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 *HARV. INT’L L.J.* 1, 6 (1999).

9 U.N. Charter art. 1.

10 International Covenant on Civil and Political Rights art. 1, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force on Mar. 23, 1976).

11 International Covenant on Economic, Social and Cultural Rights art. 1, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force on Jan. 3, 1976).

former colonies the right to statehood. However, there were clear restrictions in the application of the self-determination principle. States that were both colonizers and former colonies which had become newly independent sought to place definite limits on the application of self-determination so as to be not too destabilizing. The European colonial states naturally desired to see the principle only applicable to the areas outside of Europe it formerly governed, while the newly independent states in Africa desired to maintain the principle of *uti possidetis* and keep the pre-existing colonial borders with the hope of securing post-colonial stability.<sup>12</sup> Since states, especially those that were newly conceived, were concerned for survival, international rules that promoted their interests in establishing stability regarding their territorial boundaries made sense despite the emergence of the principle of self-determination which seemed to defy traditional norms. Thus, positivism in international law helped to create the conditions for an instrumentalism in its use so as to maintain the status quo ante. It has continued to do so because it has colored basic principles of international law such as state sovereignty.

## II. STATE SOVEREIGNTY AND THE IMPACT OF COLONIALISM IN INTERNATIONAL LAW

State sovereignty is one of the most fundamental principles of international law. It is the basis upon which states claim the legal right to manage its own affairs to the exclusion of others. As expressed under classical international law, the sovereignty of the state allows it to enjoy exclusive jurisdiction over subjects and matters that exist within its territorial boundaries. The notion that the nation-state exercises authority over a territorial jurisdiction marked a significant shift in understanding the nature of authority and accountability that had previously been hierarchical with various political authorities subject to the Holy Roman Emperor or the Pope. The end of the Thirty Years War in Europe saw the centralization and recognition of power in the princes who were treated as sovereigns. These rulers and the state powers they began to represent became the principal actors in the international system. The new world order that was established at the con-

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12 Diane Orentlicher, *Separation Anxiety: International Responses to Ethno-Separatist Claims*, 23 YALE J. INT'L L. 1 (1998).

clusion of the Peace of Westphalia in 1648 was founded on the sovereignty of these states, which has endured as the bedrock of classical international law and formed the foundation for understanding international relations for the next four centuries.

The state continues to be considered the primary actor in international relations and from the perspective of international law, continues to possess the right to be free from the interference of outsiders and refuse any form of unwarranted intrusions within its territories.<sup>13</sup> It has found articulation in international society through Article 2(7) of the UN Charter which states that “[n]othing contained in the present charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the members to submit such matters to settlement under the present Charter...” The General Assembly, on multiple occasions during the Cold War, pronounced the importance of the non-intervention principle in relation to sovereign rights of member states.<sup>14</sup> Adopted by an overwhelming majority in 1962, the Resolution on Permanent Sovereignty over Natural Resources declared that “[i]t is the duty of all States to refrain in their international relations from military, political, economic or any other form of coercion aimed against the territorial integrity of any State and the exercise of its national jurisdiction.”<sup>15</sup> In 1965, the General Assembly unanimously adopted the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of State and the Protection of Their Independence and Sovereignty. It condemned the use of armed intervention and “all other forms of interference” against sovereign states as well as attempts at coercion through political, economic and any other means to gain advantages at the expense of the target state.<sup>16</sup>

From this basic notion of state sovereignty, the corollary of rules and principles such as sovereign equality, non-intervention, and self-determi-

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13 See generally HERSCH LAUTERPACH, *INTERNATIONAL LAW AND HUMAN RIGHTS* 166-220 (1973).

14 Although General Assembly resolutions are not considered a primary source of international law, they are indicative of state practice.

15 The resolution was adopted by 108 votes in favor, 1 against and 16 abstentions.

16 See also Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations stating that “[n]o State may use or encourage the use of economic,

nation were eventually derived and utilized in the conduct of international relations. While the essential conceptual framework for state sovereignty and the derivative legal principle of non-intervention has held together for centuries, the interpretation given to important definitional elements of these principles has not necessarily remained constant. Territorial sovereignty which European states enjoyed was not extended by the leading international law publicists during the period of European colonial expansion.<sup>17</sup> A utilitarian, pragmatic, and positivist approach in understanding the principle of state sovereignty that offered a legal justification for the colonial enterprises of the various European empires created legal space for empires to grow territorially. These objective positive actions of treaty making with local “states” that ceded territory or the outright taking of territory deemed *terra nullius* by European states were taken to be legitimate.

The recent decisions of the ICJ in relation to territorial claims involving former colonial territories make this point clear. Territorial disputes between Qatar and Bahrain in 2001, between Nigeria and Cameroon in October 2002, and the Ligitan and Sipadan dispute of December 2002 share a similarity in that significant weight was given to the decisions of the colonial powers ruling at the time in the final judgment.<sup>18</sup> In a pending case

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political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind.” G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8082, at 121 (1970).

- 17 Prominent international lawyers during the time such as John Westlake of Cambridge University did not consider any of the African tribes to possess the requisite measure of sovereignty to be accorded the legal personality of states, but rather deemed them to be “uncivilized tribes.” See DAKAS, *supra* note 7.
- 18 In the territorial dispute between Qatar and Bahrain in 2001, in recognizing Bahrain’s sovereignty over the Hawar Islands and Qatar’s sovereignty over the Janan Island, the ICJ took into consideration as sole evidence the 1939 decision of the British Government, which was the colonial power over the disputed area at the time. *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahr.)*, 2001 I.C.J. 40, paras. 113-48 (Mar. 16) [hereinafter *Qatar v. Bahrain*]. Even in cases relating to the territorial disputes of newly independent states, the decisions of the western colonial powers that colonized the disputed areas were held to have absolute evidentiary value. See also *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nig.: Eq.*

before the ICJ, *Case of Territorial and Maritime Dispute between Nicaragua v. Colombia*,<sup>19</sup> one of the determinative issues involves the validity of the Barcenas-Esguerra Treaty of 1928, a treaty that was claimed to have been illegally concluded under U.S. occupation recognizing the sovereignty of Colombia over the islands in dispute. In this case, the key to its resolution will be the assessment of Nicaragua's legal arguments in emphasizing the historical circumstances after 1909, namely the assertion of illegal conclusion of the Barcenas-Esguerra Treaty under U.S. occupation and the want of effectiveness of other treaties such as the Chamorro-Bryan Treaty of 1914 that were concluded under duress.<sup>20</sup> The ICJ has generally given preference to relying on the positive acts of dominant states, including treaty making and other state acts, in navigating through the historical evidence of territories in dispute. The Court's tendency to rely on positive state action has not come without criticism by a minority from the Court.

In a separate opinion in the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Judge Kooijmans took exception to this approach and stated, "[O]nly 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."<sup>21</sup> In his separate opinion in the *Land and Maritime Boundary between Cameroon and Nigeria* case, Judge Ranjeva expressed his concern saying, "The inequality and denial of rights inherent in colonial practice in relation to ... colonies is currently recognized as an

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*Guinea intervening*), 2002 I.C.J. 303 (Oct. 10) [hereinafter *Cameroon v. Nigeria*]; and *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon./Malay.)*, 2002 I.C.J. 625 (Dec. 17).

19 *Territorial and Maritime Dispute (Nicar. v. Colom.)*, <http://www.icj-cij.org/docket/index.php?p1=3&p2=1&code=nicol&case=124&k=e2> (last visited May 20, 2010).

20 For an overview of the case, see Seokwoo Lee, *Analysis of the Recent Decisions of the ICJ Regarding Territorial Disputes and Other Pending Cases*, presented at the International Law Association - Korean Chapter, Academic Conference for Spring 2006 on International Legal Issues of Northeast Asia- Islands, Oceans and Territories, Apr. 29, 2006.

21 *Qatar v. Bahrain*, *supra* note 18, at para. 4 (separate opinion of Judge Kooijmans).

elementary truth; there is a resultant duty to memorialize these injustices and at the same time to acknowledge an historical fact.”<sup>22</sup>

The “historical-critical method,”<sup>23</sup> first referenced by Judge Ranjeva in the *Case Concerning the Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge*, provided a new direction for the development of future decisions with regard to colonial issues. In his declaration appended to the Court’s judgment, Judge Ranjeva stated that in interpreting the facts of the case, the decision was reached without having taken into consideration the political and legal order prevalent at the time.<sup>24</sup> He observed that while the relations between the colonial powers were governed by international law, the relationship between the United Kingdom and Johor could not be seen as having been established as between sovereigns, equal subjects of international law. Thus, “the sovereignty granted to indigenous authorities did not have the same significance as that in relations between colonial Powers,” and their only role was “to submit to the will of the colonial Power...”<sup>25</sup> He questioned how Johor’s title over the islands in question could have been extinguished without its consent and emphasized that in the absence of proof, the conclusion of the transfer of title relied upon presumptive consent as evidenced by Johor’s silence in the face of decisions made by the British government regarding the islands. It was under these circumstances that the Sultan of Johor could not express any form of opposition to the decision of the British government. Judge Ranjeva reached the conclusion that it was difficult to infer an international transfer of title by acquiescence since Johor was merely exercising its colonial territorial

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22 *Cameroon v. Nigeria*, *supra* note 18, at para. 3 (separate opinion of Judge Ranjeva).

23 Historical criticism is defined as the “literary criticism in the light of historical evidence or based on the context in which a work was written, including facts about the author’s life and the historical and social circumstances of the time. This is in contrast to other types of criticism, such as textual and formal, in which emphasis is placed on examining the text itself while outside influences on the text are disregarded. *Encyclopædia Britannica Online*, available at <http://www.britannica.com/EBchecked/topic/267358/historical-criticism> (last visited May 20, 2010).

24 *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malay./Sing.)*, at para. 5 (declaration of Judge Ranjeva) 2008 I.C.J. 12 (May 23).

25 *Id.*

title according to the rules and practice of the colonial Powers and that the silence of Johor could not be interpreted against such circumstances.<sup>26</sup>

Judge Ranjeva's approach to these issues is emblematic of a desire for alternative approaches in settling these issues rather than relying primarily on legal positivism. Given the impact of positivism on the shaping of international law, there is a need for viable alternative philosophical perspectives that can provide the basis for fairer international rules that depart from "a Eurocentric conception of international law based on notions of otherness."<sup>27</sup>

The recent decisions of the ICJ in dealing with the disposition of territorial disputes originating from the period of European colonial expansion reveal the lingering impact of positivism in international law. These positivist presuppositions impacted the way states resolved important issues such as what political groups were entitled to be treated as states and ultimately who had state sovereignty, and related issues such as when intervention is possible or called for. Therefore, when it came to determine how to deal with indigenous peoples and their rulers, the European states, using existing principles of international law, had to find a way to deal with these native peoples. Ultimately, the classification between civilized and uncivilized mattered because it was the basis upon which whether the already recognized principles and rules of international law would apply to these indigenous societies such as whether to treat their political unity as states or given them lesser designations such as protectorate or colony. This distinction was critical in offering a legal justification for permitting colonial expansion.<sup>28</sup>

### III. THE SEARCH FOR AN ALTERNATIVE AND THE PROBLEM OF SELF-DETERMINATION

Positivism offers a compelling descriptive account of international law. International rules are made by the states themselves. Treaties and customary international law, as examples of willful consensual state action,

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26 *Id.*

27 *Cameroon v. Nigeria*, *supra* note 14, at para. 5 (separate opinion of Judge Al-Khasawneh).

28 Anghie, *supra* note 6 at 66-74.

provide hard evidence for the existence of an international order. Despite its empirical claims, the criticism of positivism that emanates from natural law and elsewhere is that without any effective counterweight to check the desires of hegemonic states, international law is prone to be reflective of the current realities of international relations. A case in point is the period of European colonialism.

In what was a departure from positivism in international law, the development of new international legal principles during the first part of the last century such as self-determination and its application to formerly “uncivilized” groups along with new human rights norms posed a challenge to a purely positivistic conception of international law. It would have been hard to imagine any justification for the principle of self-determination during the period of European colonialism when the nations that were overrun were considered not to have the capacity for statehood. Indeed, the nature of self-determination itself having its roots in the concept of popular sovereignty and revolution<sup>29</sup> runs counter to the traditional positivist notion that international law stems primarily from the will of powerful states.

In search of an alternative perspective to ground an understanding of potentially new sources of international law, cosmopolitan, communitarian, and liberal perspectives provide potentially fertile ground for a discussion of the development of a fairer set of international rules. Utilizing the ideas of cosmopolitan theorists represented by Thomas Pogge and Charles Beitz and liberal approaches suggested by Allen Buchanan and communitarian perspectives proposed by David Miller and Michael Walzer, alternative frameworks can be erected to understand the issue of self-determination beyond a positivistic conception of international law.

#### IV. ALTERNATIVE APPROACHES

Despite the potential for violent conflict over a political separation, international law has recognized the legality of self-determination and secession in certain circumstances. The travails and victories of former colonies are a case in point. As the most dramatic and extreme form of self-determination, secession is a political act wherein a group separates itself from a state to

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29 See ANTONIO CASSESE, *SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL* 11 (1995).

form an independent political entity of its own. Because this act of self-determination rarely happens peacefully with the state willingly letting some of its population and territory go, violence often goes hand in hand with secession. Not only would the state want to prevent valuable human and physical resources from leaving its control, but because the state often also consists of many different political groups, allowing secession might set a dangerous precedent for other like-minded peoples within its control.

Various political philosophers have chimed in over the debate of when self-determination is permissible and when secession is ever justified. Their ideas largely reflect perspectives that differ on the fundamental questions regarding who secession should favor (national groups, free associations, etc.) and what rights (individual v. corporate) should be valued more. Related distinctions can also be made on the basis of the nature of the right to secession, whether the theories describe justifications for separation as a remedial right or as a primary right. Depending upon what theory of secession is adopted for a particular scenario, divergent outcomes are likely to result with different reasons and justifications given. While not all the theories fall into neat, well-defined philosophical categories, the debate over secession can be viewed in the broader context of the debate between communitarian, liberal, and cosmopolitan perspectives. Generally, whereas communitarians underscore the importance of communities and identity groups, liberals tend to stress the interests of individuals and their rights. Cosmopolitanists likewise focus on individuals, but tend to value universality and stress an individual's right to choose where her community of obligations will be. Not surprisingly, these disparate foundations have led to diverse visions and justifications for secession.

By definition, all modern theories of secession offer justifications for when political separation from a pre-existing state is permitted. As the most extreme form of self-determination, all envision circumstances that would allow a group to remove itself from any entanglements with the state they presently reside to create a new political entity. Given their divergent philosophical underpinnings, the theories offer vastly different ideas on the identity of groups that can secede, the terms and rationale of their separation, and ultimately, the benefit independent statehood would have for a secessionist group. In part, these differences highlight

their diverse conceptions of the state and what utility statehood has for self-determining groups.

Yet despite their differences, all of these theories of self-determination begin with the assumption that the state is a relevant unit of analysis when beginning to evaluate secession claims even though they qualify different groups for the right to secede. Intuitively, a theory of secession rests on its conception of the state because secession is a political act of separation from a state. The theories must wrestle with the issue of where the original, pre-existent state lies in relation to those seeking their self-determination. Whereas some theories put more value on the state and place a higher bar for justifying secession, others would permit secession under less restrictive requirements because the pre-existing state should not be a significant obstacle to self-determination. Depending on, *inter alia*, what value each theorist gives to the state, their theories result in different outcomes for self-determining groups who have aspirations for statehood.

### A. Cosmopolitan Approach

Cosmopolitan approaches share three basic characteristics: (1) there is a focus on individuals as the ultimate units of moral concern as opposed to family units, tribes, national groups, or states; (2) across the board, this special status of individuals universally attaches to all human beings; and (3) for everyone in the world, individuals are of primary importance and not just for members of their social groupings.<sup>30</sup> Despite this common ground, cosmopolitanism has three significant variations. Legal cosmopolitanists are devoted to the ideal of a world order where every individual has equal legal rights and duties reflected in the notion of global citizenship.<sup>31</sup> Moral cosmopolitanism holds that all individuals are required to respect each other's status as ultimate units of moral concern.<sup>32</sup> As a result, this approach to cosmopolitanism sets limits upon the conduct of people especially in the effort to establish international schemes. Lastly, institutional cosmopolitanism devises particular basic principles of justice that

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30 Thomas W. Pogge, *Cosmopolitanism and Sovereignty*, in *POLITICAL RESTRUCTURING IN EUROPE: ETHICAL PERSPECTIVES* 89 (CHRIS BROWN ED., 1994).

31 *Id.* at 90.

32 *Id.*

are applied to international schemes.<sup>33</sup> These schemes are entrusted with the responsibility to ensure the fulfillment of human rights.

### 1. THOMAS POGGE

It is on this institutional basis that Pogge attempts to work out a conception of self-determination based on upon the cosmopolitan ideal of democracy. Envisioning a “pluralist global institutional scheme,” Pogge does away with traditional notions of state sovereignty. In his view, the concentration of sovereign power in the state is no longer tenable, nor defensible under a cosmopolitan morality that focuses on the needs and interests of individuals. In his cosmopolitan model, sovereign power is dispersed vertically and can be achieved by centralizing and decentralizing political units above and below the state. According to him, this dispersal of power from the state would lead to the creation of new political units whose geographical shape is undetermined. In the absence of a central dominant state, individuals would rule themselves through these new political entities of various sizes. But because of the current condition of international relations, these new units have to eventually take shape both politically and geographically in the context of a state dominated system. As a result, principles of self-determination need to be expounded with respect to the creation of these new political units.

Pogge comes to the conclusion that there are two principles of self-determination. First, persons of any contiguous territory of reasonable shape are allowed to join an already existing adjoining political unit with the caveat that the decision to join was made by a majority of the people and that the people of the existing political unit accept them as members.<sup>34</sup> This is conditioned on the premise that political units who might be left out in the move can still remain viable or can be incorporated into another political unit. Second, if there are sufficient numbers of persons in any contiguous territory, they can themselves form a new political unit if the decision to create a new political unit was accepted by a majority of the people.<sup>35</sup> However, any desire to create something new out from within the old is subject to general principles of minority protection and must remain

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33 *Id.* at 91.

34 *Id.* at 112.

35 *Id.*

consistent with the rights of individual choice.<sup>36</sup> Sub-groups can opt not to join the newly created political unit to become members of another political unit. Further, sub-groups are free to reject membership in the newly created political unit to establish their own independent political entity. Lastly, any political units leftover must be viable or their members must be willing to join another political unit.<sup>37</sup>

## 2. CHARLES BEITZ

Beitz proposes a cosmopolitan perspective based on a normative framework where morality and international justice are the foundational concepts for international relations. Whereas the dogma of an amoral state in the state of nature preoccupies realism leading to a skeptical view of international morality, he provides a way to conceive of morality in international relations as a basis for making moral judgments on the affairs of state made impossible by realism. Although many who advocate positions from the natural law tradition assert that moral judgments can be made in a state of nature, principles of justice are valued less than considerations of international order. Beitz accepts the fundamental importance of the rights and interests of persons and offers a cosmopolitan approach towards thinking about international morality that is conscious of the moral relations members of a universal community have to each other. He asserts that there are no reasons why external agents cannot make moral judgments on the domestic affairs of the state.<sup>38</sup>

Challenging the assumptions and empirical claims realism makes about the world, Beitz problematizes present justifications for self-determination. He observes that current principles of self-determination are informed by the experiences of former colonies and their struggle to gain independent statehood.<sup>39</sup> However, ambiguities arise when applying these principles to other situations where the impetus for a separate state is not in reaction to colonial oppression, but rather, the desire of ethnic minorities for independent statehood. First, it is unclear what the self refers to,

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36 *Id.*

37 *Id.* at 112-13.

38 CHARLES R. BEITZ, *POLITICAL THEORY AND INTERNATIONAL RELATIONS* 182 (1979).

39 *Id.* at 94.

the government or to a certain group of people.<sup>40</sup> The ambiguity of self-determination also lies in identifying groups that have legitimate claims to self-determination. The principle was applied to former colonies that already had settled populations; however, it is unclear if it would apply to other groups.<sup>41</sup> Finally, it is not clear what form of independence would satisfy self-determination.<sup>42</sup> In response to these ambiguities, Beitz offers a moral basis upon which self-determination can be justified.

If borders are redrawn to accommodate people who seek self-determination, access to wealth and resources will be redistributed. There is a strong presumption in favor of not interfering with the status quo. Thus, a change based on principles of self-determination requires a good claim and justification of those seeking secession. Beitz argues that this self-determination claim must be validated by showing that the resulting new political entity is necessary to restore conditions with principles of justice appropriate for that community.<sup>43</sup> Thus, good claims for self-determination are correctly understood as the means by which social injustice can be remedied. In other words, the legitimacy of the state rests on adherence to the appropriate principles of justice. Thus, when self-determination is pursued by those within a colony, their efforts towards independence should be seen as their desire to see social injustices alleviated.<sup>44</sup> The implication is that a state that fails to uphold social justice runs the risk of spawning legitimate claims for self-determination and eventually, secession.

## B. Liberal Approaches

Generally, liberalism as a political philosophy is historically linked to Western schools of thought that hold individual rights and liberty as fundamental principles. These principles are enshrined in the constitutions of liberal democracies and closely associated with the rationale justifying human rights, namely the understanding that all human beings are free and equal. As within any broad philosophical movement, there is great variation on the means to achieve the goals of liberalism and how to

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40 *Id.* at 95.

41 *Id.*

42 *Id.*

43 *Id.* at 112.

44 *Id.* at 104.

conceptualize fundamental principles such as liberty, where individuals stand in relation to the state and its institutions. With respect to the right to self-determination and secession, liberal theories tend to adopt an approach that looks at the motivation behind the desire to separate as well as to the end effect of secession. The question that is asked is whether secession will promote social progress with guarantees of liberty. It is also concerned with the protection of minority rights which otherwise would not have been possible given the original political alignment.

Offering an examination of these different theories of secession, Allen Buchanan sets forth four criteria upon which to evaluate them. A superior theory of secession must be morally progressive, but also be minimally realistic. It also must be consistent with morally acceptable principles of international law in that it should not contradict these principles when interpreted in morally progressive manner. Moreover, the theory, if adopted, must not promote behavior that would subvert principles of international law or of morality, nor should it undermine strategies for conflict resolution or hinder efforts toward other desirable outcomes. Finally, while it need not be universal in acceptance, the theory should be morally accessible to wide global audience.<sup>45</sup> Buchanan is concerned with meeting theory with practice in such a way as to provide international institutions a way to respond to secession in a progressive, yet morally acceptable manner.

Theories of secession can be grouped into two general categories, remedial rights theories and primary right theories. Remedial rights theories hold that groups have a general right to secede if and only if certain rights they possess have been abused by the state they live in for which secession is the last remedy.<sup>46</sup> Unwilling to accept any other justification for secession, these types of theories do not allow for any other rights to secession other than those that justify secession on the basis of remedial rights. According to one version of a remedial right theory which Buchanan elaborates, it permits secession for a group only where: (1) the physical survival of the group's members is in jeopardy or there are violations of other basic human

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45 Allen Buchanan, *Theories of Secession*, 26 PHIL. & PUB. AFF. 31, 40-44 (1997).

46 *Id.* at 34-35.

rights or; (2) its previously sovereign territory was unjustly appropriated by the state.<sup>47</sup>

Primary rights theories, however, do not limit the right to secession only to remedy an injustice. Depending on whether the group shares common non-political characteristics like ethnicity or religion (ascriptive group theories) or whether members choose to be with each other voluntarily through a democratic political process (associative group theories), the right to secession is given without regard to any action of the pre-existing state where the group resides.<sup>48</sup> In fact, as Buchanan notes, the right to secede is given to a group even though it lives in a state that is perfectly just.<sup>49</sup>

For Buchanan, therein lies the inherent weakness in primary right theories and one of the reasons why remedial rights theories are more palatable. Primary right theories would permit secession without regard to the political, economic, and social realities on the ground and do not appear to appreciate the potential effect political separation has on exacerbating tensions in the new and former state.<sup>50</sup> In practice, ethnic minorities who seek to constitute their own state to become the majority often undertake secession. A new ethnic minority is created in the new state that can lead to the unsatisfying result of the new minority being persecuted by the newly created majority. Further, secession often leaves out members of the ethnic group creating a situation where the people left behind become even a small minority in the former state and become even more susceptible to discrimination which inspired secession to begin with.<sup>51</sup> The potential for violence resulting from a secessionist act is high. Thus, remedial rights theories of secession do not leave it up to groups the right to choose secession, but would rather constrain the right to secede in cases where there are

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47 *Id.* at 37.

48 *Id.* at 38.

49 *Id.* at 40.

50 *Id.* at 45.

51 *Id.*

clear injustices that cannot be remedied other than by created a separate state for those being persecuted.

### C. Communitarian Approaches

In contrast to liberal and cosmopolitan approaches geared toward universalism and individualism, communitarianism rests its focus upon the value of communities. On the whole, communitarian theories encourage pluralism and stress the importance of local cultures. Consequently, communitarian theories readily acknowledge differences in worldviews affected by local conditions. Communitarians argue that there is no one standard of justice, but that the standards should be found in the particular cultures that exist in the world. By taking such an approach, the rights they advance do not support a singular, universal approach applicable to everyone, but are rights that serve to protect differences and local conditions. These conditions such as culture can affect the development of distinctive political institutions and can affect the prioritization of rights as well as the justification of those rights, the right to self-determination and secession included. Whereas some countries and cultures champion individual rights and institutions that are committed to liberal democratic values, communitarians are readily willing to accept these distinctions without making the value judgments liberals are bound.

#### 1. DAVID MILLER

In his exposition on the idea of nationality, Miller proposes that a national people in a particular territory possess a “good claim to be politically self-determining.”<sup>52</sup> He claims that these people should have their own state that would allow them to pursue matters that are of primary concern to them. In defense of this claim, he argues that the reasons why the boundaries set by nationality should correspond with the boundaries set by statehood are twofold with another more speculative reason following these justifications. His first reason looks to the state being made up of institutions that should be able to appreciate and meet the expectations of the national people’s conception of social justice.<sup>53</sup> The second reason to favor national self-determination is that the resulting national state would serve to pro-

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52 DAVID MILLER, ON NATIONALITY 81 (1995).

53 *Id.* at 83.

tect the national culture.<sup>54</sup> He then goes on to posit that pursuing national self-determination reflects the desire for collective autonomy which he qualifies as being speculative, but should be a strongly considered reason nonetheless because people desire to affect the world with others who share the same nationality.<sup>55</sup> After justifying national self-determination, Miller examines how the national state should exercise its sovereign authority if national self-determination is a regulating value. He then puts forth the resulting obligations these states have towards other national states. Finally, he deals with the difficult situation where political and national boundaries do not correspond to each other and where secession may be rationalized.

Miller offers a compelling vision of self-determination suggesting that a national state is practically necessary in order to realize the full measure and values of a national people. In his ideal case, since the community is made up of one national people, their own national state will suffice to give them control over issues which they would not have had were they to reside in a state where they were the minority group.<sup>56</sup> For him, the national state is the political means to achieve a robust expression of nationalism through which reciprocity of obligations can flourish. Without the state, these obligations to one another are ambiguous, but with the backing of state power these mutual obligations become concretized in terms of citizenship.

Miller also asserts that self-determination also benefits the national culture through the protection of the state. Miller believes that a common national culture is valuable to members of a national community because it not only gives them sense of belonging and a historical identity, but also offers them a supportive environment where individual choices on how to live can be made and that a state made up of members of a nation can foster and nurture this environment.<sup>57</sup> National self-determination and the existence of a national state are a means to protect national culture.<sup>58</sup> Miller asserts that “if you care about preserving your national culture, the

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54 *Id.* at 85.

55 *Id.* at 88.

56 *Id.*

57 *Id.* at 85-86.

58 *Id.* at 85.

surest way is to place the means of safeguarding it in the hands of those who share it—your fellow-nationals.”<sup>59</sup>

Miller stresses that a national state will be more responsive to the needs of the nation which is itself a community of obligation. The members of this community acknowledge the duties owed to other members of the nation to meet fundamental needs and to guard their interests. In order for these duties to be assigned and enforced, the national state can establish and regulate institutions that can dispense rights and responsibilities to the people in a manner that is acceptable to them in accordance with their conception of social justice. In this manner, social justice can be realized as a regulating principle within a national community.<sup>60</sup>

Miller’s more speculative justification for supporting efforts for a national state is based on the notion that national self-determination is an expression of collective autonomy. He argues that human beings have an interest in shaping the world with those who share similar values and concerns, usually with their own national people.<sup>61</sup> Thus, a state can function most effectively where there is a single national community. The goals of the national community can be realized in a political environment where the members trust each other to uphold the obligations the state puts on them.<sup>62</sup> In his ideal case, since the community is made up of one national people, their own national state will suffice to give them control over issues which they would not have had were they to reside in a state where they were the minority group.

## 2. MICHAEL WALZER

Discounting the idea of a universal tribe coming from the common humanity of people, Walzer identifies the crucial commonality among human beings, his concept of particularism in which people are all members of particular thick cultures that they call their own.<sup>63</sup> Walzer’s reasoning for pursuing self-determination hinges on the right of people to govern themselves in accordance with their own political ideas insofar this can

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59 *Id.* at 88.

60 *Id.* at 83-84.

61 *Id.*

62 *Id.* at 91.

63 MICHAEL WALZER, THICK AND THIN 83 (1994).

be done without harming locals who might lose out if self-determination becomes a tangible reality. Using the captive example, he explains how his conception of self-determination is justified. The captive describes a national people that has recently been incorporated into a state through conquest. The captivity of this people is wrong judged on the minimalist principle that aggression is a criminal act in international relations.<sup>64</sup>

Along the same lines, Walzer extends his reasoning for self-determination in situations where it is evident that a cohesive group within a state faces oppression from the ruling people. He observes that these groups, or national tribes as he calls them, come from a position of fear as they are confronted with the prospect of conquest and oppression.<sup>65</sup> As a result, conflicts flow out of this fear as minority groups respond with violence to majoritarian injustices. A solution for the potential for violent conflict is to permit the creation of protected areas of many different kinds where these national tribes can meet their own needs.<sup>66</sup> In some cases, secession will be the appropriate route. Rather than see traditional alignments upheld, Walzer would prefer separation if it is demanded by a political movement that represents the popular will of the people. He declares, "Let the people go who want to go."<sup>67</sup>

Inherent in Walzer's justification for self-determination is the understanding that there is a right to resist the erosion of a national culture. Tribes, subjected to the forces of modernity and contemporary culture, respond by building walls to protect themselves from losing the thickness of the cultures. He recognizes the right to build these walls depending on the local context of where this will happen and the constitutional structures that will be used to support them.<sup>68</sup>

## V. CONCLUSION

Since states are the sole actors in the international system imbued with legal personality to act, one is able to derive the content of the interna-

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64 *Id.* at 71.

65 *Id.* at 77.

66 *Id.* at 78.

67 *Id.*

68 *Id.* at 72.

tional legal order from state action vis-à-vis other states. This perspective is consistent with the positivist strain in the interpretation of the creation and development of international law. As indicated through Article 38 of the Statute of the International Court of Justice, international law consists of international conventions and international custom. According to the positivist account, the main sources of international law reflect the consensual nature of the rules. States, by their own will, enter into treaties and undertake state practice. Thus, states recognize the legitimacy and efficacy of the rules that they themselves created. "The doctrine of positivism . . . teaches that international law is the sum of the rules by which states have consented to be bound, and that nothing can be law to which they have not consented."<sup>69</sup>

A positivist reading of state sovereignty looks to the rational and necessary aims of such a principle which had its root in the Peace of Westphalia (1648) ending the brutal Thirty Years War in Europe. The bargain that was reached among the various powers that took part in the conflict resulted in the recognition that each sovereign was the master of its own physical territory, and as a consequence, others sovereigns were required to heed the borders of other sovereigns.<sup>70</sup> Cosmopolitan, liberal, and communitarian views, as discussed above, challenge the positivistic strand of international law by not simply looking at sovereign will as the source for the justification of legitimate international rules but are concerned about what would be acceptable and just.

Unlike positivism's focus on the state, cosmopolitan thinkers are more apt to look beyond the state and focus on the rights of individuals

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69 J.L. BRIERLY, *THE LAW OF NATIONS* 1 (SIR HUMPHREY WALDOCK ED., 1962).

70 A question arises as to the perspective that could be drawn from advocates of positivism on the beneficial outcome that resulted from the recognition of state sovereignty after the Peace of Westphalia. Prior to the Peace, rulers exercised personal sovereignty, that is, authority over people groups in which "sovereigns" were referred to as ruler of the Franks or King of the Goths. The common interpretation given for the creation of state sovereignty was that it was necessary to deal with the fractious religious conflicts occurring on the European continent. Through the separation of church and state and establishing sovereign states, religious conflicts would be abated. One must question whether the European powers utilized religion as a pretext and rallying point to engage in conflicts to dominate the continent.

and the universality of individual moral obligations. Pogge and Beitz accept the cosmopolitan notion that individuals are the primary units of concern where there is interaction in a global environment on the basis of an international morality that is built on the needs of individuals. The modern state is devalued to the extent that individuals are preeminent in their theories of secession. Pogge goes so far as to conceive of an alternative framework where the result of valid claims for self-determination would lead to a vertical dispersal of power in other entities below and above the state. The result would be to lessen the importance of the state in order to achieve a pluralist international scheme that protects the interests of individuals. While not offering as extreme a cosmopolitan approach as Pogge, Beitz does recognize the fundamental value of individual rights and interests and accepts its universal scope. However, he tempers his theory of secession on the basis of the state's obligation to uphold the appropriate principles of justice. A state can remain legitimate and relevant as long as it upholds social justice.

Like their cosmopolitan counterparts, liberal political philosophers accept the premise that the individual is the focus of any discussion of rights. However, they limit their universal aspirations not to the obligations individuals have to each other, but to the universal nature of individual rights regardless of boundaries created by identities shaped by culture and religion. In some liberal circles, these liberal values find their expression in the state and their constitutions. However, if a state fails to protect human rights, and abuses come about as a result, liberals would give the groups who have suffered a good claim to self-determination and potentially secession if the situation warrants. Buchanan expresses such sentiments as he argues for the superiority of remedial rights theories of secession over theories that would justify secession absent any abuse of rights. The implication is that the state has an obligation to be the guarantor of individual freedoms and liberties. The state is accorded the responsibility to ensure minorities, groups that would qualify for self-determination under other theories of secession, have access to political power to have a system responsive to their needs. Secession would only be used as a last resort as a means to protect their human rights.

In stark contrast, communitarian approaches are inclined to see secession as a means for groups to exist in political communities whose institutions would be the most responsive to their unique needs by virtue of their

shared identity. Opposed to the universalism advocated by cosmopolitan philosophies, communitarians generally find value in the particular and celebrate the diversity found in different societies and cultures. Thus, some communitarians such as Miller and Walzer would allow national groups who have a desire for self-determination to secede subject to certain conditions. They advocate for a primary right theory of secession that enables national groups to pursue statehood justifiably to protect their interests and to promote their causes in the most receptive fashion. Although Walzer would prefer groups to secede with some showing that they suffered abuses and while Miller does not advocate an absolute right to secession for every national group, a presumption in favor of secession is given where conflict is likely because of identity politics. The state serves not only the negative role as a buffer against external threats to security and cultural erosion, but the positive function in the promotion of shared values. In the current context of international relations, the national state is the primary vehicle to attain such communitarian goals.

Cosmopolitan, liberal, and communitarian conceptions of self-determination and their theories of secession bear out their different conceptions of the state and its purposes. These perspectives differ sharply in that cosmopolitan and liberal theorists would tend to limit the practice of secession only to more extreme cases of group oriented human rights abuses and communitarians view secession as an opportunity to enhance communitarian values of particularism. However, what they hold in common is that they challenge the assumptions and presuppositions of positivism in international law. Such perspectives provide more than a descriptive account of international law. While they offer different methods for approaching international legal issues, they look beyond merely sovereign will by focusing on justifications for self-determination upon alternative positions of how best to secure justice and thus, to develop a fairer set of international rules.

# Partly Virtual, Partly Real: Taiwan's Unique Interaction with International Human Rights Instruments

*Fort Fu-Te Liao'*

## I. INTRODUCTION

One major purpose of the United Nations (UN) is to promote and encourage respect for human rights for all. The UN and its members, in pursuit of this purpose, shall act in accordance with the principle that all persons are endowed with fundamental human rights, regardless of the country in which they live. The Universal Declaration of Human Rights (UDHR), which was adopted in 1948 by the UN General Assembly (GA), has been proclaimed as a common standard of achievement for all peoples and all nations. Therefore, no distinction shall be made on the basis of the international status of the country or territory to which a person belongs.

The UN has always been urging states to join international human rights treaties. It accepts all instruments of ratification or accessions to human rights treaties, even those coming from non-UN member states or territories of which sovereignty is in doubt. The primary issue for most states is whether they wish to join. In some cases, the question is how much pressure the international community is willing to exert to push for inclusion.

However, for Taiwan, the question is not only whether it wants to join, but also whether it even has the ability to join the international human rights system. This article therefore discusses Taiwan's unique interaction with international human rights treaties.<sup>2</sup> Apart from this introductory section it includes three main parts. Section II traces back Taiwan's adventures in the international human rights regime. Section III considers interac-

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2 The international human rights treaties referred to in this essay mainly include the International Bill of Rights and core international human rights treaties.

tions between the Taiwanese Constitution and international human rights instruments. Section IV reviews how Taiwan incorporated international human rights treaties without the successful deposition of the instruments of ratifications or accessions to the UN. The conclusions of this article will be presented in section V. A general image of such interaction between Taiwan and international human rights instruments presents a unique picture that is part reality, but that is also something that akin to virtual reality.

## II. ADVENTURES IN THE INTERNATIONAL HUMAN RIGHTS REGIME

I divide Taiwan's adventures in the international human rights regime into three stages. In the first stage, between 1945 and 1971, Taiwan did not act as a positive participant. The second stage ran from 1971 to 2000, when Taiwan suffered double isolation. In the third stage since 2000, Taiwan has desired to join the international human rights regime but has had no opportunity. Instead, special domestic laws have been enacted to incorporate international human rights treaties.

### A. 1945-1971: Not Really a Positive Participant

After the UDHR was adopted in 1948, both the International Covenant on Civil and Political Rights (ICCPR)<sup>3</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>4</sup> were concluded in December 1966. The UDHR, ICCPR, and ICESCR are collectively known as the "International Bill of Rights." Together they represent the most basic set of international human rights standards. This set of international human rights regulations is the basis for many other human rights treaties. The Optional Protocol to the ICCPR (ICCPR-OP1), which was also adopted in 1966, confers on the individual citizens of state parties to the Protocol the right to bring complaints against governments for rights violations. Apart from the International Bill of Rights, the UN also concluded one core inter-

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3 International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

4 International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

national human rights treaty by 1971, i.e., the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).<sup>5</sup>

As a result of Japan's defeat in August 1945, China, then governed by the Republic of China (ROC) government, took over Taiwan on behalf of the Allied Powers, pursuant to an order issued by General Douglas MacArthur. Two months later, the ROC unilaterally proclaimed Taiwan a province.<sup>6</sup> The ROC, representing China, was a member state of the UN and permanent member of the Security Council between 1945 and 1971. Moreover, the ROC was a long-term member of the UN Commission on Human Rights, and for many years acted as the vice-chair of the Commission. Mr. Chung Peng-Chun,<sup>7</sup> representative of the ROC to the Commission, was regarded as one of the five key people who drafted the UDHR. Therefore, it can be argued that the ROC actively participated in drafting the International Bill of Rights and some of the significant international human rights treaties at that period of time.

However, this formerly active participant merely signed the two international covenants and the ICCPR-OP1 in 1967 with no ratification following 1971. The ROC ratified the ICERD in 1970 before she was forced to eventually leave the UN.

It can therefore be argued that during the period between 1945 and 1971, the ROC had opportunities to fully join the international human rights regime, but it did not wish to do so.

## B. 1971–2000: Double Isolation

Between 1971 and 2000, the international human rights regime continued to advance, leaving the long-term martial-ruled Taiwan<sup>8</sup> further behind.

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5 International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 660 U.N.T.S. 195, *entered into force* Jan. 4, 1969.

6 HWANG JAU-YUAN, LIAO FORT FU-TE & CHANG WEN-CHEN, *DEVELOPMENT OF CONSTITUTIONAL LAW AND HUMAN RIGHTS IN TAIWAN FACING THE NEW CENTURY* 6 (2003).

7 All peoples' names that are translated from Chinese characters in this essay are presented surname first, first name second.

8 The martial law decree went into effect in Taiwan on May 20, 1949. Until its lifting in July 1987, the 38-year-long martial law rule did intrude into many aspects of civilian lives. Martial law orders on Taiwan's offshore islands, including Kinmon,

Among the International Bill of Rights, the two international covenants and the ICCPR-OP1 came into force in 1976. The Second Optional Protocol to the ICCPR (ICCPR-OP2), aiming at the abolition of the death penalty, was proclaimed by the UN GA in 1989.

The UN GA also passed several core international human rights treaties in this period including the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW),<sup>9</sup> the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Convention on the Rights of the Child (CRC), and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW). There were also several optional protocols concluded to offer more procedural and substantial protections, including the Optional Protocol to the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW-OP), the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (OP-CRC-AC), and the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution, and child pornography (OP-CRC-SC).

However, the situation in Taiwan had changed dramatically since 1971 which told another story. The UN GA passed Resolution No. 2758 that recognized “the representatives of the Government of the People’s Republic of China [as] the only lawful representatives of China to the United Nations and that the People’s Republic of China is one of the five permanent members of the Security Council.”<sup>10</sup> It also decided “to expel forthwith the representatives of Chiang Kai-shek from the place which they unlawfully occupy at the United Nations and in all the organizations related to it.”<sup>11</sup> Since then, the UN and most states in the world no longer recognize the ROC government neither as the Chinese government nor even as a sovereign state. Consequently, Taiwan has practically lost almost all of the

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Matsu, Tungsha, and Nansha, were not lifted until November 1992. These areas were in fact under martial law rule from December 10, 1948 to November 6, 1992.

9 Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, *entered into force* Sept. 3, 1981.

10 G.A. Res. 2758 (XXVI), at 2, U.N. Doc. A/RES/2758 (XXVI) (Oct. 25, 1971).

11 *Id.*

available opportunities to participate in the evolution of the international human rights regime.

As Taiwan was under decades of authoritarian rule which made human rights taboo, coupled with international isolation, the importance of the international human rights treaties, as well as the related international legal issues of accession, were not given weight. It can therefore be argued that Taiwan suffered a double isolation. On one hand, Taiwan was internationally isolated, having no opportunity to accede to international human rights instruments. On the other hand, Taiwan was self-isolated, not even expressing a wish to join the international human rights regime or to incorporate international human rights norms into its domestic legal system.

### **C. After 2000: Having Will But No Opportunity**

After the year 2000, additional core human rights treaties were adopted, such as the International Convention for the Protection of All Persons from Enforced Disappearance (CPED) and the Convention on the Rights of Persons with Disabilities (CRPD). Another key development of the international human rights regime in the 21<sup>st</sup> century was the adoption of several optional protocols to those core human rights treaties. They include the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OP-CAT), the Optional Protocol to the Convention on the Rights of Persons with Disabilities (OP-CRPD), and the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR-OP). These optional protocols provided new mechanisms of monitoring.

In Taiwan, it was not until the year 2000 that a democratic transfer of power from one political party to another occurred. This transfer of power happened again in 2008. Therefore, developments of acceding to international human rights treaties and bringing them into the domestic legal system can be divided into two periods.

#### **1. 2000 – 2008: The DPP Government**

There was a new start in returning to the international human rights regime after Chen Shui-Bian, a member of the Democratic Progressive Party

(DPP),<sup>12</sup> won the presidential election in 2000. President Chen put forth the ideal of “building a human rights state” in his first inaugural speech on 20 May 2000. He stressed the importance of catching up with international human rights standards through this process. Ratifications of the ICCPR and the ICESCR therefore became one of his key human rights policies.

In April 2001, the cabinet passed a proposal by the Ministry of Foreign Affairs (MOFA) to submit to the Legislative Yuan (LY), the Taiwanese Parliament, to ratify the ICCPR and the ICESCR. The DPP government believed that regulations not conforming to the covenants could be dealt with through revisions in the law, and thus no reservation was required.

However, there was an enormous debate in the LY. The LY, which was then dominated by the Kuomintang (KMT),<sup>13</sup> passed the ratification procedure on 31 December 2002, but with reservations.<sup>14</sup> A declaration to common Article 1 of the two covenants was also included stating that “self-determination is applied to colonies or to non-self-governing territories only, and since the ROC is a sovereign state, therefore it does not subject itself to self-determination.”<sup>15</sup>

The DPP was of the view that such declaration did not comply with common Article 1 of the two covenants. Therefore, the DPP applied for repealing such declaration in January 2003.<sup>16</sup> This repeal was not even discussed before the expiration of that term of the LY.<sup>17</sup> The ratification

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12 The DPP was established in 1986, and claimed that its establishment “marked the culmination of 100 years of struggle and sacrifice by the Taiwanese people for self-government.” See website of the DPP, available at <http://dpttaiwan.blogspot.tw/p/history.html>.

13 The KMT was founded by Sun Yat-Sen in Hawaii in 1894. It ruled China from 1928 until its retreat to Taiwan in 1949 after being defeated by the Communist Party of China during the Chinese Civil War. The ROC took over Taiwan in 1945; therefore the KMT in fact ruled Taiwan between 1945 and 2000. Since Ma Ying-Jeou of the KMT won the presidential election in 2008 and was reelected in 2012, the KMT will be in power until 2016.

14 Those included reservations to Article 6 (right to life) and Article 12 (right to liberty of movement and freedom to choose residence) of the ICCPR and Article 8 (right to form trade unions) of the ICESCR.

15 Official Gazette of the Legislative Yuan, Jan. 4, 2003, vol. 92 no. 3(3), at 206.

16 Official Gazette of the Legislative Yuan, Jan. 15, 2003, vol. 92 no. 5, at 694.

17 *Id.*

procedure was therefore not completed. By the end of May 2008, when the DPP administration ended, ratifications of the ICCPR and ICESCR still had not been accomplished.

However, there was a different story for accession to the CEDAW. The DPP government did not make accession to the CEDAW a top priority of its human rights policy. Nonetheless, because of the promotion from women's rights NGOs, this issue also went to the consideration of the DPP government, which gradually accepted the idea. In July 2006, the cabinet passed a proposal by the MOFA to submit to the LY a plan to accede to the CEDAW without any reservation. It is noteworthy that the LY accepted the idea of including no reservations and passed accession procedures in January 2007. This accession became the first step towards interaction with international human rights instruments in the decades after 1971.

There are two possible reasons for this achievement. One was that such accession was not regarded as a top priority, therefore there were fewer political conflicts. Although the KMT held the majority in the LY, it accepted a proposal from the DPP government. The other reason was that women's organizations in Taiwan played an important role when the LY negotiated a bill concerning women's rights. Unless it concerned a very controversial issue, members of the LY, no matter whether they belonged to the DPP, the KMT, or other political parties, tried not to conflict with those women's rights NGOs so as to gain more support and votes.

A difficult question came with the success of the domestic procedure of accession to the CEDAW: whether or not to deposit the instrument of accession to the UN Secretary-General (SG). On one hand, it was ruled that a state has to deposit its instrument of accession to become a contracting state and be bound by the Convention. By legal terms, Taiwan should have wasted no time in completing this procedure. It was argued that the deposit is to formally declare before the international community Taiwan's commitment to be bound by the CEDAW. Deposit not only brings strengthened human rights guarantees, but it also gets Taiwan back on track internationally. Article 25, paragraph 4 of the CEDAW states that the Convention "shall be open to accession by all States." Those who supported depositing reasoned that the UN's acceptance of Taiwan's accession would

not be important. However, deposit would necessarily implicate Taiwan's sovereignty and independence and would be opposed by the PRC.

Those opposed to deposit offer views in political terms. They believe that there is no urgency to deposit, and questioned whether or not their actions could be respected. They also feared that a failed attempt at deposit could damage national dignity and relations with China and draw criticism about the human rights standards of Taiwan's diplomatic allies and negatively impact the direction of foreign relations.

It can be regarded as a general rule that there is no problem for states that wish to deposit their instruments of accession to international human rights treaties directly to the UN SG. Nevertheless, one special case should be noted. According to Article 48, the CRC is open for accession by any state, and its instrument of accession shall be deposited with the UN SG. The Niue and Cook Islands acceded to the CRC in 1995 and 1997 respectively. The Niue and Cook Islands were not member states of the UN at that time. Both of them were in the situation of "self-governing in free association with New Zealand."<sup>18</sup> There was even a doubt about whether they were sovereign states. Nevertheless, the UN accepted them as contracting states to the CRC.

It is a pity that Taiwan is not a UN member state or, even worse, not even recognized as a sovereign state. In March 2007, the DPP government attempted to deposit an instrument of accession with the help of Taiwan's diplomatic allies.<sup>19</sup> However, at the end of March 2007, the UN SG returned the instrument to Taiwan's allies, stating that Taiwan was not regarded as a sovereign state by the UN.

The unsuccessful deposit of instruments of accession triggered a puzzle: Whether the CEDAW bound Taiwan and whether it had domestic legal

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18 See The CIA World Factbook (re Cook Islands and Niue), available at <https://www.cia.gov/library/publications/the-world-factbook/geos/cw.html> and <https://www.cia.gov/library/publications/the-world-factbook/geos/ne.html>.

19 See MOFA Taiwan, Newsletter no. 065, (April 30, 2007); See also Ho Bih-Jen, *The Strategies and Efforts for Promoting Taiwan's CEDAW Bid*, 32 BI-MONTH J. RES. & EVALUATION 4, 43-53 (2008).

status. Again, Taiwan adopted a unique approach by enacting a special domestic law to solve this problem that will be further reviewed in section III.

## 2. After 2008: KMT Government

Former Taipei City Major and KMT member, Ma Ying-Jeou, was elected president in March 2008. During his campaign, Ma released a nine-point declaration on human rights, but the ratifications of the ICCPR and the ICESCR were not included. Unlike Chen in 2000, there were no bold human rights policy objectives outlined, and no further mention of human rights was made in Ma's inauguration speech. One possible reason was that the ratifications of the ICCPR and the ICESCR were core human rights policies of former President Chen. Taking the same policy as Chen's could politically mean to follow his path.

However, Ma suddenly declared his commitment to ratify the two covenants on 10 December 2008, the 60<sup>th</sup> anniversary of the UDHR.<sup>20</sup> It was also noteworthy that Ma's objective was the same as Chen's in 2000. While the KMT blocked attempts under Chen's administration, a KMT president was now proposing the very same policy. Ma's decision was based on bringing Taiwan's human rights position up to international standards, which was also a fundamental part of Chen's motivation. Ma proposed ratifications without reservation and declaration in 2009, which was the same approach as that of Chen.

As the KMT occupied almost three fourths of the LY at that time, there was no difficulty in passing the ratifications proposed by a president of the same political party. On 31 March 2009, the LY approved the ratifications. It also should be noted that the KMT-dominated LY insisted on reservations and declarations to the covenants in 2002, but gave up such insistence in 2009 when the ratifications were proposed by President Ma.

An Act to Implement the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights was also enacted by the LY on the same day the treaties were ratified. The very details of the Act, which will be reviewed in section III, were in fact originally proposed by Chen's administration. The KMT changed

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20 Press Release, Office of the President, *President Ma Attends 2008 Asia Democracy and Human Rights Ceremony* (Dec. 10, 2008).

the last article only to add a “sun-rise clause” to allow for preparation in advance of the Act’s effective date of 10 December 2009.

After completing the ratification procedure for the two covenants, the KMT government faced a similar dilemma: whether to deposit the instruments of ratifications or not? As mentioned earlier, the ICCPR and the IECSCR were adopted in 1966. The ROC signed them in 1967, but was forced to leave the UN in 1971. The only reason that Taiwan could ratify the covenants in 2009 was that Taiwan could continue to use the signatures of the ROC in 1967.

Therefore, the first core issue is whether those signatures by the ROC in 1967 are still effective. I consider this issue from three angles: Taiwanese, Chinese, and international.

First, Taiwan believed that signatures by the ROC before 1971 were still valid. As seen above, both the DPP and the KMT governments took the same position. It was believed that following this path could be a means to interact with the international human rights regime.

Second, the People’s Republic of China (PRC) has insisted that signatures or ratifications by Taiwanese authority were illegal and void. The PRC made such a declaration when Taiwan acceded to the ICERD in 1981. Again, when the PRC signed the ICCPR in 1998, it made a similar declaration, stating that “the signature that the Taiwan authorities affixed, by usurping the name of ‘China,’ to the [Convention] on 5 October 1967, is illegal and null and void.”<sup>21</sup> However, the PRC’s report under the ICERD did not include Taiwan.<sup>22</sup> Since the PRC has not ratified the ICCPR, its reports covered only Hong Kong and

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21 See <http://www.unhchr.ch/tbs/doc.nsf/Statusfrset?OpenFrameSet>.

22 See Comm. on the Elimination of Racial Discrimination [CERD], Int’l Convention on the Elimination of all Forms of Racial Discrimination [ICERD], *Reports Submitted by States Parties Under Article 9 of the Convention*, U.N. Doc. CERD/C/357/Add.4 (Parts I - IV) (April 3, 2001); CERD, ICERD, *Consideration of the Reports Submitted by States Parties Under Article 9 of the Convention*, U.N. Doc. CERD/C/275/Add.2 (Sep. 30, 1996) (submitted by the People’s Republic of China).

Macau,<sup>23</sup> but not Taiwan. Neither did Chinese reports under the ICESCR<sup>24</sup> and the CEDAW<sup>25</sup> include the situation of Taiwan.

Third, the UN registered all signatures to and ratifications of international human rights instruments by the PRC, while all those done by the ROC were deleted. However, it is worth noting that the states of the former Yugoslavia, such as Croatia, Slovenia, and Macedonia, succeed to all international human rights treaties to which Yugoslavia was a contracting party. The Czech Republic and Slovakia also succeed to those human rights treaties ratified by Czechoslovakia.

Several colonies also succeeded to human rights treaties many years after their independence. For example, Antigua and Barbuda became independent in 1981, but succeeded to the ICERD in 1988. Saint Lucia became independent in 1975, but did not succeed to the ICERD until 1990.

In fact, the Human Rights Committee (HRC) has consistently taken the view, "as evidenced by its long-standing practice, that once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State party, including dismemberment in more than one State or State succession or any subsequent action of the State

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23 See Human Rights Comm. [HRC], Int'l Covenant on Civil and Political Rights [ICCPR], *Report of the Hong Kong Special Administrative Region of the People's Republic of China in the light of the ICCPR*, U.N. Doc. CCPR/C/HKSAR/99/1/Add.1 (May 23, 2000); HRC, ICCPR, *Consideration of Reports submitted by States Parties Under Article 40 of the Covenant*, U.N. Doc. CCPR/C/HKSAR/99/1 (June 16, 1999) (prepared by Hong Kong Special Administrative Region of the People's Republic of China).

24 See U.N. Econ. & Soc. Council [ECOSOC], *Implementation of the International Covenant on Economic, Social and Cultural Rights: Initial Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant*, U.N. Doc. E/1990/5/Add.59 (March 4, 2004) (submitted by the People's Republic of China).

25 See Comm. on the Elimination of Discrimination Against Women, U.N. Convention on the Elimination of All Forms of Discrimination against Women [CEDAW], *Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women: Combined Fifth and Sixth Periodic Report of States Parties*, U.N. Doc. CEDAW/C/CHN/5-6 (June 10, 2004).

party designed to divest them of the rights guaranteed by the Covenant.”<sup>26</sup> Therefore, before the former Yugoslavia states succeeded to the ICCPR, the HRC declared that “all the peoples within the territory of the former Yugoslavia are entitled to the guarantees of the Covenant.”<sup>27</sup>

It can therefore be argued that Taiwan may declare succession of signatures on the ICCPR and the ICESCR in 1967 by the ROC, and move on to ratification and deposit. All of the states mentioned above took the same approach of asking the UN SG to declare their succession to human rights treaties. It can also be a way for Taiwan to make such a request.

However, Taiwan has to face the second core problem: both covenants stipulate that they may be ratified by “any State Member of the United Nations or member of any of its specialized agencies ... and by any other state which has been invited by the General Assembly...”<sup>28</sup> Taiwan could not fulfill those conditions. While the KMT government adopted the DPP’s method of relying on the help of diplomatic allies to deliver its ratification instruments to the UN SG, the UN SG did not accept such instruments. Ma’s government acknowledged this and stated, “Though not able to deposit its instruments of ratification with the UN Secretariat, the ROC government is committed to full implementation of the provisions of the covenant.”<sup>29</sup>

After 2000, it can be argued that Taiwan had strong commitment to join the international human rights regime, but the UN did not give Taiwan any opportunity. One thing that should be emphasized is that international human rights treaties are for *all peoples and all nations regardless of the country in which they live* and without distinction of *the international status of the country*. International human rights monitoring mechanisms have been urging states to participate in as many international human rights treaties as possible. It is obviously unfair to turn down Taiwan when it wishes to abide by the international human rights regime. If the international com-

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26 HRC, *General Comment No. 26: Continuity of Obligations*, ¶ 4, U.N. Doc. CCPR/C/21/Rev.1/Add.8/Rev.1 (Dec. 8, 1997).

27 HRC, *Comments of the Human Rights Committee: Republic of Bosnia-Herzegovina*, U.N. Doc. CCPR/C/79 Add.14 (Dec. 28, 1992).

28 See ICCPR, *supra* note 3, art. 48; ICESCR, *supra* note 3, art. 26.

29 Press Release, Office of the President, *President Ma Attends Ceremony to Bestow 2009 Asia Democracy and Human Rights Award* (Dec. 10, 2009).

munity takes universal human rights seriously, it should make Taiwan's accession available. There will be no universal human rights without Taiwan.

### III. TWO STRANGERS: CONSTITUTIONAL FRAME AND HUMAN RIGHTS TREATIES

This section focuses on the interaction between the Taiwanese Constitution and international human rights instruments and is divided into three subsections. First, I trace back to the original constitutional drafting history to see whether there was any idea concerning the international human rights regime. Second, I examine those constitutional interpretations in relation to international human rights instruments. Third, I review constitutional amendments in Taiwan and offer a new constitutional provision by referring to comparative constitutional models.

#### A. Views in Drafting History

It is quite special that the current Constitution of Taiwan in fact did not originate from Taiwan. Instead, it was promulgated in China in 1947 and has been imposed on Taiwan since then. It was not until the outbreak of the "228 Massacre,"<sup>30</sup> during which many people were killed on 28 February 1947, that China changed its mind by allowing Taiwan a primitive degree of constitutional rule.<sup>31</sup> In 1949, the exiled ROC government took refuge on Taiwan, but claimed to continue representing China including Taiwan, Tibet, and even Mongolia. It chose to hold on to the 1947 Constitution in order to support its self-claimed legitimacy. As a result, the 1947 Consti-

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30 On 28 February 1947, about two thousand people gathered in front of the Bureau of Monopoly in Taipei to protest the brutal beating of a woman cigarette peddler and the killing of a bystander by the police the previous evening. The Chinese Governor, Chen Yi, responded with machine guns, killing several people on the spot. Uprisings erupted. What ensued was a series of massacres on the island by the troops sent from China by Chiang Kai-Shek that resulted in the deaths of more than 30,000 Taiwanese people.

31 See Liao Fort Fu-Te & Hwang Jau-Yuan, *Think Globally, Do Locally – Internationalizing Taiwan's Human Rights Regime*, in *TAIWAN'S MODERNIZATION IN GLOBAL PERSPECTIVE* 80 (Peter C.Y. Chow ed., 2002).

tution, designed for China, has been imposed on Taiwan, regardless of compatibility problems.

It is therefore important to examine whether the original constitutional provisions made in 1947 express any ideas concerning international human rights treaties. There are two articles in the Constitution that may relate to international human rights treaties. The first is Article 22, which provides that “All other freedoms and rights of the people that are not detrimental to social order or public welfare shall be guaranteed under the Constitution.” What should be determined is whether “other freedoms and rights” include those rights guaranteed by international human rights treaties.

The original Chinese Constitution was drafted between 15 November and 25 December 1946 in China. The document, Principles for Drafting the Constitution (Principles), which was reached by political compromises by the major political parties at that time, was taken as a foundation. Article 9.1 of the Principles stated that, “rights and freedoms enjoyed by people in democracy should be guaranteed by the Constitution, and should not be illegally violated.”<sup>32</sup> It was not clear whether “rights and freedoms enjoyed by people in democracy” included those protected by international human rights treaties. It was reported that this Article was added so that rights and freedoms not listed in other provisions were also protected,<sup>33</sup> to avoid omission of rights, and to adapt to the needs of the future. Examples cited as similar provisions include the Ninth Amendment of the US Constitution and Article 20 of the Portuguese Constitution.<sup>34</sup> It is obvious what was emphasized were rights not listed, not rights guaranteed by international human rights treaties. In fact, this conclusion is quite reasonable based on the time frame, as the UN was founded in 1945 and the UDHR was adopted in 1948, which was the starting point of the international human rights system. It can be reasonably established when the Constitution was drafted that there

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32 Article 9.1 of the Principles for Drafting the Constitution, in DOCUMENTS OF CHINESE CONSTITUTIONAL HISTORY 593 (Miu Chen-Gi ed., 1991).

33 Report of constitutional drafts by the President of the Legislative Yuan, in ISSUE ON THE NATIONAL ASSEMBLY 24 (Hwang Sahn-San ed., 1947).

34 Committee of Promotion of Constitutional Draft of the ROC, EXPLANATIONS OF CONSTITUTIONAL DRAFT OF THE ROC 21 (1940).

was no international human rights system and the drafters could not have foreseen the creation of such a system.

The other provision that may concern international human rights treaties is Article 141, which provides that the state's foreign policy shall "respect treaties and the Charter of the United Nations, in order to ... promote international cooperation, advance international justice and ensure world peace." The issues here include: what is the meaning of "respect treaties and the Charter of the United Nations?"; does "respect" mean that treaties have domestic legal status?; do "treaties" include international human rights treaties?; and can human rights clauses in the UN Charter be directly applied in the domestic legal arena.

Article 11.2 of the Principles states that "principles of diplomacy include...fulfilling obligation of treaties and complying with the UN Charter..."<sup>35</sup> However, there was resistance from the KMT's official newspaper, the *Central Daily News*, which stated that "it is difficult to expect that the UN will exist forever."<sup>36</sup> It therefore inquired whether "the constitution will [be] dependent on changes of the UN." It also expressed that while the Constitution merely enshrined the obligations of fulfilling treaties, the state would have no standing in cases where other parties denied rights in the treaties.<sup>37</sup> That sentence was then amended to "respect treaties and the Charter of the United Nations."<sup>38</sup> Although some members insisted on deleting this sentence, the chairperson of the drafting assembly, Hu Shih, emphasized that "this is the first state that includes the UN Charter into her constitution, to which the world pays much attention."<sup>39</sup> As a result, the sentence was kept as it stands now.

We may observe from the drafting history that, although the word "respect" was applied, the real intention was to fulfill treaty obligations. I therefore argue that the interaction between the Constitution and interna-

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35 Miu Chen-Gi, *supra* note 34, at 594.

36 *Central Daily, Basic Policies' in Constitutional Draft*, in Hwang Shan-San, *supra* note 35, at 100-101.

37 *Id.* at 101.

38 Hwang Shan-San, *supra* note 35, at 156.

39 Hu Shih might not think that the first state that introduced the UN Charter into her Constitution was thereafter forced to leave the UN. It is also difficult to find that a non-UN member state has a constitutional duty to respect the UN Charter.

tional human rights treaties in Taiwan should be observed through both Articles 22 and 141. Even though the drafters did not state clearly whether treaties had a higher legal status than that of domestic law, international human rights treaties did have constitutional status.

## 2. Constitutional Interpretation

According to Article 78 of the Taiwanese Constitution, the Judicial Yuan (JY) shall interpret the Constitution. It is the Constitutional Court (CC) of the JY, which consists of 15 justices, including the chairperson and deputy chairperson of the JY, to interpret the Constitution. The first part of this sub-section reviews how the CC interprets Articles 22 and 141 of the Constitution. The second part probes how the CC makes reference to international human rights treaties.

### A. TWO RELATED ARTICLES

It has been argued that the drafters of the Constitution could not have been able to foresee the international human rights system when they drafted Article 22. The CC extended the term “other freedoms and rights” in Article 22 to include rights such as the right to select one’s name,<sup>40</sup> freedom of contract,<sup>41</sup> and right to privacy.<sup>42</sup> But the CC never made it clear that it covered those rights guaranteed by international human rights treaties.

The key interpretation of the meaning of “respect treaties and the Charter of the United Nations” in Article 141 by the CC is JY Interpretation No. 329.<sup>43</sup> There are three major points in this interpretation. First, it defines the term “treaty” in the Constitution to include three elements: (1) a treaty is an international agreement concluded between Taiwan (including those institutions and groups authorized by governmental agencies) and other states (including their authorized institutions and groups or international organizations); (2) it involves directly in important national issues such as defense, diplomacy, finance, the economy, or people’s rights and duties; and

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40 J.Y. Interpretation No. 399 (1996) (Taiwan).

41 J.Y. Interpretation No. 576 (2004) (Taiwan); J.Y. Interpretation No. 580 (2004) (Taiwan).

42 J.Y. Interpretation No. 585 (2004) (Taiwan); J.Y. Interpretation No. 603 (2005) (Taiwan).

43 J.Y. Interpretation No. 329 (1993) (Taiwan).

(3) it has legal effect. Second, as to the legal status of a treaty, it rules that a treaty reviewed by the LY has the same status as law. Third, agreements that employ the title of treaty, convention, or agreement, and have ratification clauses should be sent to the LY for deliberation. Other international agreements, except those authorized by law or pre-determined by the LY, should also be sent to the LY for deliberation.

It can therefore be concluded that Taiwan adopts a monist approach, meaning that any ratified international human rights treaty that directly involves people's rights and duties as ruled by JY Interpretation No. 329, has domestic legal status.<sup>44</sup> From a constitutional perspective, no special domestic law is needed to incorporate a human rights treaty.

## B. REFERRING TO INTERNATIONAL HUMAN RIGHTS TREATIES

The CC began functioning in 1948, but it did not make reference to international human rights instruments until 1995. I classify its path into three groups. In the first group, applicants quoted international human rights instruments, but justices of the CC did not respond. In the second group, some justices took international human rights instruments as references for their arguments in their dissenting or concurring opinions. The third group came after 1995, when the CC officially referenced international human rights instruments in its reasoning and holdings.

### *i. No Response to Application*

There were some cases where applicants introduced international human rights instruments, especially the UDHR and the ICCPR, as their basis of argument. In JY Interpretation No. 483,<sup>45</sup> the applicant quoted "all human beings are born free and equal in dignity and rights," from Article 1 of the UDHR as the foundation of the protection of the people's right to hold public office. The applicant in JY Interpretation No. 469<sup>46</sup> also took the UDHR for his argument. It was argued that, as Article 10 of the UDHR guarantees

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44 See Hsiao Fu-San, *Comments on Achievements of JY Interpretation No. 329 from the Meaning of a Treaty and System of Reservation*, LAW. COMM. 190, 60-65 (1985); see also Chou Chi-Hong, *On the Legislative Yuan's Power of Reviewing Treaties*, J.L. & POL. SCI. 1, 51-87 (1983).

45 J.Y. Interpretation No. 483 (1999) (Taiwan).

46 J.Y. Interpretation No. 469 (1998) (Taiwan).

“full equality to a fair and public hearing by an independent and impartial tribunal,” the Constitution should be interpreted in accordance with this provision. In JY Interpretation No. 517,<sup>47</sup> the applicant referred to Article 10 of the ICCPR and emphasized that freedoms of residence and migration were fundamental rights.

The problem with these applications was that these applicants did not offer the reason why international human rights instruments could or should be taken into consideration. They merely cited related provisions in international human rights instruments to ask for more constitutional protections of rights. It was also regrettable that the justices did not offer any response to these applications — although the CC, as will be explained in the coming sub-sections, had already made reference to international human rights instruments. Of course these interpretations did not contribute to the interaction between the Constitution and international human rights instruments.

#### *ii. Opinions of Individual Justices*

Some justices tried to extend the ambit of rights already guaranteed by the Constitution or to grant more rights than are listed in the Constitution by referring to international human rights treaties. In JY Interpretation No. 372,<sup>48</sup> former justice Su Jyun-Hsiung presented his concurring opinion expressing that the preamble and Article 1 of the UDHR guarantee universal human dignity. He emphasized that as “a signatory state of the UDHR,” Taiwan had an obligation to “protect international human rights” so as to maintain democratic constitutionalism.

In JY Interpretation No. 514, former justice Hwang Tueh-Chin expressed that “those rights and freedoms are not listed at the Constitution can be guaranteed according to the UDHR and other international human rights instruments.”<sup>49</sup> One of his reasons was that “constitutional amendments in Taiwan did not offer more rights, but international human rights instruments have been greatly developed.”<sup>50</sup> He also expressed his worry about not applying international treaties because of international

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47 J.Y. Interpretation No. 517 (2000) (Taiwan).

48 J.Y. Interpretation No. 372 (1995) (Taiwan).

49 J.Y. Interpretation No. 514 (2000) (Taiwan).

50 *Id.*

isolation in JY Interpretation No. 547.<sup>51</sup> His approach was to incorporate international human rights through the interpretation of Article 22 of the Constitution. It was believed that the CC's approach of reviewing domestic legislation by referring to international treaties was a faithful interpretation of constitutional principles.<sup>52</sup> Therefore he, being a labor law scholar, cited many conventions of the International Labor Organization (ILO) to grant more protection of labor rights.

However, these views were in the minority among the respective interpretations. These supportive views toward applying international human rights treaties did not receive agreement among most justices.

#### *iv. Views in Reasoning and Holdings*

JY Interpretation No. 372,<sup>53</sup> which was made in 1995, was the first interpretation to cite international human rights instruments in its reasoning. Seven years later in 2002, JY Interpretation No. 549<sup>54</sup> became the first case to refer to international human rights instruments in its holding.

JY Interpretation No. 372 emphasized human dignity, citing the fact that such an idea was enshrined in the UDHR to support its reasoning. But JY Interpretation No. 372 did not mention why the UDHR could be a resource for constitutional interpretation.

Another case was JY Interpretation No. 392,<sup>55</sup> where the CC had to decide whether the "court" provided for in Article 8 of the Constitution included the prosecutor's office, hence empowering the prosecutor to detain a person beyond 24 hours. The applicant did not make reference to international human rights instruments. The Ministry of Justice (MOJ) cited Article 9 of the ICCPR as a basis of its argument. However, JY Interpretation No. 392 refuted such an argument, stating that "it is not appropriate to invoke the provisions of 'international covenant,' 'conventions,' and claims that the reference to 'court' in Article 8, Paragraph 2, first sentence, of the Constitu-

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51 J.Y. Interpretation No. 547 (2002) (Taiwan).

52 *Id.*

53 J.Y. Interpretation No. 372 (1995) (Taiwan).

54 J.Y. Interpretation No. 549 (2002) (Taiwan).

55 J.Y. Interpretation No. 392 (1995) (Taiwan).

tion shall include ‘other officers authorized by law to exercise judicial power’ such as a prosecutor.”

It is interesting that JY Interpretation No. 582<sup>56</sup> referred to Article 14-III(v) of the ICCPR to establish “the universal and fundamental right of an accused to examine a witness.”<sup>57</sup> The Interpretation emphasized that such a right is also protected by Articles 16 and 8 of the Constitution. Its approach was to make reference to the ICCPR to support its constitutional interpretation, which was different from that of Interpretation No. 392. A possible reason was that, since the MOJ cited the ICCPR, the CC was obligated to decide on this matter. The CC had no choice but to say clearly that the domestic constitutional provision had a different context from that of the ICCPR. A normal approach for the CC was to make reference to international human rights instruments to support its reasoning.

A similar approach was adopted in JY Interpretation No. 587.<sup>58</sup> The CC cited in its reasoning Article 7 of the CRC, which guarantees a child’s right to identify his/her blood filiations, to establish that the right to establish paternity shall be protected under Article 22 of the Constitution. Again, in JY Interpretation No. 623,<sup>59</sup> the CC cited Articles 19 and 34 of the CRC to establish that “to protect a child or juvenile from engaging in any unlawful sexual activity is a universally recognized fundamental right and thus a significant public interest” in its reasoning. Therefore, the CC ruled that: (1) “the State should be obligated to take appropriate measures to safeguard the mental and physical health and sound development of children and juveniles;” and (2) Article 29 of the Child and Juvenile Sexual Transaction Prevention Act, which imprisons and fines a person who puts information in the media to induce a person to engage in unlawful sexual activity, was constitutional.

International human rights instruments also appeared in the holdings of two constitutional interpretations concerning labor rights, JY Inter-

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56 J.Y. Interpretation No. 582 (2004) (Taiwan).

57 *Id.*

58 J.Y. Interpretation No. 587 (2004) (Taiwan).

59 J.Y. Interpretation No. 623 (2007) (Taiwan).

pretation No. 549 and JY Interpretation No. 578.<sup>60</sup> Former justice Hwang Tueh-Chin's idea was further endorsed in these two interpretations.

JY Interpretation No. 549 ruled that "Articles 27, 63, 64, and 65 of the Labor Insurance Act should be amended within two years." It further required that "an overall examination and arrangement, regarding the survivor allowance, insurance benefits, and other relevant matters, should be conducted" in accordance with not only "principles of this Interpretation" but also "related international labor conventions." JY Interpretation No. 578 emphasized that the Labor Standards Act was enacted and implemented in 1984, and therefore should be reviewed at appropriate times. It then required the Act to be amended by taking account of "the fundamental principle of the Constitution to protect workers," the constitutional principle of protection of labor, and related provisions of "international labor conventions."

Indeed, after developments of several decades, international human rights instruments are not total strangers to the CC anymore — especially the UDHR, the ICCPR, and ILO conventions that were referenced in several cases. However, a common problem with these interpretations was that the CC did not say why it could cite international human rights instruments for its reasoning. The CC did not ever clarify the UDHR's legal nature and status. When the CC applied the ICCPR, Taiwan was not a contracting party. Neither did the CC explain why international labor conventions should be taken into consideration when amending domestic laws. Nor did the CC rule on how strong this obligation was. In the event that the government and the LY do not follow up, there will be further constitutional conflicts.

It seems that the CC can pick up whatever human rights document whenever it feels suitable and leave those documents if it does not think it is necessary. The CC should construct a consistent and clear approach of interpretation on whether, when, and how to apply international human

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60 J.Y. Interpretation No. 578 (2004) (Taiwan).

rights instruments. We can expect the CC to develop its comprehensive approach on this matter, but it could take much time.

### 3. Constitutional Amendments

Another way to make a clear rule of interaction between the constitutional frame and the international human rights regime is to amend the Constitution. I first trace back to the paths of past constitutional amendments in Taiwan. Then I review comparative models of constitutional provisions providing their connections with international human rights regime and offer my own proposal for Taiwan.

#### 1. PAST PATHS

After the original Chinese Constitution was brought into Taiwan, a long period of time passed during which no amendments were dared to be introduced, as Chiang Kai-Shek and Chiang Ching-Kuo, who dominated Taiwan for almost four decades, wished to bring the original text back to China.

Amending the Constitution did not begin until 1991 after Lee Teng-Hui was elected President. The Constitution has thereafter been amended seven times in twenty years.<sup>61</sup> Those amendments focused mainly on governmental structure and the election system. Amendments in 1991, 2000, and 2005 did not focus on human rights. Other amendments did focus on human rights issues. In 1992, a new provision to maintain women's dignity and security was added. It also ruled that the state should eliminate sexual discrimination. In 1994, the name "mountain people" was changed to "indigenous people" to prevent discrimination. For similar reasons, "handicapped" was changed to "people with disability" in 1996. It also determined that the state should maintain cultural diversity and should promote the culture and language of indigenous peoples. In 1999, a provision to protect soldiers was also added.

It can be observed that these amendments mainly focused on equal protection and cultural diversity. The idea of "bringing international

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61 See Chen Shin-Min, *DEVELOPMENTS OF CONSTITUTIONAL AMENDMENTS IN TEN YEARS 1990-2000* (2002).

human rights home” into the Constitution was not even mentioned during any of those seven occasions in twenty years.

## 2 FOUR MODELS

After many years of interaction between domestic and international law, especially after the 1990s, there are many examples that demonstrate that international human rights have been adopted into constitutional provisions. I classify them into four models.

### *a. Preambles*

In the first model, obedience to international human rights norms is expressed in the preambles of constitutions. One sub-model offers such guarantees in general term. An example is the preamble of the Constitution of Morocco, which expresses “determination to abide by the universally recognized human rights.” The other sub-model expresses the constitutional will to be bound by specific international human rights instruments in their preambles. The preamble of the Constitution of Bosnia and Herzegovina declares that the Constitution is inspired by the UDHR, the ICCPR, the ICESCR, the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, as well as other human rights instruments. Another example can be found in preamble of the Mauritanian Constitution, which proclaims its attachment to the principles of democracy as they have been defined by the UDHR and by the African Charter of Human and Peoples Rights as well as in the other international conventions which Mauritania has signed.

### *ii. Constitutional Texts*

A second model adopts international human rights treaties into constitutional texts. Three sub-models can also be found. The first sub-model enshrines protection of universal rights as a general principle. Article 7 of the Constitution of Georgia states that “the state shall recognize and protect universally recognized human rights and freedoms as eternal and supreme human values.” The second sub-model puts much more emphasis on the UDHR. Article 5 of the Constitution of Principality of Andorra rules that the state is bound by the UDHR. It can also be found in Article 7 of Afghanistan Constitution, which expresses that the state shall abide by the

UDHR. The third sub-model focuses on specific treaties and those that a state has ratified. Article 75, Section 2 of Argentine Constitution lists many international human rights instruments as having constitutional hierarchy, including the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, the UDHR, the ICESCR, the ICCPR, ICERD, CEDAW, CAT, and CRC.

### *iii. Constitutional Interpretation*

A third model provides that constitutional implementation or interpretation should comply with international human rights standards. Section 10.2 of the Spanish Constitution states that “provisions relating to the fundamental rights and liberties recognized by the Constitution shall be construed in conformity with the UDHR and international treaties and agreements thereon ratified by Spain.” Article 93 paragraph 2 of the Constitution of Columbia states that “the rights and duties mentioned” in the Constitution “will be interpreted in accordance with international treaties on human rights ratified by Colombia.”

### *iv Right to International Remedies*

A fourth model grants a right to their people to international remedies. Article 55, paragraph 4 of the Constitution of Ukraine states that “after exhausting all domestic legal remedies, everyone has the right to appeal for the protection of his or her rights and freedoms to the relevant international judicial institutions or to the relevant bodies of international organizations of which Ukraine is a member or participant.” Article 46 of the Constitution of Russia also guarantees that “everyone shall have the right to turn to interstate organs concerned with the protection of human rights and liberties when all the means of legal protection available within the state have been exhausted.”

## A PROPOSAL

A comparative analyses of the above-mentioned models reveal several issues. First, as it expresses obeying international human rights norms in a preamble, the key issue of the first model is whether a preamble has the power to grant rights to the people. Whether referencing international

human rights treaties in general or specific terms, a preamble could serve a declarative function but is without substantial protection.

Second, the third model in fact focuses more on constitutional rights. What has been achieved by this model is that those rights guaranteed by the constitution can be interpreted as complying with international human rights instruments. However, this model does not bring all related international human rights treaties into the constitution.

Third, the pre-condition of the fourth model is that states shall join the international system, which grants individual communications, such as found in the ICCPR-OP, CEDAW-OP, or others. States also have to set up mechanisms to implement those decisions by international human rights monitoring bodies. Therefore, the fourth model cannot be achieved merely by constitutions; it needs to follow the international human rights system.

I therefore argue that the second model is a more ideal approach for Taiwan for three reasons. First, it is much clearer to adopt international human rights treaties into constitutional texts. This model also grants those treaties domestic legal status. Second, most states rule that international human rights treaties have a higher status than domestic law. Whenever they are in conflict, international human rights treaties prevail. Third, as the rule is included into constitutional text, international human rights treaties can be enforced directly. Those treaties can also be sources of constitutional interpretation, and constitutional rights should be interpreted to comply with international human rights standards.

It can also be observed from comparative experience that this will be a comprehensive approach if a constitution can include the UDHR, important regional human rights treaties, such as the European Convention on Human Rights (ECHR), and those UN human rights treaties that a state has ratified. However, it is a pity that Asia, where Taiwan is situated, does not have a regional human rights treaty. Taiwan also faces the difficulty of depositing instruments of ratification to the UN SG. A constitutional provision connecting international human rights instruments will be very helpful. In addition, the establishment of a national human rights institute, which has long been promoted by the UN, can be a mechanism for domestic

implementation of international human rights treaties. Therefore, I propose a new constitutional provision for Taiwan the text of which is as follows:

- (1) Rights and freedoms guaranteed in the Constitution should be interpreted to comply with the Universal Declaration of Human Rights and other international human rights instruments.
- (2) The Universal Declaration of Human Rights and international human rights treaties passed by the Legislative Yuan shall have domestic legal status. When domestic laws are in conflict with the Universal Declaration of Human Rights and international human rights treaties passed by the Legislative Yuan, they should comply with those international human rights standards.
- (3) The National Human Rights Commission, which shall exercise its functions independently, should be established to implement rights and freedoms guaranteed by the Universal Declaration of Human Rights, international human rights treaties passed by the Legislative Yuan, and the Constitution.

The first paragraph builds a connection between constitutional rights and international human rights instruments and avoids conflicts between them. The second paragraph clearly rules that the UDHR and those international human rights treaties passed by the LY shall have domestic legal status, and when conflicts occur, international human rights instruments prevail. In order to avoid the problem of deposit, it rules that when the LY passes human rights treaties, they gain domestic legal status, no matter if the deposit is successful or not. The third paragraph provides a constitutional foundation to the proposed National Human Rights Commission. It also establishes that the Commission should be independent and should implement both constitutional and international rights.

In Taiwan, it is quite difficult to pass a constitutional amendment. It needs to be initiated upon the proposal of one-fourth of the total members of the LY; passed by at least three-fourths of the members present at a meeting attended by at least three-fourths of the total members of the LY; and agreed by electors at a referendum held upon the expiration of a six-month period of public announcement of the proposal, wherein the number

of valid votes in favor exceeds one-half of the total number of electors.<sup>62</sup> However, it should be emphasized that the issue of bridging a connection between the Constitution and international human rights treaties is not and should not be regarded as a political matter. My view is that once there is any opportunity, this issue should be brought into consideration so that consensus among different political parties and the public may be reached.

#### IV. I DID IT MY WAY: INCORPORATION WITHOUT SUCCESSFUL RATIFICATION OR ACCESSION

When there have been obstacles to acceding to international human rights instruments, and no constitutional provision to rule on the interaction between domestic and international laws, an “I did it my way” approach has been developed in Taiwan by incorporating some international human rights treaties through its own domestic laws. The following sections will first examine the general structure, and then review in detail the incorporation of the ICCPR, the ICESCR, and the CEDAW.

##### A. Monist State, Dualist Approach

Here, the first issue that should be reviewed is whether Taiwan is a monist or dualist state. A related question is, if Taiwan is a monist state, what is the legal status of an international human rights treaty in Taiwan?

##### 1. JUDICIAL VIEWS

International law has no power to decide whether a state should adopt a monist or dualist position. Normally, this issue is determined in a state's constitution. As the Taiwanese Constitution merely expresses that the state should respect treaties, it is very important to note how the CC interprets this clause. One paragraph of JY Interpretation No. 329 deserves to be emphasized:

According to the Constitution the President has the power to conclude treaties. The Premier and Ministers shall refer those treaties that should be sent to the Legislation Yuan for deliberation to the Committee of the Executive Yuan. The Legislative Yuan has the power to review those treaties. All these are explicitly enshrined in

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62 See Additional Articles of the Constitution of the Republic of China, art. 12.

Article 38, Article 58 Paragraph 2 and Article 63 of the Constitution respectively. Treaties concluded in according to above procedures hold the same status as laws.

JY Interpretation No. 329 in fact has held that treaties concluded according to constitutional procedure have the same status as domestic law. If a treaty does not have domestic legal effect, there is no need to decide its domestic legal status. At the same time, if a treaty has domestic legal status, it surely means that it has domestic legal effect. Therefore, I argue that, when the CC says that treaties “hold the same status as domestic law,” it expresses two meanings at the same. First, it says that Taiwan is a monist state, i.e., once a treaty is concluded through constitutional procedure, it has domestic legal effect automatically even without a special domestic law saying so. Second, ratified treaties have the same legal status as domestic law. The CC however has not made it clear whether a treaty is superior to domestic law.

## 2. REQUIREMENTS IN TREATIES

However, due to its unique international status, Taiwan has to confront a second issue: if the deposit of the ratification instrument of a treaty has yet to be consummated, would the treaty have any domestic legal effect?

From the view of international law, a state ratifies or accedes to a treaty after it comes into force. The treaty will enter into force on this state a few days after it deposits its instrument of ratification or accession. Taking the ICCPR and the ICESCR as examples, both covenants rule that it will come into force three months after a state deposits its ratification instrument.<sup>63</sup> There is a similar rule in the CEDAW. For those states ratifying or acceding to the CEDAW after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.<sup>64</sup>

Observing from this rule, as Taiwan could not deposit its ratification and accession instruments, the two covenants and the CEDAW will not come into force in Taiwan. Even though Taiwan is a monist state, a treaty cannot come into force if the state cannot deposit its instrument of ratification or accession successfully. The result is that, even if domestically the LY and the President have gone through the treaty reviewing procedure

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63 See ICCPR, *supra* note 3, art. 49; ICESCR, *supra* note 4, art. 27.

64 See CEDAW, *supra* note 9, art. 27.

according to the Constitution, a treaty cannot obtain domestic legal status if there is an international obstacle.

### 3. STANDARDS FOR HANDLING OF TREATIES

However, if we observe from the perspective of the Taiwanese Constitution, there is a different view. As Interpretation No. 329 does not refer to the deposit procedure, it is believed that once an international human rights treaty has been passed by the LY and signed by the President, it has domestic legal effect and holds the same status as a law. But it is regrettable that in Taiwan there is still no law clarifying this issue, as a special law ruling on issues of signing and ratifying treaties is still under consideration by the LY. Such related issues are currently regulated by the Standards for Handling of Treaties and Agreements (Standards), which is an administrative regulation written by the MOFA.

In 2002, the DPP government amended Article 11 paragraph 2 of the Standards. According to this amended provision, a treaty, if it had been passed by the LY and signed by the President, gained domestic legal status, even without depositing a ratification instrument with the UN SG. After regaining power, the KMT government amended Article 11 paragraph 2 of the Standards again in 2009. It empowers that “under special circumstances” the President may announce a treaty coming into force after the LY passes it, even if there is no procedure for depositing an instrument of ratification or its process is not successful. The DPP’s approach is to rule that all treaties gain domestic legal status after the LY passes it. On the other hand, the KMT’s approach is to offer the President the power to decide whether domestic legal status exists under special circumstances. However, a more important issue is that a common position of the two approaches is to offer a treaty domestic legal effect when there is difficulty in depositing the instrument of ratification to the UN.

It seems that, according to the Standards, the President has the power to decide that “under special circumstances” a treaty comes into force after the LY passes it, even though the process of depositing an instrument of ratification is not successful. However, the LY adopted a different approach. The LY enacted an implementing act when it passed a treaty and it was difficult to deposit an instrument of ratification or accession to the UN. Such an implementing act can be regarded as an approach similar to that of a dualist state. The result is that Taiwan, though a monist state, applies

the approach of a dualist state to incorporate international human rights treaties because of its international isolation.

### **B. Incorporating ICCPR, ICESCR and CEDAW**

Taiwan acceded to the CEDAW in 2007, but its deposit of the instrument of accession was not successful. When considering to accede to the CEDAW, there was a debate within the DPP government over whether to enact a special domestic law to resolve the problem of the inability to deposit the instrument of accession. The MOJ argued that such a law was not necessary. The MOJ based this on two major reasons. One was that after the LY passes a treaty and the President signs it, such treaty shall have domestic legal status. Therefore, there was no need to enact a domestic law to establish domestic legal effect. The other was that the CEDAW was not part of the International Bill of Rights but only one of the several core international human rights treaties and thus, it did not have sufficient significance for a special domestic law. As a consequence of that decision, no governmental organs expressed that they were bound by the CEDAW between 2007 and 2011, and the courts did not apply the CEDAW in individual cases.

After the KMT gained power in 2008, it again pushed for a special domestic law to implement an international human rights treaty. The first successful case was when the Act to Implement the ICCPR and the ICESCR was adopted on the same day that ratifications of the two covenants were passed. It was the MOJ who took on such responsibility. As the MOJ agreed with enacting a special domestic law to implement the International Bill of Rights, the procedure moved smoothly within the administrative process. The KMT also dominated the LY at that time; therefore there were no obstacles that existed during the Act's legislative process.

With this successful experience, the KMT then moved on for a new law to implement the CEDAW, as its accession had been approved. This time, the Executive Yuan (EY)<sup>65</sup> asked the Ministry of Interior Affairs (MIA) to take charge. The MIA fully agreed and prepared a draft to the cabinet and submitted it to the LY in May 2010. The LY passed the Act to Implement the Convention on the Elimination of all Forms of Discrimination against

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65 The Executive Yuan is the administrative government in Taiwan.

Women (Act to Implement the CEDAW) on 20 May 2011, and the Act came into force on 1 January 2012.

The background and procedures for incorporating the ICCPR, the ICESCR, and the CEDAW into the domestic legal system triggered several issues, which will be discussed in detail in the following sub-sections.

## 1. PAST AND NEW STEPS

The first issue to note is that when Taiwan ratified the two covenants in 2009, it in fact declared its successions to the signatures of the ROC in 1967. However, even supposing Taiwan could be regarded as a sovereign state, it would be difficult for Taiwan to qualify to fulfill the requirements of Article 48 of the ICCPR and Article 26 of the ICESCR. As the ROC left the UN in 1971 and the CEDAW was concluded in 1979, Taiwan's accession to the CEDAW was a completely new step. The core point was that the UN did not regard Taiwan as a sovereign state.

A related point is that when Taiwan declared to succeed to the ROC's signatures of the two covenants, it follows that Taiwan should also admit that it is bound to all the international human rights treaties that the ROC had signed and ratified by 1971. As mentioned above, the ROC ratified the ICERD in 1970 before it was forced to leave the UN. However, Taiwanese governments never officially declared this view. It is my view that this should be done at once.

## 2. DOMESTIC LEGAL EFFECT

A second issue is whether the two covenants and the CEDAW have domestic legal effect. In order to solve this problem, Article 2 of the Act to Implement the ICCPR and the ICESCR provides that human rights protection provisions in the two covenants have domestic legal effect. Article 2 of the Act to Implement the CEDAW included the same rule, stating that provisions protecting sexual equality in the CEDAW have domestic legal effect.

After the Act to Implement the ICCPR and the ICESCR was adopted, President Ma once noted that "84 articles of the two covenants have become part of the life of the people."<sup>66</sup> However, it should be argued that domestic legal effect extends to merely the two covenants' "human rights protection

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66 Press Release, Office of the President, *President Ma Signs Instruments of Ratification of Two Covenants on Human Rights* (May 14, 2009).

provisions,” which in fact cover only Articles 1 to 27 of the ICCPR and Articles 1 to 15 of the ICESCR. The reality is not the situation as President Ma stated. As to the CEDAW, Articles 1 to 16 have domestic legal effect.

### 3. DOMESTIC LEGAL STATUS

Even if the human rights protection provisions in the two covenants and provisions protecting sexual equality in the CEDAW have domestic legal effect, the third issue concerns their domestic legal status. When the two provisions are not determinative of the issue, it leaves it to the judicial branch to make such a decision. The problem is that different courts could have different views. As mentioned previously, JY Interpretation No. 329 rules that treaties concluded in accordance with constitutional procedures hold the same status as laws. But the core problem is that it has not clearly expressed whether treaties stand above domestic law.

There may be three rules of statutory interpretation to resolve this problem. One is the *lex specialis* rule taking a treaty as a special law. A second rule is *lex posterior derogat lex priori*, which means regardless of whether it is a treaty or a domestic law, the newer one is applied. The third concerns conflict of laws; when there are conflicts between treaties and domestic laws, courts therefore have to decide whether domestic laws may protect rights guaranteed by the two covenants.

In fact the MOJ once interpreted that “when a treaty conflicts with a domestic law, it is the treaty [that takes] precedence.”<sup>67</sup> Some Taiwanese domestic courts ruled that when there were conflicts, treaties should be applied according to the *lex specialis* rule.<sup>68</sup> However, it seems that such views have not been a definite position of the MOJ and the courts.

After the two covenants had domestic legal effect on 10 December 2009, courts have been gradually applying human rights protection provisions in the two covenants in their judgments. But it seems that very few judgments offer a view on this issue. One special case was a judgment by the Kaohsiung domestic court which clearly found that the ICESCR was superior to domestic laws<sup>69</sup> As the Act to Implement the CEDAW came into effect in

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67 See Ministry of Justice, Letter No. 1813 (1983) (Taiwan).

68 See Gan (1) No. 128 (Taiwan High Ct., 1990) (Taiwan).

69 See Civil Summary Appeal no. 201, (Kaohsiung Dom. Ct., Oct. 30, 2009) (Taiwan). It is interesting that this judgment was delivered before the Act to Implement the

January 2012, there is still no judgment dispositive on this point. It therefore can take a long time for courts to take a final position. The problem is that different courts could have different views, and Taiwan may suffer from such uncertainty.

#### 4. INTERPRETATIONS

A fourth issue is how to interpret the content of rights protected by the two covenants and the CEDAW. Article 3 of the Act to Implement the ICCPR and the ICESCR provides that “Applications of the two covenants should make reference to their legislative purposes and interpretations by the HRC.” Again, Article 3 of the Act to Implement the CEDAW also rules that applications of the CEDAW should make reference to its legislative purposes and interpretations by the Committee on the Elimination of Discrimination against Women (CEDAW Committee).

However, the first problem is how to be sure of the legislative purposes of the two covenants and the CEDAW. In my view, it could refer to the preambles of the two covenants, both of which commonly emphasize that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”<sup>70</sup> Of course, it also covers the preamble of the CEDAW. It is however regrettable that there was no case ever referring to the legislative purposes of the two covenants and the CEDAW, no matter if such application came from governmental organs or the courts.

The second problem is that Article 3 of the Act to Implement the ICCPR and the ICESCR merely refers to interpretations by the HRC, but not to the Committee on Economic, Social and Cultural Rights (CESCR). One possible reason why the CESCR was not included could be that it did not appear in the provisions of the ICESCR. It is difficult to interpret the phrase “interpretations by the HRC” as seen in Article 3 of the Act to Implement the ICCPR and the ICESCR to include those views of the CESCR. Therefore, in my view, a better approach is to amend Article 3

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ICCPR and the ICESCR came into force.

70 ICCPR, *supra* note 2, Preamble, ¶ 2; ICESCR, *supra* note 3, Preamble, ¶ 2.

of the Act to Implement the ICCPR and the ICESCR to explicitly include interpretations by the CESCR.

A third problem is what the legal effect is, if a governmental organ, when applying the two covenants and the CEDAW, does not make reference to interpretations by the three committees. In reality, there is no penalty found in the two acts. It could be regarded as a “soft duty” of governmental institutions. In the Taiwanese system, outside monitors of the administrative branch are the Control Yuan (CY)<sup>71</sup> and the courts. However, it can be argued that even the CY and the courts themselves have not fully made reference to interpretations by those committees. So far, it is difficult to ask them to monitor the administrative process in detail. A typical way of applying the two covenants was to mention particular provisions, but without further referring to interpretations by the HRC or the CESCR. However, it is still too early to say whether governmental organs will apply decisions of the CEDAW Committee. It seems that how far both these two provisions of the Acts will be fully implemented depends on how many Taiwanese governmental organs know about them and how willing they are to apply them in individual cases.

### 1. *Who Is Bound*

A fifth issue concerns who is bound by the two covenants. Article 4 of the Act to Implement the ICCPR and the ICESCR states, “Whenever exercising their functions, all levels of governmental institutions and agencies should conform to human rights protection provisions in the two Covenants.” Article 4 of the Act to Implement the CEDAW has similar language.

Here, the core idea is the ambit of all levels of governmental institutions and agencies. In Taiwanese law, when the term “all levels of governmental institutions and agencies” is utilized, it includes all five governmental branches, including not only the administrative, legislative, and judicial branches but also the CY and the Examination Yuan (EY).<sup>72</sup> Therefore, the

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71 According to Amendment Article 7 of the Constitution, the CY shall be the highest control body of the state and shall exercise the powers of impeachment, censure, and audit.

72 The independent power of examination is a unique feature of the political system in Taiwan. According to Amendment Article 6 of the Constitution, the EY is the

two covenants and the CEDAW impact all branches of the governmental organs.

## 2. *Obligations*

A sixth issue is what are the obligations of governmental institutions. It can be argued that the two acts that implement the ICCPR, the ICESCR and the CEDAW impose two kinds of obligations on governmental organs.

### a. **All Governmental Organs**

On one hand, the two acts require all governmental organs to meet four obligations. First, in general terms, Article 4 of both acts require that, whenever exercising their functions, all levels of governmental institutions and agencies should conform to the human rights protection provisions in the two covenants or provisions protecting sexual equality in the CEDAW, avoid violating human rights, protect the people from infringement by others, and positively promote the realization of human rights. The Act to Implement the CEDAW came into force in 2012, so time is needed to observe whether and how governmental organs will apply the CEDAW. On the other hand, all governmental organs have been gradually applying the two covenants. It can be observed that once the “snowball” starts, it is expected to continue growing.

Second, both Article 5 of the two acts requests all levels of governmental institutions to take the responsibility for preparing, promoting, and implementing human rights protection provisions in the two covenants and the CEDAW within their functions, as governed by existing laws and regulations. After the two acts became effective, some governmental organs tried to emphasize their obligations of implementation and protection of rights. However, it is difficult to judge whether governmental organs have undertaken their responsibility.

Third, Article 7 of both acts ask all governmental institutions to preferentially allocate funds to implement human rights protection provisions in the two covenants and the CEDAW according to their financial status and take steps to enforce them. But so far, it has not been found that there was ever a governmental organ intentionally allocating funds to implement

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highest examination authority, responsible for the examinations and management of all civil service personnel.

human rights protection provisions in the two covenants and the CEDAW. An easier way was to put one more label onto previous efforts to indicate that such efforts were also to implement the two covenants and the CEDAW.

Fourth, Article 8 of the Act to Implement the ICCPR and the IC-ESCR provides that “All governmental institutions should review laws and regulations within their functions according to the two covenants, and all laws and regulations incompatible to the two covenants should be amended within two years after the Act enters into force.” The MOJ took this tough task of coordinating governmental organs for reviewing existing laws. Consequently, there were 263 cases listed. By the end of the two-year deadline on 9 December 2011, the MOJ indicated that 187 cases (71%) had been finished.<sup>73</sup> Obviously it can be seen that such incorporation of the two covenants has had a great impact on the domestic legal system.

The MOJ also revealed that those unfinished 76 cases (29%) included amendments to 54 laws, 21 administrative regulations, and 1 administrative order.<sup>74</sup> The MOJ emphasized that it will continue its endeavors. However, there was no definite time limitation set. It seems that after passing the two-year deadline set by Article 8 of the Act, the administrative government and the LY have no more obligations to follow up on such responsibility.

Another related issue is whether the LY, when enacting new laws, shall also review whether they comply with the two covenants. One comparative experience is the United Kingdom’s Human Rights Act 1998. Article 19 of the Act requires the administrative branch to make a “statement of compatibility” expressing that the proposed bill is compatible with the rights guaranteed by the ECHR. However, no similar provision can be found in the Act to Implement the ICCPR and the ICESCR. It then could happen that the LY amends old laws to comply with the two covenants on the one hand, but on the other, the LY enacts new laws not following the standards of human rights protections in the two covenants. A good way to take those rights in the two covenants seriously is to enact new laws obeying such standards. In my view, as the two-year time limitation has passed, a new provision with similar contents to Article 19 of the Human Rights

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73 MOJ, <http://www.humanrights.moj.gov.tw/ct.asp?xItem=252992&ctNode=30551&mp=200>.

74 *Id.*

Act 1998 should be inserted into the Act to Implement the ICCPR and the ICESCR so as to make sure that all proposed laws meet such standards.

Article 8 of the Act to Implement the CEDAW allows three years after the Act enters into force to amend existing laws, regulations, and orders to comply with the CEDAW. The deadline will come at the end of 2014. The government has not yet begun such an effort. It could repeat those done to comply with the two covenants. As three years will also pass, so a provision of imposing a “statement of compatibility” may also be needed in the Act to Implement the CEDAW after 2015.

#### **b. Administrative Branch**

The two acts specially impose two obligations on the administrative branch. First, both Article 5, Paragraph 2 of the two acts require that the administrative government should cooperate with other national governments and international non-governmental organizations and human rights institutions to realize the promotion and protection of human rights provisions in the two covenants and the CEDAW. This is a duty of international human rights cooperation. It is however, again a soft obligation. So far no project has ever been proposed by the administrative government to implement the special paragraphs of the two acts.

Second, Article 6 of the Act to Implement the ICCPR and the ICESCR pushes the administrative government to set up a human rights reports system in accordance with the two covenants. Article 6 of the Act to Implement the CEDAW asks the administrative government to submit a report according to the CEDAW every four years. It is also required the government to invite related scholars and NGOs to review the report and set up its follow-up mechanism.

Article 18 of the CEDAW requires a state party to submit its initial report within one year. Therefore, after passing the accession to the CEDAW, the administrative government tried to write its initial report even before the Act to Implement the CEDAW was enacted. The MOFA was in charge of the promotion from the Committee of Promoting Women's Rights of

the EY.<sup>75</sup> The initial report<sup>76</sup> was completed in March 2009, two years after passing the accession procedure.<sup>77</sup> NGOs also wrote shadow reports, especially on the issues of human trafficking and migrant workers.

Article 18 of the CEDAW also requires a state party to submit its reports to the UN SG for the consideration of the CEDAW Committee. However, as the UN SG did not even accept Taiwan's deposit of its instrument of accession, it is almost impossible that he would accept Taiwan's CEDAW reports. As a result, Taiwan did not have a channel through which to engage the international human rights monitoring system. An alternative way proposed by human rights NGOs was to invite experts to come to Taiwan to review the report and to provide recommendations. This is an approach that substantially follows international practice. This proposal was accepted by the DPP government and followed by the KMT government. Thereafter, several experts, including former members of the CEDAW Committee, were invited to deliver their comments and recommendations.<sup>78</sup>

In both covenants, Article 40 of the ICCPR and Article 16 of the ICESCR ask a state party to submit reports on the measures it has adopted which give effect to the rights recognized in the covenants. It is argued that the human rights reporting system required by the Act to Implement the ICCPR and the ICESCR should be understood as the approach required by the two covenants. However, it seems that the current KMT government, although it had partly prepared its CEDAW report, did not know many details about this. It did not follow this approach until human rights NGOs recommended that it do so.

Article 40 of the ICCPR requires that a state party should submit its initial report within one year of the entry into force of the Covenant for the

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75 The Committee of Promoting Women's Rights has been reorganized as the Department of Sexual Equality of the Executive Yuan since January 1, 2012.

76 CEDAW-Initial Report of Republic of China (Taiwan), [http://www.womenweb.org.tw/doc/CEDAW\\_Initial\\_Report.pdf](http://www.womenweb.org.tw/doc/CEDAW_Initial_Report.pdf).

77 The report was written from March 2007 to March 2009. As the administrative power turned from the DPP to the KMT in May 2008, both the DPP and the KMT governments participated in this process.

78 Their recommendations can be found at <http://sites.google.com/site/cedawgongzuozhan/cedaw-in-taiwan/cedaw-guo-jia-bao-gao-ying-zi-bao-gao-ji-guo-nei-shi-xing-fa/cedaw-guo-jia-bao-gao-shu-guo-wai-zhuan-jia-jian-yi-shi-xiang-yan-yi-hui-yi-jian-yi-hui-zheng-biao-2010-01-21-22>.

state. It is a rule that a state party should submit its initial report according to the ICESCR within two years after the Covenant comes into force for the state. It means that since the Act to Implement the ICCPR and the ICESCR came into force on 10 December 2009, the administrative government should submit its ICCPR initial report by 9 December 2010 and the ICESCR report by 9 December 2011. However, the Taiwanese government did not finish the reports until April 2012.

Like those of the CEDAW, state reports under the ICCPR and the ICESCR shall also be submitted to the UN SG, who shall transmit them to the HRC and the CESCR. Again, it is a great challenge for Taiwan. Using the similar approach of inviting current or former members of the HRC and the CESCR to come to Taiwan could also be adopted. The Taiwanese government had not yet decided whether to adopt this proposal as of the end of January 2012. This approach is a unique way that no other state has ever adopted, so it could be regarded as a special Taiwanese way. It is a means towards virtual international monitoring with partial reality.

As to the cycle of reporting, Article 6 of the Act to Implement the CEDAW requires a party to demonstrate compliance with Article 18(1) (b) of the CEDAW every four years. As the initial report was delayed one year,<sup>79</sup> the next CEDAW report shall be due in 2012. Even supposing the starting point was March 2009, the next report would be due by March 2013.

The Act to Implement the ICCPR and the ICESCR does not provide guidance on this point, but Article 6 requires the government to set up a human rights reporting system in accordance with the two covenants. In fact, both the HRC and the CESCR have established a five-year reporting cycle. It therefore can be argued that Taiwan should follow this path. It is of course acceptable if the government wishes to accelerate the frequency.

## V. CONCLUSIONS

Taiwan's adventures in the international human rights regime can be divided into three stages. The ROC had opportunities but did not act as a positive participant. Between 1971 and 2000, Taiwan suffered from

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79 As Taiwan acceded to CEDAW in March 2007, its initial report should have been submitted by the end of March 2008. However, it was not completed until March 2009.

double isolation; both international and self-inflicted isolation. Since 2000, Taiwan has wished to join the international human rights regime but has had no channel.

Interaction between Taiwan's Constitution and international human rights treaties should be observed through both Articles 22 and 141 of Taiwanese Constitution. Indeed, after developments of several decades, international human rights instruments are not complete strangers to the Constitutional Court anymore. The UDHR, the ICCPR, and ILO conventions were specifically referred to in several cases. However, the CC has not yet constructed a consistent and clear approach to interpretation on whether, when, and how to apply international human rights instruments. It is also my view that once there is any opportunity for a constitutional provision to build bridges between international human rights instruments and domestic law, it should be considered.

Taiwan, being a monist state, applied the approach of a dualist state to incorporate international human rights treaties because of its international isolation. Therefore, two special domestic laws have been enacted to incorporate the ICCPR, the ICESCR, and the CEDAW. Whereas there was not a true international human right monitoring system, these human rights treaties impacted the domestic legal systems and governmental organs. A general image of the interaction between Taiwan and international human rights instruments presents a unique picture showing partial reality but also a sense of the virtual.

# International Law in the Courts of the Straits Settlements

*Kevin YL Tan*<sup>1</sup>

## I. INTRODUCTION

When the British colony of the Straits Settlements – comprising Penang, Malacca and Singapore – was legally created in 1824, there existed only a Court of Judicature for Prince of Wales Island (Penang). This Court had been established in 1807 by what is commonly called the First Charter of Justice<sup>2</sup> and its jurisdiction did not extend to the territories of Malacca and Singapore. It was only in 1826 that a Second Charter of Justice<sup>3</sup> was issued, establishing a Court of Judicature for Prince of Wales Island, Singapore, and Malacca.

The Court of Judicature had the jurisdiction that was a cross between that of a country court and a high court in England and was presided over by a Recorder. The Court was based in Penang, with the Recorder going on circuit but later moved to Singapore when the latter outstripped Penang in commercial and strategic importance. In 1867, the Straits Settlements became a Crown Colony and its administration was transferred from Bengal to the Colonial Office in London. With this significant change, the Court of Judicature was upgraded to a superior court of record, thus becoming the Supreme Court of the Straits Settlements. Like most other colonial courts, the Straits Settlements Supreme Court had both original

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  - 2 Letters Patent Establishing the Court of Judicature on the Prince of Wales Island, Mar. 25 1807, 47 Geo III.
  - 3 Letters Patent Establishing the Court of Judicature, of Prince of Wales Island, Singapore and Malacca, 27 Nov 1826, 7 Geo IV.

and appellate jurisdiction, with final appeals going to the Judicial Committee of the Privy Council in London.

This article examines the constitution of these courts, their jurisdictions and the two dozen or so cases on international law there were decided over the 120 years of their existence. The cases examined fall to be considered under three broad headings: (a) piracy; (b) jurisdiction; and (c) sovereign immunity. In examining these cases, the following factors will be considered: (a) applicable law; (b) the use of precedents and sources; and (c) consonance with international law norms and relevance in local jurisprudence.

## II. ESTABLISHING THE COURTS & THEIR JURISDICTION

### A. The British Acquisition of Penang and the First Charter of Justice

The British began trading in Southeast Asia from the early 1600s but did not establish a permanent trading post till 1685 when they established Fort York at Bencoolen (today's Bengkulu in Southwest Sumatra).<sup>4</sup> Their next settlement was the Island of Penang, the cession of which was negotiated with Sultan Abdullah of Kedah in 1786. The treaty of cession was entered into between Sultan Abdullah and Captain Francis Light (representing the British) on 1 May 1791. In consideration of 6,000 Spanish dollars,<sup>5</sup> the Sultan agreed not to allow Europeans of any other nation to settle in the territory. Initially, the island was practically uninhabited, but within three years, its population grew to about 10,000. As the population grew, it became increasingly difficult to administer law and order on the island in the absence of proper legislation to do so. This resulted in the grant of a Charter of Justice by the Crown on 25 March 1807 that established the Court of Judicature on the island. Known as the Court of Judicature of the Prince of Wales' Island, it consisted of the Governor, three Councillors and one other judge, known as the Recorder of the Prince of Wales' Island.

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4 See JOHN BASTIN, *THE BRITISH IN WEST SUMATRA 1685–1826* (1965).

5 This was approximately equivalent to £288.50 in 1819, or £12,000 in today's currency.

The Court had the same jurisdiction and powers of the Superior Courts in England. In the words of Sir Peter Benson Maxwell R:<sup>6</sup>

The whole of the Charter ... gives to the Court the powers of the Superior Courts of Law and Equity at Westminster, to be exercised as far as circumstances admit, without stating or leaving any room for presuming that it was intended that those powers should be exercised otherwise than in the same manner and under the same rules and principles as they are exercised in England.<sup>7</sup>

## B. Singapore, Malacca and the Second Charter of Justice 1826

European involvement in Malacca began early in the 16<sup>th</sup> century with the Portuguese conquest of the port in 1511. It remained in Portuguese hands till 1641 when they were displaced by the Dutch. In 1795, when Holland was overrun by the French during the Napoleonic Wars, the Prince of Orange ordered that all his overseas possessions be surrendered to the British for “safekeeping.” As such, Malacca was governed by the British from 1795 to 1818. In 1826, following the British Parliament’s ratification of the Anglo-Dutch Treaty of 1824, the Dutch permanently surrendered Malacca to the British in exchange for Bencoolen in Southwest Sumatra.

The British first established a “factory” or trading post at Singapore in February 1819, following a Treaty of Friendship and Cooperation signed between Thomas Stamford Raffles of the British East India Company and Sultan Hussein of Johor. In 1824, the Sultan ceded the island to the British,<sup>8</sup> and it joined Malacca and the Prince of Wales’ Island to form the Straits Settlements.<sup>9</sup>

As the 1807 Letter Patent (First Charter of Justice) did not extend beyond Penang, a new Charter of Justice had to be issued to cover Singapore

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6 Sir Peter Benson Maxwell (1817–1893) served as Recorder of Penang from 1856 to 1866 and Chief Justice of the Straits Settlements from 1867 to 1871.

7 *Regina v. Willans*, [1858] 3 Ky 16.

8 Treaty of Friendship and Alliance between the Honourable East India Company, and the Sultan and the Temenggong of Johore dated 2 Aug. 1824.

9 This was effected by the passage of the Transfer of Singapore etc Act, 5 Geo. IV c. 108 under which Singapore and Malacca were transferred to the control of the East India Company, and by 39 & 40 Geo. III c. 79 under which these territories were placed under the jurisdiction of the Supreme Court of Judicature in Fort

and Malacca and this was done by a second Letter Patent which is more commonly known as the Second Charter of Justice. This Charter was granted on 27 November 1826 and arrived in the Straits in 1827. Under the Charter, a Court of Judicature was created for all three territories with

such jurisdiction and authority as our Court of King's Bench and our Justices thereof, and also as our High Court of Chancery and our Courts of Common Pleas and Exchequer, respectively ... have and may lawfully exercise within ... England, in all civil and criminal actions and suits, and in matters concerns the revenue, and in the control of all inferior courts and jurisdictions, as far circumstances will admit.

In criminal matters, the Court was to

administer criminal justice in such or the like manner and form, or as nearly as the condition and circumstance of the place and the persons will admit of, as our courts of Oyer and Terminer and Gaol Delivery do or may, in ... England, due attention being had to the several religions, manners and usages of the native inhabitants.

The Court of Judicature was a single-level colonial court with no court of appeal. The only appeal was to the King-in-Council or Queen-in-Council.

It should be noted that the East India Company's only territorial acquisitions in the Malay peninsula remained the three Straits Settlements territories till 1874. Prior to 1874, the British adopted a policy of non-intervention in the politics of the Malay states and thus recognised each of the Malay states as sovereign territories. It was only with the coming to power of the Conservatives in 1874 that an aggressive imperial policy was adopted, leading to the implementation of the Residency system which brought four Malay states under British control as the Federated Malay States: Perak, Selangor, Negeri Sembilan, and Pahang.<sup>10</sup> These states formed a separate legal entity – the Federated Malay States – under international law. The remainder of the Malay States – Johor, Kedah, Kelantan, Perlis, and Terengganu – also received British protection but did not federate into

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William in Bengal. The transformation of the Straits Settlements from a presidency into a Crown Colony was effected by the Government of the Straits Settlements Act 1866, 29 & 30 Victoria c 115, by the British Parliament.

10 See EMILY SADKA, *THE PROTECTED MALAY STATES, 1874–1895* (1968); EUNICE THIO, *BRITISH POLICY IN THE MALAY PENINSULA, 1880–1910* (1969).

a single sovereign entity and were collectively referred to as the Unfederated Malay States.<sup>11</sup>

### III. THE LACK OF ADMIRALTY JURISDICTION

Both the First and Second Charters of Justice suffered a major deficiency – the courts they created had no admiralty jurisdiction. This meant that the Court of Judicature had no way of dealing with acts of piracy or crimes committed on the high seas or even in the colony’s territorial waters. The omission of admiralty jurisdiction was more than an administrative oversight. Up till 1887, there existed in England, a separate and distinct High Court of Admiralty under the charge of the Lord High Admiral.<sup>12</sup> This anomaly was a product of history. A court exercising jurisdiction over maritime matters came into existence sometime between 1340 and 1357<sup>13</sup> and during this time, the common law courts ceased to hear maritime cases. From about 1360, the sea coast of England and Wales was divided into 19 districts, each of which was under the control of a Vice-Admiral of the Coast, and they all represented the Lord High Admiral.

Sir John de Beauchamp was appointed the first Admiral of all the English fleets in 1360 and his responsibility extended to protecting the coasts, administering maritime justice, collecting payments due the Crown, and suppressing piracy. This gave him jurisdiction over all disputes arising from any of these activities<sup>14</sup> and extended to all criminal and civil matters as well. His criminal jurisdiction included piracy and murder and mayhem committed on the high seas and on ships “below the bridges of great rivers.” The rise of the Admiralty Court was not welcomed by the common law

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11 See generally R. O. WINSTEDT, *MALAYA: THE STRAITS SETTLEMENTS, AND THE FEDERATED AND UNFEDERATED MALAY STATES* (1923).

12 On the origins and history of the Courts of the Admiralty, see Charles S. Cumming, *The English High Court of Admiralty*, 7 *TUL. MAR. L.J.* 209 (1993); Lionel H. Laing, *Historic Origins of Admiralty Jurisdiction in England*, 45 *MICH. L. REV.* 163 (1946); F. L. WINSWALL JR., *THE DEVELOPMENT OF ADMIRALTY JURISDICTION AND PRACTICE SINCE 1800: AN ENGLISH STUDY WITH AMERICAN COMPARISONS* (1970).

13 Laing, *supra* note 11, at 167.

14 *Id.* at 168.

judges who saw this as competition and a usurpation of their jurisdiction. The Court of the King's Bench thus began building up a substantial body of case law in which it also exerted admiralty jurisdiction and over time, reduced the jurisdiction of the admiralty courts but the divisions remained till the late 19<sup>th</sup> century.

When the British East India Company settled in India and began establishing courts there, the division between common law courts and admiralty courts persisted. Mayor's Courts were established in Madras, Bombay, and Calcutta in 1726, almost 40 years after the Courts of Admiralty were established in these three presidency towns in 1683 under the 5<sup>th</sup> Charter of the East India Company.<sup>15</sup> It was only with the passage of the Regulating Act of 1773 that the Supreme Court at Calcutta was established. This Court, which comprised a Chief Justice and three puisne judges, had a jurisdiction that extended to all inhabitants of the states of Bengal, Bihar, and Orissa. The Supreme Courts at Madras and Bombay were established only in 1800 and 1823 respectively.<sup>16</sup>

The promulgation of Regulating Act of 1773 by the King of England paved the way for establishment of the Supreme Court of Judicature at Calcutta. The Letters Patent was issued on 26 March 1774<sup>17</sup> to establish the Supreme Court of Judicature at Calcutta, as a Court of Record, with full power and authority to hear and determine all complaints for any crimes and also to entertain, hear, and determine any suits or actions against any of His Majesty's subjects in Bengal, Bihar, and Orissa. King George III established the Supreme Courts at Madras and Bombay on 26 December 1800 and on 8 December 1823 respectively. The Courts in these three territories did not exercise admiralty jurisdiction till 1813 when an Act was passed to this effect:

And whereas the Courts established by the said United Company have no Jurisdiction over Crimes Maritime, and Doubts have been entertained whether the Admiralty Jurisdiction of His Majesty's Jurisdiction, by reason whereof Failures of Justice may arise: Be it therefore enacted, That it shall and may be lawful for His Majesty's

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15 JOHN F. RIDDICK, *A HISTORY OF BRITISH INDIA: A CHRONOLOGY* 185 (2006).

16 For a brief account of the establishment of these early courts, see CJB Larby, *Centenary of the High Courts of Calcutta, Bombay and Madras*, 12 ICLQ 1044 (1963).

17 Letters Patent was issued on March 26, 1774.

Courts at *Calcutta, Madras, and Bombay*, exercising Admiralty Jurisdiction, to take Cognisance of all Crimes perpetrated on the High Seas, by any Person or Persons whatsoever, in as full and ample a Manner as any other Court of Admiralty Jurisdiction established by His Majesty's Authority in any Colony or Settlement whatsoever belonging to the crown of the said United Kingdom.<sup>18</sup>

Even so, this grant of admiralty jurisdiction to the Indian courts did not automatically extend to the Straits Settlements. In the meantime, the situation was quite dire. Writing in 1840, John Anderson, former Secretary to the Government of the Straits Settlements noted:

Piracy prevails to an alarming extent in the vicinity of these settlements, and an Admiralty jurisdiction in the Straits is indispensable, with a view to the suppression of that barbarous practice, so detrimental to the trade of the several ports. The expense of sending offenders of that description to Calcutta for trial, as has sometimes been done, is very considerable, and punishment inflicted at so great a distance does not operate as an example of any utility of effect.<sup>19</sup>

The lack of admiralty jurisdiction was raised as early as in November 1803 by Judge John Dickens of Penang as well as by the Grand Jury. James William Norton-Kyshe, former Registrar of the Supreme Court of the Straits Settlements noted:

Admiralty Jurisdiction was thus given to the Court after the lapse of very many years and after repeated representations both by the authorities and the Grand Jury, papers from Mr Dickens bearing date 8<sup>th</sup> November, 1803, being also on record on the subject, the result having been that previous to the grant of Jurisdiction, the authorities had been powerless to act, the records shewing, number

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18 53 Geo III Cap 155, 1813: An Act for continuing in The East India Company, for a further Term, the Possession of the British Territories in India, together with certain exclusive Privileges, for establishing further Regulation for the Government of the said Territories, and the better Administration of Justice within the same, and for regulating the Trade to and from the Places within the Limits of the said Company Charter, 21 Jul 1813.

19 John Anderson, *On the Administration of Justice in the British Settlements in the Straits of Malacca, and the Government of Penang, Singapore, and Malacca*, XXXI ASIATIC J. & MONTHLY REGISTER FOR BRITISH & FOREIGN INDIA, CHINA & AUSTRALASIA (NEW SERIES) 250 251 (1840).

of prisoners charged with piracy, *released* for want of authority to deal with them, and in other cases, some few being sent to Calcutta for trial in the very early days, without these however, shewing any result whatever.<sup>20</sup>

Indeed, Sir Ralph Rice, Recorder of the Court of Judicature from 1817 to 1824, told the House of Lords that while there were “a great many” cases of piracy and that admiralty jurisdiction was “very much wanted there,” cases subject to admiralty jurisdiction had to be “sent up to Calcutta” since the Court did not have “the Power to interfere in any way.”<sup>21</sup>

The earliest reported case demonstrating this difficulty is *R v. Noquedah Allong & Ors.*<sup>22</sup> This case arose in Penang where the prisoners charged and were convicted of committing murder under the common law jurisdiction of the Court of Judicature of the Prince of Wales’ Island (Penang). The offence was committed on a boat within 30 yards of Batu Sembilan, a spot at the southern end of Penang Island. At the time of the offence, the boat was within view of the land, but outside the high-water mark. At the time of the murder, it was high tide and the boat was afloat. The issue before the Recorder, Sir Edmund Stanley, was whether the Court of Judicature had jurisdiction over the case:

Whether the place where the murder was committed is within the Common Law or Land jurisdiction of the Court of Prince of Wales’ Island, and whether the prisoners were properly tried there, or whether they ought to be tried by the Admiralty or Sea jurisdiction?

Stanley R, citing various authorities, including Coke’s *Institutes*, came to the conclusion that the Court of Judicature had jurisdiction:

It appears by Lord Coke, 4 *Inst: on the Court of Admiralty*, that those arms of the sea which run between lands which are visible from one side to the other, are within the Common Law jurisdiction, and the offences committed within those arms of the sea,

20 See J. W. NORTON KYSHE, A JUDICIAL HISTORY OF THE STRAITS SETTLEMENTS 1786–1890, reproduced in 11(1) MALAYA L. REV. 1, 114 (1969).

21 *Affairs of the East India Company: Minutes of Evidence: 11 March 1830*, 62 J. OF THE HOUSE OF LORDS 971–77 (1830), available at <http://www.british-history.ac.uk/report.aspx?compid=16411>.

22 [1811] 1 Kyshe 1. The word “Noquedah” referred to the captain, or the most important person on board the vessel.

are triable by the country, and not by the Admiralty jurisdiction. 2 Hawkins, on the *Court of the Coroner*, concurs in this doctrine. In 2 East's *Crown Law*, tit: *Piracy*, he seems to narrow the rule to those arms of the sea running *inter faces terrae*, where a person can see on one side what is done on the other; but he thinks that where there is a doubt, the Common Law jurisdiction ought to prevail. In *Rex v Coombe*, 1 Leach CC, p 388, a murder committed by a shot fired from land at Southampton harbour, which killed a person in a boat one hundred yards at sea, was properly tried at the Admiralty Session: no reason is stated, nor description given of the exact locality, but perhaps by the old Statute of 15<sup>th</sup>, Richard II, cap 3, the Admiralty has a concurrent jurisdiction with the Common Law, as to the death of a man happening in arms of the sea or in great rivers. In *Rex v Broadfoot*, in Foster's CC, p 154, it appears the prisoner was tried at the Recorder's Court at Bristol for a murder committed some leagues at sea from Kingroad.<sup>23</sup>

Nonetheless, Stanley R felt compelled to send the case up to the Supreme Court at Calcutta for an opinion and Sir Henry Russell CJ and all the Judges at Calcutta

were of opinion that this Court had no jurisdiction over the offence, as at Common law; but the place where it was committed, was exclusively within the Admiralty jurisdiction.<sup>24</sup>

Expressing regret at this decision, Stanley R had no option but to order the prisoners to be sent to Calcutta with the several witnesses "to take their trial before the Court there, in its Admiralty jurisdiction."<sup>25</sup>

In another case that came up before Stanley R two years later, the Court took pains to clearly delineate the distinct jurisdictions the Common Law and Admiralty. In *Rex v. Lebby Cundoo & Anor*<sup>26</sup> the accused committed armed robbery, having attacked their victims in the Kuru River (which was in the jurisdiction of Penang), and then forcing the victims to sail up the Kurau River (which is in the state of Perak and outside the jurisdiction of

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23 *Id.*

24 *Id.*

25 *Id.*

26 [1813] 2 Kyshe Cr 6.

Penang) where two persons were murdered. Once again, Stanley R sought the opinions of not only the judges at the Supreme Court of Calcutta but also of the judges of the Supreme Court of Madras.

All the judges – with the exception of Sir William Burroughs of the Calcutta Supreme Court – were of the opinion that as the crime of robbery had been completed at Juru River even if the prisoners were forced to assist the perpetrators in carrying off the boat to Kurau, the offence was committed within the Common Law jurisdiction of the Court of Judicature and the conviction should be upheld. Burroughs J opined that the Court of Judicature would have jurisdiction if the offence was committed *within the river* but that the evidence suggested that the commission or completion of the offence had been outside jurisdiction. Stanley R, affirming and concurring with the Judges of India, upheld the conviction and the prisoners were accordingly sentenced to death.

Indeed, the Court of Judicature did not have such jurisdiction till 1837 when an Act was passed “granting admiralty jurisdiction to the Court of Judicature of Prince of Wales’ Island, Singapore and Malacca.”<sup>27</sup> In 1855, a Third Charter of Justice<sup>28</sup> was promulgated to extend the jurisdiction of the Court of Judicature and to provide for an additional Recorder to be appointed for Singapore and Malacca. This last Charter specifically established the Court of Judicature as a Court of Admiralty

with full power and authority to take cognizance of, hear, examine, try, and determine all causes, civil and maritime, and all pleas of contracts, debts, exchanges, policies of assurance, accounts, charterparties, agreements, loading of ships, and all matters and contracts which, in any manner whatsoever, relate to freight or money due for ships hired and let out, transport-money, maritime

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27 6 Wm IV Cap LIII, 13 Aug 1836. As Braddell noted:

Great inconvenience had been experienced by the Court’s lack of Admiralty jurisdiction. To remedy this, the Statute 6 & 7 Wm IV c 53 was passed in 1836 whereby the Court was granted such jurisdiction, and Letters Patent were issued for carrying into effect the Statute on February 25<sup>th</sup>, 1837. See ROLAND ST. JOHN BRADDELL, *THE LAW OF THE STRAITS SETTLEMENTS: A COMMENTARY* 32 (1982).

28 Letters Patent Reconstituting the Court of Judicature of Prince of Wales’ Island, Singapore and Malacca, in the East Indies, Bearing Date the Tenth Day of August, in the Nineteenth Year of the Reign of Victoria in the Year of Our Lord One Thousand Eight Hundred and Fifty-Five.

usury or bottomry, or to extortions, trespasses, injuries, complaints, demands, and matters civil and maritime whatsoever, between merchants, owners, and proprietors of ships and vessels employed or used within the jurisdiction aforesaid, or between others, contracted, done, had, or commenced in, upon, or by the sea, or public rivers or ports, creeks, harbours, and places overflown within the ebbing and flowing of the sea and high-water mark, without, about, and throughout the Settlement of Prince of Wales' Island, Singapore, and Malacca, and its dependencies, the cognizance whereof doth belong to the jurisdiction of the Admiralty, as the same is used and exercised in ... England...

Beyond establishing the Court's admiralty competence, the Third Charter went further to establish the Court's jurisdiction over maritime crimes, giving it

full power and authority to inquire, hear, try, examine, and determine by the oaths of honest and lawful men, being British subjects resident in the said Settlement, all treasons, murders, piracies, robberies, felonies, maimings, forestallings, extortions, trespasses, misdemeanours, offences, excesses, and enormities, and maritime crimes whatsoever, according to the laws and customs of the Admiralty of England, done, perpetrated, or committed upon any of the high seas; and to fine, imprison, correct, punish, chastise, and reform parties guilty, and violators of the laws, usurpers, delinquents, contumacious absenters, masters of ships, mariners, rowers, fishers, shipwrights and other workmen exercising any kind of maritime affairs, according to the said civil and maritime laws, ordinances, and customs, and their respective demerits; and to deliver and discharge persons imprisoned in that behalf who ought to be delivered; and to take recognizances, obligations, stipulations, and cautions, as well to our use as at the instance of other parties, and to put the same in execution, or to cause or command them to be executed; and also to arrest, or cause or command to be arrested, according to the civil law and the ancient customs of our High Court of Admiralty in England, all ships persons, things, goods, wares and merchandises, for the premises and every of them, and for other causes whatsoever concerning the same, wheresoever they shall be met with or found ...

... shall and it is hereby empowered to take cognizance of all crimes perpetrated on the high seas by any person or persons whatsoever, in as full and ample a manner as our supreme Court of Judicature at Fort William in Bengal is now, by virtue of any Charter or Acts of Parliament, authorized to exercise any admi-

rality jurisdiction or as any other Court of Admiralty established by royal authority in any Colony or Settlement whatsoever belong to the Crown of the said United Kingdom. PROVIDED ALWAYS, that the several powers and authorities herein given to the said Court to proceed in maritime causes, and according to the laws of the Admiralty as herein expressed, shall extend and be construed to extend only to such persons as, pursuant to the provisions hereinbefore contained, are and would be amenable to the said Court of Judicature of Prince of Wales' Island, Singapore and Malacca, in its ordinary jurisdiction.

The admiralty jurisdiction of the Supreme Court of the Straits Settlements was reaffirmed with the passage of the Straits Settlements Courts Ordinance 1907,<sup>29</sup> where under section 9(2), the original civil and criminal jurisdiction of the Court was to include "The jurisdiction and authority of a Colonial Court of Admiralty conferred upon it by The Colonial Courts of Admiralty Act 1890." This piece of legislation<sup>30</sup> was passed to "amend the Law respecting the exercise of Admiralty Jurisdiction in Her Majesty's Dominions and elsewhere out of the United Kingdom." The relevant provision, section 2(1) provides:

Every court of law in a British possession which is for the time being declared in pursuance of this Act to be a court of Admiralty, or which, if no such declaration is in force in the possession, has therein original unlimited civil jurisdiction, shall be a court of Admiralty, with the jurisdiction in this Act mentioned, and may for the purpose of that jurisdiction exercise all the powers which it possesses for the purpose of its other civil jurisdiction, and such court in reference to the jurisdiction conferred by this Act is in this Act referred to as a Colonial Court of Admiralty. Where in a British possession the Governor is the sole judicial authority, the expression 'court of law' for the purposes of this section includes Governor.

With the passage of this legislation, and by its reaffirmation by the Straits Settlements Court Ordinance, any further lingering doubt about the admiralty jurisdiction of the Straits Settlements was put to rest.

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29 Ordinance No. XXX of 1907.

30 53 & 54 Vic., Cap. 27.

#### IV. PIRACY

Related to the problem of admiralty jurisdiction was the scourge of piracy.<sup>31</sup> Now having been vested with admiralty jurisdiction in 1837, the Straits Settlements Supreme Court could hear cases in which piracy was committed.<sup>32</sup> The earliest case to come before the court in which piracy was alleged was the 1840 case of *Regina v. Tunkoo Mohamed Saad & Ors*<sup>33</sup> in which the grandson of the former Sultan of Kedah was accused of piracy. Much of this case revolved around arguments as to whether the acts of the accused were piratical acts or acts of war, and the jury acquitted them on the evidence. This time, the Court had absolutely no doubt that it had jurisdiction to try the case, especially since it involved allegations of piracy on the ground that

persons of all nations are *primâ facie* subject to the jurisdiction of a Court of Admiralty, for crimes committed upon the high seas against the acknowledged Law of Nations.<sup>34</sup>

Addressing the prisoners, Norris R said:

Prisoners, you have been tried of an ignominious crime – as alleged pirates, violators of the universal Law of Nations, and enemies of all mankind. The crime with which you stood charged is a capital crime, and had you been convicted, your lives would have been in jeopardy.<sup>35</sup>

This was the first instance in which the concept of universal admiralty jurisdiction was asserted in cases involving piracy *jure gentium* (piracy by the law of nations). The distinction between an act of piracy as determined

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31 See generally, L.A. Mills, *British Malaya, 1824-1867*, in 1(2) J. OF THE MALAYAN BRANCH OF THE ROYAL ASIATIC SOCIETY 214-38 (1923); CARL A. TROCKI, *PRINCE OF PIRATES: THE TEMENGGONGS AND THE DEVELOPMENT OF JOHOR AND SINGAPORE, 1784-1885* (1979); and Alfred P. Rubin, *The Uses of Piracy in Malayan Waters*, in GROTIAN SOCIETY PAPERS: STUDIES IN THE HISTORY OF THE LAW OF NATIONS, 111, 111-135 (Charles Henry Alexandrowicz ed., 1968).

32 As to the Court's power to punish pirates, see the Court of Appeal decision in *R. v. Chia Kuek Chin & Ors*. [1909] 13 S.S.L.R. 1.

33 [1840] 2 Ky. Cr. 18.

34 *Id.*

35 *Id.*

by municipal law and by the law of nations was made all the more explicit in the case of *Regina v. Mat Erat*.<sup>36</sup> In that case, the accused were charged with murder committed on the Krian River,<sup>37</sup> which divided British territory from that of another sovereign state. As such, the case revolved around the question of whether or not this amounted to “piracy on the high seas.” Mr. Justice Hackett held that the Admiralty Court had no jurisdiction over the crime as proved since it did not amount to piracy *jure gentium*, and the prisoner was not liable for any other offence unless he was a British subject or committed the crime on board a British vessel.<sup>38</sup>

The Court maintained this stance in the 1882 decision of *Hass v. Choo Chye Hok*<sup>39</sup> where the appellant Chief Officer of the German steamship *Picciola* allegedly assaulted, beat, and kicked the respondent, the officer-in-charge of the cargo on the merchant ship. The assault took place while the vessel was proceeding from Rangoon to Penang but the assault occurred on the high seas. The case was tried before a magistrate who convicted the accused and fined him \$10.00. The magistrate’s decision was overturned on appeal, and Wood J held that the Court’s admiralty jurisdiction did not extend to a foreigner committing a crime on a foreign ship on the high seas.<sup>40</sup> Likewise, the criminal courts of the Straits Settlements would have no jurisdiction over a foreign subject who wilfully fails to perform his obligations under a contract signed in the Straits, but which was to be performed in a foreign land.<sup>41</sup>

The Straits Settlements Court of Appeal had occasion to consider in greater detail, what constituted “piracy *jure gentium*” in *Regina v. Nya Abu & Ors*,<sup>42</sup> a case which arose in 1886. In that case, the accused, who were from Aceh (and therefore of Dutch nationality), were accused of piratical acts on

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36 [1872] 2 Ky. Cr. 86.

37 This river is today known as the Kerian River or Sungei Kerian and is located in the north of the state of Perak.

38 The following cases were cited in support of this proposition: *Reg. v. Lewis*, 26 L.J. M.C. 104; and *Reg. v. Bjorsen*, 34 L.J. M.C. 180.

39 [1882] 3 Ky. 152.

40 See also, *R. v. Low Chok & Ors.* [1893] 1 S.S.L.R. 145; and *R. v. Poh Lam Tengah*, [1854] 2 Ky. Cr. 74.

41 See *The Attorney-General v. Wong Yew* 10 S.S.L.R. 44 (1906).

42 [1885-1890] 4 Ky. 169.

a Dutch vessel. The Court thus had to consider if it had jurisdiction to try the prisoners. Mr. Justice Wood adopted the definition of “piracy” given in Sir James Fitzjames Stephens’ *Digest of the Criminal Law* in which he said:

Piracy by the law of nations is taking a ship in the high seas, or within the jurisdiction of the Lord High Admiral, from the possession or control of those who are lawfully entitled to it, and carrying away the ship itself or any of its goods, tackle, apparel or furniture, under circumstances which would have amounted to robbery, if the act had been done within the body of an English country.<sup>43</sup>

As this statement of the law had found endorsement in the Judicial Committee of the Privy Council in the 1873 decision of *Attorney-General of Hongkong v. Kwok A Sing*,<sup>44</sup> Wood J held that the acts were indeed acts of piracy over which the court had jurisdiction.

## V. SOVEREIGN IMMUNITY

From the outset, the Court of Judicature observed the edict that foreign sovereigns are not amendable to its jurisdiction. The earliest reported decision is the case of *Sultan Omar Akamoden v. Nakodah Mohamed Cassim*<sup>45</sup> which involved Sultan Omar Akmuddin III of Sambas, an old kingdom that had been overrun by the Dutch, located on the island of Borneo. A dispute arose between the Sultan and the defendant over a contract for the sale of some chests of opium at Sambas where the disputants were both resident at the time. After the breach occurred, both parties arrived in Singapore and the plaintiff commenced this action. As it was the Sultan who commenced the action, Norris R held that even though the Sultan can lay claim to being a foreign sovereign, his commencement of the suit subjected and submitted him to the jurisdiction of the Court.<sup>46</sup>

In *Abdul Wahab bin Mohomat Alli v. Sultan Alli Iskander Shah (Sultan of Johore)*,<sup>47</sup> a case decided 1843, the Court recognised the distinction

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43 *Id.* at 173, citing JAMES FITZJAMES STEPHEN, A DIGEST OF THE CRIMINAL LAW 64 (1877).

44 5 L.R.P.C. 177, 199.

45 [1841] 1 Ky. 37.

46 *Id.*

47 [1808-1884] 1 Ky. 298.

between acts of the state and commercial acts – *acta jure imperii* versus *acta jure gestionis*. In that case, the defendant Sultan of Johore was sued on a promissory note he had given for a loan given by the plaintiff. Norris R cited Vattel's *Treatise on the Law of Nations*, Book 1, chapter 1, as authority for this distinction:

What has no affinity with his functions and character, cannot partake of the privileges which are solely derived from his functions and character. Should a minister, therefore, [as it has often been the case] embark in any branch of *commerce*, all the effects, goods, money and debts active and passive, which are connected with his mercantile concerns, and likewise all contests and law-suits, to which they may give rise, fall under the jurisdiction of the country. [But see *Taylor v Best*, 23, LJCP [ns] 89.] And although, in consequence of the minister's independency, no legal process can, in these law-suits, be directly issued against his person, he is nevertheless, by the seizure of the effects belonging to his commerce, indirectly compelled to plead in his own defence. The abuses which would arise from a contrary practice, are evident. What could be expected from a merchant vested with a privilege to commit every kind of injustice in a foreign country? There exists not a shadow of reason for extending the ministerial immunity to things of that nature. If the Sovereign who sends a minister is apprehensive of any inconvenience from the indirect dependency in which his servant thus becomes involved, he has only to lay on him his injunctions against engaging in commerce, an occupation, indeed, which ill-accords with the dignity of the ministerial character.<sup>48</sup>

Applying the doctrine expressed by Vattel to the case at hand, Norris R held:

Now if such be the liabilities incurred by an Ambassador, who abuses his public privileges for private purposes, can it be reasonably contended that a Sovereign Prince who is permanently resident in a foreign country, enjoying the full protection of its laws, is exempt from all legal responsibility, when he lays aside as it were, his sovereign character and descends to the level of an ordinary subject, by engaging in mercantile transactions wholly unconnected with his royal station? I think not. Under such circumstances, he may fairly be presumed to have waived, to that extent, his exclusive privileges, and by voluntarily entering into contracts with common men, to have impliedly given his assent to those laws to which all contracting parties are of necessity, answerable;

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48 *Id.* at 300.

for where there is no mutuality of rights and remedies, there can be no legal contract. And as, on the one hand, a Sovereign thus contracting would probably not scruple, or at least would think himself entitled to demand legal redress for a breach of any such contract, so, on the other, he must, on the principles of evenhanded justice, be considered as impliedly acquiescing in the other party's legal right to redress in case of need. Now the instrument on which the present action is founded, is a contract of this description, *viz.*, a promissory note importing upon the face of it, that it is given in consideration of money advanced by the plaintiff to the defendant *for the purposes of trade*; and for the enforcement of such trading contract, the defendant's effects are in the ordinary course of law, and with the qualification above mentioned, liable, in my opinion, notwithstanding his sovereign character, supposing that to have been satisfactorily proved.<sup>49</sup>

The only case in which an *acta jure imperii* was deemed to have taken place was *JMP Smith v. Sultan of Kedah*<sup>50</sup> heard in Penang in 1906. Here, the plaintiff land concessionaire sought damages against the Sultan of Kedah for an alleged breach of contract when the latter reneged on a promise to transfer land to him. The Court held regardless of whether Sultan of Kedah was an independent sovereign or a dependency of Siam, “a grant of State land by the Sultan of Kedah as Ruler of Kedah, must be taken as a grant of State land by or on behalf of an independent State” and “no foreign country can have the right to interfere with any disposition of its property made by an independent State.”<sup>51</sup> Law J added:

I think every independent State must have the right to dispose of its property including land, in whatever way it sees fit, and that the Courts of no foreign country can have the right to interfere with any disposition of its property made by an independent State. As a rule any attempt at interference would have no effect, and if such an attempt could be made effectual it would, it seems to me, be a most serious interference with the independence of the State

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49 *Id.* at 300-301.

50 [1906] 10 S.S.L.R. 1.

51 *Id.* at 6.

where the property was situated, and also be a breach of the comity of nations.<sup>52</sup>

A foreign sovereign automatically attracts immunity provided that the entity of which he or she is the ruler is recognised as a sovereign state by the British government. This point was made patently clear in *Lim Guan Teet v. Tunku Akobe*<sup>53</sup> where the Court was asked to consider the status of the defendant Tunku Akobe of Pateh in Sumatra. Wood J held that:

The authorities seem to lay down, that recognition is first necessary, before this Court can hold the defendant exempt. I don't at present see there has been any recognition, but if the occasion require it, will the parties consent to my enquiring of the authorities, if there has been any communication between the Dutch Government and the Crown of England, relative to the independent state of Pateh in Acheen, and if so what?<sup>54</sup>

The Court did not go so far, as the case was dismissed on the basis of fraud committed by the plaintiff. Recognition of a foreign sovereign was accorded in the case of *Nairne v. Ahmed Tajudin bin Sultan Zain Noor Rashid (Sultan of Kedah)*.<sup>55</sup> In this case, the plaintiff had carried out some mercantile partnership transactions with the Sultan of Kedah and proceeded to sue him in Penang on these transactions which involved a charterparty that sunk off the coast of Cochin China. At the time of the transaction, the Sultan was residing in Penang, but he subsequently returned to his home state of Kedah, a state tributary of Siam. The main task for the Court was to consider the Sultan's objection to being sued in the British courts. This is a long and difficult judgment as a number of separate issues were conflated within it. Maxwell R approached it by asking if the Sultan could be considered a British subject because he was born in Penang. Maxwell R answered this in the negative, stating that while he may well have been a British subject – and hence amenable to the Court's jurisdiction – at the time of his birth, his subsequent acquisition of independent sovereign status as the ruler of Kedah afforded him immunity. After an extensive consideration of the English case of *The King of Hanover v The Duke of*

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52 *Id.*

53 [1808-1884] 1 Ky. 539.

54 *Id.* at 541.

55 [1808-1884] 1 Ky. 145.

*Brunswick*,<sup>56</sup> Maxwell held that this about the general rule establishing the immunity of sovereigns that

it appears that the rule is founded on this general consideration, that to require a foreign sovereign to submit to the authority of our Courts would be a violation of immunities necessary to his independence and a hostile aggression on his inviolability. This would be a legitimate ground of offence to him and to all other Princes, and might lead to war; and in the choice of evils, it is better that there should be a failure of justice to an individual, than that the state should be involved in danger. And it appears to me that all the exceptions to the rule turn on the existence of peculiar circumstances which preclude the giving of legitimate offence and the consequent danger. Thus, the sovereign who appeals to a foreign tribunal cannot complain that his sovereign rights are infringed by his being required to answer a cross bill, or a bill of discovery, concerning the same subject matter. So, those rights are not invaded when he is made a party to a suit merely for the purpose of giving him the option of defending his interests already imperilled through his agent.<sup>57</sup>

## VI. CONCLUSION

The major pre-occupation of the courts of the Straits Settlements was in dealing with two key concerns: first, the lack of admiralty jurisdiction to handle offences committed within its territories and with piracy; and second, claims of independent sovereignty that would oust their jurisdiction. Of these two problems, the first was rather more difficult for the Court to handle. The division between common law and admiralty jurisdiction was historical and did not receive sufficient attention in the metropolis. This was further compounded by the fact that the British East India Company, which lasted from 1600 to 1858, functioned as an agent of the British state, but was itself far more concerned with its potency in trade and jurisdiction over maritime matters. The separation between common law and admiralty jurisdictions did not pose a serious a problem in England since both the common law courts and those of the Lord High Admiral were located close to each other. It proved a most inconvenient problem

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56 6 Beav 1.

57 *Id.* at 156.

when the Straits Settlements was being run out of the Bengal Presidency, with only the three Admiralty Courts in Calcutta, Madras, and Bombay exercising exclusive admiralty jurisdiction but with the nearest Court of Judicature in Penang located almost 1500 miles away. The preservation of this historical distinction meant that up till 1837, persons arrested in the waterways (outside the proverbial lower-water extent of land) or on the high seas had to be sent to Calcutta for trial or otherwise set free.

The problem of sovereign immunity was rather less intractable but nonetheless presented the courts with some difficulty. The law that was applied was clear and straightforward: independent sovereigns acting as sovereigns were immune from the Court's jurisdiction. In that sense the distinction between *acta jure gestionis* and *acta jure imperii* was established very early on, indeed long before the English courts recognised this distinction in 1977.<sup>58</sup> This could well be because the Straits Settlements courts adopted the logic of Grotius rather than that of Alberico Gentili in determining the extent of and exceptions to sovereign immunity. Gentili, who held the Regius Professorship in Civil Law at Oxford from 1580 to his death in 1608, published a number of influential international law texts, the most important of which was *De Jure Belli Commentationes* or *Law of War* (1589). Of particular relevance to our discussion is his *De legationibus, libri tres* or *Three Books on Embassies* (1585). Gentili's works were published in Latin and were not translated into English till the early part of the twentieth century. This may well have been the reason why his position on sovereign immunity was less well-known and accepted in later years. As Przetacznik explains:

The English doctrine of immunity from civil jurisdiction, as that from criminal jurisdiction, also begins with Gentili's *Three Books on Embassies*. As indicated earlier, A. Gentili based his arguments in the field of the jurisdictional immunity of diplomatic agents in general, and their immunity from civil jurisdiction in particular, on the doctrines of Roman law. Therefore, it seems indispensable to state the rules of the Roman law *de legatis*. A *legatus* was exempt from the jurisdiction of the tribunals in Rome as to all actions *ex contractu* arising out of liabilities incurred before his appointment, and as to all actions *ex delicto* and criminal proceedings for wrongs done or offenses committed before the same period. The reason of

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58 See, *Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] 2 Q.B. 529 (Court of Appeal).

the rule was that he might not be disturbed in the performance of his duties, and that the business of the legation might be impeded. For the same reason, and also because he was not liable to be sued, he could not maintain an action *ex contractu* in those tribunals during the continuance of his office. But for contract or wrong done during the continuance of his office, he was not immune; as to the former, that he might not carry off the property of his creditors without paying for it; as to the latter, because his immunity was forfeit by his own wrong....

... Gentili's concept, which virtually denied the immunity from civil jurisdiction of diplomatic agents, was not accepted by the doctrine of international law. H. Grotius laid down a contrary rule, according to which the movable goods of an ambassador ought to be free from all constraint, whether touching his person or things which are necessary to him, in order that his security may be complete. In the view of the latter, if an ambassador has contracted a debt, he should be asked to pay in a friendly way; if he refuses, the request should go to the one who sent him. Finally, the methods may be used which are customarily used against debtors living outside the country. In this respect, the doctrine of international law followed H. Grotius rather than A. Gentili, as the former's concept was accepted by the most distinguished writers, including such classics as C. Bynkershoek and E. de Vattel.<sup>59</sup>

Emerich de Vattel's *Treatise on the Law of Nations*, it will be recalled, was cited as authority in the Court of Judicature's 1843 decision in *Abdul Wahab bin Mohomat Alli v. Sultan Alli Iskander Shah (Sultan of Johore)*.<sup>60</sup> This work, which was first published in 1758, was translated into English just two years later in 1760 and was readily accessible to jurists throughout the English-speaking common law world.

Insofar as the local cases are concerned, it is not, however, clear how much weight the court gave to each respective transaction. For example, the Court had no problem determining that the Sultan of Johore could be sued on a promissory note, but the Sultan of Kedah should be immune when the vessel he owned was destroyed and his business partner sought recompense from him. The main difficulty confronting the Court was in determining which "sovereigns" were independent and whether they were

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59 See, Franciszek Przetacznik, *The History Of The Jurisdictional Immunity Of The Diplomatic Agents In English Law* (1978) 7 ANGLO-AM L. REV. 348, at 372-373.

60 [1808-1884] 1 Ky. 298.

immune. Historical accounts were often relied upon to determine if the person claiming immunity still had sufficient independence and power to act as a sovereign. Many of the “sovereigns” had in fact been displaced by the British themselves through treaties of cession. Are these former rulers to be dealt with in the same manner as independent sovereigns? Would they be treated differently if they were under the protection of Britain’s European rivals, such as Holland?

One thing is certain. The early colonial courts were quite prepared to deal with international legal issues and to deal with them according to the law of nations as they understood it. The sources relied upon by the colonial courts were typically cases decided by the courts in London. They also cited with great approval, important publicists like Emmerich Vattel, Richard Zouche, and Henry Wheaton. These writers, together with home-grown talent like Sir James Fitzjames Stephens provided the necessary intellectual fodder and ballast for the Court to render decisions intelligently, efficaciously, and in line with international practice.

## Why Wield Constitutions to Arrest International Law<sup>1</sup>

*Prabhakar Singh*<sup>2</sup>

A constitution's seductive potential cannot be ignored even in international law. Though partisan in character, a constitutional lens, *inter alia*, is increasingly used to see international law today. While European lawyers interpret the *Kadi* judgement of the Court of Justice of the European Union (ECJ) as pluralist — a case of embracing monism upside-down — a developing country observer clearly sees *Kadi* as dualist. American scholars envisage international law subordinate to the United States' constitution. From a studied monism Europe has moved to pluralism while the U.S. has always been dualist. In the post-colonial era, many developing and least developed countries (Third World) have established a successful constitu-

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1 This essay is dedicated to the life and work of late Professor R. P. Anand (1933-2011) who will always inspire generations of international lawyers to a just world order.

2 President's Graduate Fellow, and Associate, Centre for International Law, Faculty of Law, National University of Singapore; LL.M. (University of Barcelona), Spain; B.A. LL.B. (Hons.) (National Law Institute University), Bhopal, India. I began writing this article while visiting the European Court of Justice, Luxembourg in May 2007. In January 2008, I presented the first draft at the *Conference of the Toronto Group for the Study of International, Transnational, and Comparative Law*, Toronto University. Quislex Legal Services Pvt. Ltd. was kind enough to fund my travel to both Luxembourg and Toronto. On the grant of funds from the *Graduate School of International Development*, Nagoya University, Japan I was able to visit Japan to research and present a subsequent draft of this paper. Comments from Cheryl Saunders, Shilpi Bhattacharya, Raesa Vakil, Charles Maddox, Pasha Hsieh and Hee Eun Lee helped me improve the article immensely. However, errors are all mine. <prabhakarsingh.adv@gmail.com>.

tional democracy. Little surprise then, a new found constitutional confidence is colouring such countries' international advocacy. In *India - QRs*, India drove the separation of power argument that New Zealand had made in the *Rainbow Warrior* case a step further. However constitutionalism, as an ideology, remains, as is often the case, an inconclusive question for an eternally observing Third World. This article discusses the rise of constitutionalism in international law and the Third World's possible responses.

## 1. INTRODUCTION

After the assault on international law in the war on terror, academics are nursing international law's injuries through constitutionalism.<sup>3</sup> The

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3 In the post 9/11 world, constitutional debates promise to fill the chasm between international security and international law. Mattias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, 15 EUR. J. INT'L L. 907-931 (2004). Klabbbers thinks it is tough to reach a definition of this term. Jan Klabbbers, *Constitutionalism lite*, 1 INT'L ORG. L. REV. 1 (2004). This question has descriptive, conceptual and normative components. See Jeffrey Dunoff & Joel Trachtman, *Ruling The World? Constitutionalism, International Law and Global Governance*, EJIL: DEBATE! (Thursday, Dec. 10, 2009). For Bogdandy, constitutionalism is "striving for a global legal community that frames and directs political power in the light of common values and a common good." Armin von Bogdandy, *Constitutionalism in International Law: Comment on a Proposal from Germany*, 47 HARV. INT'L L.J. 223 (2006). Nonetheless, its timing and prominence, according to Dunoff, give rise to constitutional debates "reflecting disciplinary anxieties that have been heightened by recent geopolitical developments." Jeffery Dunoff, *Constitutional Conceits: the WTO's Constitution and the Discipline of International Law*, 17 EUR. J. INT'L L. 647 (2006). Cho contends that "constitutional adjudication is self-legitimizing to the extent that such adjudication communicates with the domestic legal system via various forms of internalization, be it a judicial accommodation, as regards the *Charming Betsy* doctrine, or a policy change at the executive level." After all, Cho argues, compliance leads to legitimacy inasmuch as legitimacy renders compliance pull. Sungjoon Cho, *Global Constitutional Process*, 31 U. PENN. J. INT'L L. 621, 676 (2010). Dunoff sees no constitutional chromosomes whatsoever in the body of international law, Dunoff, *ibid*, at 647-75; Bogdandy sees them very clearly. Armin von Bogdandy, *Law and politics in the WTO: Strategies to Cope with a Deficient Relationship*, 5 MAX PLANCK YEARBOOK U.N. L. 609, 614 (2001). Astonishingly, such opposite understandings

story of constitutionalism began with the advocacy that the United Nations (UN) should be seen as the constitution of the world.<sup>4</sup> The debate has moved further since then. International institutions are now seen as lawmakers.<sup>5</sup> Article 38(1)(d) of the Statute establishing the International Court of Justice — the teachings of the most highly qualified publicists of the various nations — allows lawyers to nurse international law; albeit such works remain only subsidiary sources of international law. Be that as it may, in a purely legal critique, Sornarajah establishes that international law is often kidnapped by powerful nations, *inter alia*, through academic writings, which sometimes even trump the sovereign wishes of weaker nations.<sup>6</sup> Since within the power-based understanding of international law, publicists' views often reflect the interest of their nations, scholarly publi-

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come up while analysing the same legal instrument — the WTO agreement. While analysing international law *vis-à-vis* EC law, Koskeniemi, far removed from both Dunoff and Bogdandy, sees constitutionalism as a “mindset.” See generally, Martti Koskeniemi, *Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization*, 8 THEORETICAL INQUIRIES IN L. 9-36 (2007). See, e.g., Prabhakar Singh, *International Law as Intimate Enemy*, 14 OR. REV. INT'L L. 377 (2012) for a new lens to see international law.

4 Bardo Fassbender, *The United Nations Charter As Constitution of the International Community*, 36 COLUM. J. TRANSNT'L L. 531-619 (1998); Erika De Wet, *International Constitutional Order*, 55 INT'L & COMP. L. Q. 51-76 (2006).

5 Armin von Bogdandy & Ingo Venzke, *Beyond Dispute: International Judicial Institutions as Lawmakers*, 12 GERMAN L. J. 979-1004 (2011).

6 “A series of arbitral awards, followed by confirmatory writings of the so-called “highly qualified publicists,” all of them coming from the so-called “civilised legal systems,” held that such a contract was akin to a treaty in that responsibility of the state followed the event of the breach of the contract and failure to amend the breach. The use of awards of tribunals and the writings of “highly qualified publicists,” often mercenary participants in the litigation writing up their opinions or briefs as articles in “learned” journals, resulted in the creation of an international law in the area. The practice still continues. The members of the so called “arbitration fraternity” elevate each other in status, cite each other's views and create law on the basis that they are “highly qualified publicists.” It is hypocritical that no text on international law adverts to this practice of lawmaking for so many states and peoples by so few in an age in which there is much talk of democratic legitimacy.” See M. Sornarajah, *Power And Justice: Third World Resistance In International Law*, 10 SINGAPORE YB INT'L L. 19, 31 (2006).

cations have much to add to the sources of international law. Therefore, if European lawyers, highly qualified publicists, project a constitutional or any other view of international law, it is worth a discussion from a Third World angle. Consequently, three observations are in order:

- (1) There is a burgeoning European trend to see governance through a constitutional lens.<sup>7</sup> Regardless, American scholarship regularly rejects this.<sup>8</sup>
- (2) Even against a sharp criticism, the division of our planet into three worlds remains a useful categorisation to study behavioural internationalism of the states.<sup>9</sup>
- (3) The project of international law is increasingly seeking refuge in constitutionalism for its survival.

How does one assess constitutional developments in international law in the context of global constitutionalism today?<sup>10</sup> In the *Paquete Habana* case, the U.S. Supreme Court identified “Japan as a last member of the civilized nations whose legal customs were allowed to be taken into comparative judicial account.”<sup>11</sup> Since then countries like India have developed robust constitutional democracy. Nonetheless due to colonialism’s effect on the non-Western world, anything European is reliably constitutional and easily international today. It is this decidedly European nature of the constitutional argument that displeases the Americans and Third worlders. Europe gave sovereignty to the world, and when the Third World, due in large part to colonialism, has accepted the idea of sovereignty, Europe has

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7 Bogdandy, *supra* note 3, at 223.

8 Paul Stephan, *US Constitutionalism and International Law: What the Multilateralist Move Leaves Out*, 2 J. INT’L CRIMINAL JUSTICE 11–16 (2004).

9 B.S. Chimni, *Third World Approaches to International Law: A Manifesto*, 8 INT’L CMTY. L. REV. 3–27, (2006)

10 Jiunn-Rong Yeh & Wen-Chen Chang, *The Emergence of East Asian Constitutionalism: Features in Comparison*, 59 AM. J. COMP. L. 805, 806 (2011).

11 *The Paquete Habana*, 175 U.S. 677 (1900). The idea of a civilized state and its customs is now well established in international law. See Statute of the International Court of Justice, Article 38(1)(c), “the general principles of law recognized by civilized nations,” available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>.

moved to a post-national position. European Union (EU) is thus a source of constitutional interpretation of international law through its highly qualified publicists as the article 38 (1) (d) of the Statute of the International Court of Justice stipulates. As such, it is argued that from a third world perspective, the rise of constitutionalism in international law looks suspect and thus worthy of investigation. This article is a humble step in that direction.

## 2. FROM EUROPEAN TO WTO CONSTITUTIONALISM

Though consisting mostly of Europeans, there is a growing school of constitutionalists.<sup>12</sup> Constitutionalism is a crystallization of domestic institutional virtues for reworking internationalism. However unanimity over the true definition of constitutionalism continue to elude scholars.<sup>13</sup> International legal scholarship harbours very divergent, sometimes conflicting, notions of constitutionalist debates.

For some, constitutionalism is a medicine to the fragmentation of international law.<sup>14</sup> Notably, harking back to constitutionalism gives Europe a distinctive advantage; it breaches international law yet it can defend itself as champion of individual internationalism by claiming to protect the human rights of member country citizens. Thus even if the EU's constitutional norms trump universal international law, it nonetheless crafts a state practice which is applicable among twenty-seven *plus* EU member states. This fashions an unprecedented situation within international law, a model

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12 Bogdandy, Ackerman, de Wet, de Búrca, Klabbers, Koskenniemi, Walker, Peters, Maduro, Petersmann, Kumm, Trachtman, Rosenfeld and Suo, *inter alia*, are some of the constitutional and pluralist scholars. See, e.g., Ming-Sung Kuo, *The End of Constitutionalism As We Know It? Boundaries and the State of Global Constitutional (Dis)Ordering*, 3(1) TRANSNAT'L LEGAL THEORY 329-369 (2010); See Jeffrey Dunoff & Joel Trachtman, *The Lotus Eaters*, ¶ 6, EJIL Analysis /EJIL Debate! (Jul 16, 2010).

13 Bruce Ackerman, *The Rise of World Constitutionalism* 83 VA. L. REV. 771-797 (1997); Bogdandy, *Proposal from Germany*, *supra* note 3; Anne Peters, *Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures* 19 LEIDEN J. INT'L L. 579 (2006).

14 See generally, Koskenniemi, *supra* note 3, at 9-36.

that cannot be imitated by a Third World sovereign and thus does not add usefully to the growth of customary international law or state practice.

The build-up of constitutional and human rights courts the world over further aids to the constitutional advocacy within international law.<sup>15</sup> *Inter alia*, some of these courts are the ECJ,<sup>16</sup> Inter-American Court of Human Rights,<sup>17</sup> European Court of Human Rights,<sup>18</sup> and African Court on Human and Peoples' Rights.<sup>19</sup> John Jackson, Ernst-Ulrich Petersmann and Deborah

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15 International Criminal Court is not part of the UN system. See ICC: *About the Court*, ¶2, available on <http://www.icc-cpi.int/Menus/ICC/About+the+Court/>. It reads "governed by the Rome Statute, is the first permanent, treaty based, international criminal court established to help end impunity for the perpetrators of the most serious crimes of concern to the international community." *Id.*, at ¶ 1.

16 The ECJ was established in 1952. See, [http://curia.europa.eu/jcms/jcms/Jo2\\_6999/](http://curia.europa.eu/jcms/jcms/Jo2_6999/). The ECJ was set up under the Treaty of Paris (1951) to implement the legal framework of the European Coal and Steel Community (ECSC). When the European Community was set up under the *Treaty of Rome* (1957), the ECJ became its court. When the European Union was created under the *Maastricht Treaty* (1992), the ECJ's powers were again expanded to cover the broader legal remit of the EU. The Lisbon Treaty (2007) again extended the ECJ's remit to include, among other areas, Justice and Home Affairs, as well as renaming the courts the "Court of Justice of the European Union." The number of cases sent to the ECJ has grown dramatically since the institution was established. The Court of First Instance was renamed the "General Court" in the Lisbon Treaty. In addition to this, the Civil Service Tribunal was set up in 2005 to adjudicate in disputes between the EU and its civil service. All three courts are based in Luxembourg. See ECJ, available at <http://www.civitas.org.uk/eufacts/FSINST/IN5.htm>.

17 The Inter-American Court of Human Rights is located in San José, Costa Rica. The inter-American human rights system was born with the adoption of the *American Declaration of the Rights and Duties of Man* in Bogotá, Colombia in April of 1948 See <http://www.cidh.oas.org/what.htm>.

18 See ECtHR, available at [http://www.echr.coe.int/echr/homepage\\_EN](http://www.echr.coe.int/echr/homepage_EN). The ECtHR recently brought out Statistics on judgments by State to further concretize its importance. See The Council of Europe, *Judgments by State: Statistics 1959-2010*, available at, [http://www.echr.coe.int/NR/rdonlyres/E6B7605E-6D3C-4E85-A84D-6DD59C69F212/0/Graphique\\_violation\\_en.pdf](http://www.echr.coe.int/NR/rdonlyres/E6B7605E-6D3C-4E85-A84D-6DD59C69F212/0/Graphique_violation_en.pdf).

19 See *African Court on Human and Peoples' Rights*, Sept. 22, 2011, available at <http://www.african-court.org/en/>. However one can always contest the effectiveness of international courts. See George M. Wachira, *African Court on*

Cass are the chief architects of a constitutional view of international trade law.<sup>20</sup> Their advocacy has been the basis for new scholars to either find or oppose a constitutional interpretation of the WTO law.<sup>21</sup>

[Sungjoon Cho] identifies a nascent phenomenon of “global constitutional lawmaking” in recent “WTO” jurisprudence that struck down a certain calculative methodology (“zeroing”) in the anti-dumping area ... [Cho] interprets the Appellate Body’s uncharacteristic anti-zeroing hermeneutics, which departs from a traditional treaty interpretation under the Vienna Convention on the Law of Treaties and the past pro-zeroing under the General Agreement on Tariffs and Trade (“GATT”) case law, as a “constitutional” turn of the WTO ... [Cho] argues that a positivist, inter-governmental mode of thinking, as is prevalent in other international organizations such as the United Nations, cannot fully expound this phenomenon.<sup>22</sup>

Furthermore, Kill believes that the WTO Panel’s Report in *Mexico—Measures Affecting Telecommunications Services*<sup>23</sup> dished out a possibility of a right-based constitutionalism as a “theory that comes complete not only with an ideology, but with a specific model of a judiciary as accomplice in achieving its ideological goals.”<sup>24</sup> There is definitely a methodical tact in the changing hermeneutics of the WTO — like any other international court there is a discursive burden on the WTO to keep its irrelevance at bay. A

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*Human and Peoples’ Rights: Ten years on and still no justice*, Report: Minority Rights Group International (2008), available at, <http://www.unhcr.org/refworld/pdfid/48e4763c2.pdf>.

20 See Ernst-Ulrich Petersmann, *Theories of Justice, Human Rights and the Constitution of International Markets*, 37 *LOYOLA L. REV.* 2004, 407-460; Petersmann, *Human Rights, Constitutionalism and the WTO: Challenges for WTO Jurisprudence and Civil Society*, 19 *LEIDEN J. INT’L L.* 633-667 (2006); DEBORAH CASS, *THE CONSTITUTIONALIZATION OF THE WORLD TRADE ORGANIZATION* (2005).

21 Joel P. Trachtman, *The Constitutions of the WTO*, 17 *EUR. J. INT’L L.* 623 (2006).

22 Cho, *Global Constitutional Process*, *supra* note 3, at 621.

23 Report of the WTO panel, *Mexico - Measures Affecting Telecommunications Services*, WT/DS204/R (Apr. 2, 2004).

24 See Theodore Kill, *The Evidence for Constitutionalization of the WTO*, 20 *MINN. J. INT’L L.* 65, 122 (2011).

constitutional handle gives the WTO the platform to connect to non-trade issues as well as it helps identify free market and consumer preference as some kind of a fundamental right.<sup>25</sup>

With the regular assault on multilateralism<sup>26</sup> and the stalled Doha process, only a constitutional hermeneutics can possibly keep the WTO in business. But one has to note that the precedents for such constitutional visions have washed up the shores of the WTO from the EU experience. It is because of this that America sees constitutionalism as a distinctly European norm and thus not acceptable. Posner clearly admits this when he sarcastically remarks: “The American perspective on international law is wrong because it is not the European perspective, which has become law and is therefore right.”<sup>27</sup> But how do we know, Posner asks, “the Europeans got it right?”<sup>28</sup> Similarly, how does a third-worlder know if both the Europeans and Americans got it right?

### 3. THE KADI EFFECT ON INTERNATIONAL LAW

#### A. *Kadi*: A Reminder

The *Kadi* case arose from the EU regulation transposing the UN Security Council resolution’s guidelines.<sup>29</sup> Mr. Kadi, a British national of Saudi Arabian origin, challenged the EC’s implementation of this resolution. It had identified him as being involved with terrorism and mandated that his assets be frozen.<sup>30</sup> The ECJ delivered a judgment “annulling the relevant implementing measures and declaring that they violated fundamental rights protected by the EC legal order.”<sup>31</sup> Here, the ECJ found, “and con-

25 Joost Pauwelyn, *The Transformation of World Trade*, 104 MICH. L. REV. 1-65 (2005).

26 See generally, JAGDISH BHAGWATI, *TERMITES IN THE TRADING SYSTEM: HOW PREFERENTIAL AGREEMENTS UNDERMINE FREE TRADE* (2008).

27 See Eric A. Posner, *A Response to Robert Ahdieh*, OPINIO JURIS, available at [http://opiniojuris.org/2011/02/11/hilj\\_posner-responds-to-ahdieh/](http://opiniojuris.org/2011/02/11/hilj_posner-responds-to-ahdieh/).

28 *Id.*

29 *Kadi & Al Barakaat Int’l Found. v. Council and Comm’n*, Joined Cases C-402/05 P and C-415/05 P. Also, de Búrca, *infra* note 102, at 1.

30 *Id.*

31 *Id.*

demned on EC law grounds, that the EC legislature had implemented a U.N. Security Council resolution providing for antiterrorist measures in such a way as to violate Mr Kadi's rights of defense."<sup>32</sup> According to Búrca, the Kadi judgment spawns a "significant departure from the conventional presentation and widespread understanding of the EU as an actor maintaining a distinctive commitment to international law and institutions."<sup>33</sup>

Notably, it also marks a complete swap in Europe's traditional position on international law. By analogy, in *Kadi*, the ECJ established the primacy of European constitutional concerns over international law.<sup>34</sup> But the decision has also highlighted that the European review of lawfulness applies only to EC acts and never to acts of the Security Council under Chapter VII of the UN Charter. This is true even if such a review were to be limited to examination of the compatibility of that resolution with *jus cogens*.<sup>35</sup>

In the beginning, the ECJ did not challenge the existing hierarchy of norms within the international legal order. A question, however, must be asked: whether the primacy of UN Charter obligations is jeopardised due to *Kadi*?<sup>36</sup> Advocate General Maduro advised the EC courts to determine the effect of international obligations within the EC legal order by reference to the conditions set by EC laws.<sup>37</sup> Thus the ECJ, based clearly on the opinion of Maduro, ruled that the UN sanction led to the subversion of EU law and EU constitutionalism.<sup>38</sup>

## B. When Koskenniemi Locks Horn with Maduro?

A power-based explanation of the *Kadi* judgment exposes the EU's increasing refusal to play second fiddle to the U.S. If the Security Council has been a puppet of the U.S., if seen from a Third World perspective, the

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32 Bronckers, *infra* note 41, at 13.

33 de Búrca, *infra* note 102, at 2.

34 Albert Posch, *The Kadi Case: Rethinking The Relationship Between EU Law and International Law?* 15 COLUM. J. EUR. L. ONLINE at 1 (2009).

35 *Id.*

36 *Id.*

37 Maduro, *infra* note 43, § III, ¶ 23.

38 Nikolaos Lavranos, *Judicial Review of UN Sanctions by the ECJ*, 78 NORDIC J. INT'L L. 343-359 (2009).

EU is now shifting the headquarters of international law to the ECJ. By spawning centrifugal constitutionalism, the ECJ is also pushing the ICJ into oblivion “due in large part to the failure of the Security Council to provide satisfactory due process protections.”<sup>39</sup> In fact, there is an apprehension that if the WTO has taken the economic aspect away and the ECJ has increasingly begun to “exercise its functions within the framework of customary international law,” what is there for the ICJ to do?<sup>40</sup>

The ECJ is now the new centre of international law formation; it interacts with the International Tribunal for the Law of the Sea (ITLOS), the WTO and the ICJ — as Marco Bronckers puts it — with a “muted dialogue” as against the direct effect, as evidenced from its recent judgments.<sup>41</sup> However, European lawyers have exhibited reluctance in accepting the ECJ’s dualism. Therefore, constitutional lawyers have been seen using terms like “pluralist,” “comprehensive pluralist,” and “muted dialogue methodology” for the ECJ’s new approach.<sup>42</sup>

In his analysis of the *MOX Plant case*, Koskenniemi criticised the ECJ for its dualism and disrespect for international law. He finds this disturbing.<sup>43</sup> The Third World has to examine whether pluralism or constitutionalism within international law is yet another academic trope or a serious appreciation of global diversity. If it is the latter, are there opportunities, scope, and support for its normative translations for those who have watched international law’s overtures from the periphery?

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39 Devika Hovell, *A House of Kadis? Recent Challenges to the UN Sanctions Regime and the Continuing Response to the ECJ Decision in Kadi*, EJIL TALK! (July 7, 2009).

40 See Rosalyn Higgins, *The ICJ, the ECJ, and the Integrity of International Law*, 52 INT’L & COMP. L. Q. 1, 17 (2003).

41 See, e.g., Marco Bronckers, *From ‘Direct effect’ to ‘Muted dialogue’: Recent Developments in the European courts’ case Law on the WTO and Beyond*, J. INT’L ECON. L. 1-14 (2008).

42 Kirsch uses “pluralism,” Rosenfeld uses “comprehensive pluralism,” Přibáň says “Multiple Sovereignty” and Bronckers uses “Muted Dialogue” as against the express use of “Dualism.” See Přibáň, *Multiple Sovereignty: on Europe’s Self-Constitutionalization and Legal Self-Reference*, 23 *RATIO JURIS* 41 (2010).

43 See Martti Koskenniemi, *International Law: Constitutionalism, Managerialism and Ethos of Legal Education*, 1 *EUR. J. LEGAL STUD.* (2007).

### C. Opposite Constitutional Narratives

In the *Kadi* case, Maduro gave a powerful advisory opinion asserting EU constitutionalism. Maduro was very conclusive in his opinion.<sup>44</sup> The ECJ in this case stood for the fundamental rights of its citizen. *Kadi* gave the ECJ an opportunity to deliberate on the relationship between the UN and EU in strictly legal terms. In Maduro's opinion, "the Community Courts have jurisdiction to review measures enacted by the Community in order to implement U.N. Security Council Resolutions."<sup>45</sup> He further opined that:

It would be wrong to conclude that, once the [European] Community is bound by a rule of international law, the EC Courts must *bow* to that rule with *complete acquiescence* and apply it *unconditionally* in the EC legal order. The relationship between international law and the EC legal order is governed by the EC legal order itself, and international law can *permeate* that legal order only under the conditions set by the *constitutional* principles of the EC.<sup>46</sup> *Essentially they* [Council of EU & Commission of the EC] *argue that, when the Security Council has spoken, the Court [EC] must remain silent.*<sup>47</sup>

He also referred to a US domestic decision — Justice Murphy's dissenting opinion of *Korematsu v. United States*.<sup>48</sup> The assumption goes that one must respond and refer to domestic decisions of the U.S. *Why?* Perhaps, the U.S.'s domestic norms, unlike Third World states' norms, directly challenge international law. The U.S.'s supreme military power ensures that its norms do not go unnoticed. Never has a European or American court looked beyond Latin maxims to discover alternative rules of interpretations. The much vaunted globalization of legal knowledge, it seems, only means a further export of Euro-American rules to the Third World. The traffic of knowledge is decidedly one-way.

Koskenniemi's reactions to *MOX Plant* and Maduro's opinion in *Kadi* puts them in opposite camps. Both Maduro and Koskenniemi, among

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44 See Maduro, *infra* note 43, § v.

45 See *Kadi*, Maduro's Opinion, at ¶ 16, § iii, ¶ 19, ¶¶ 26, 27, 28 29, § iv, available at <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-402/05>.

46 *Id.* ¶ 24 (emphasis added).

47 *Id.* ¶ 1. (emphasis added).

48 323 U.S. 214, 233234 (1944).

other significant European scholars, have sketched international constitutionalism's possible algorithm. Their approach, nonetheless, is completely divorced. Maduro advises for a dualist approach as discerned from his opinion in *Kadi. MOX Plant* that began at ITLOS is another possible site for a Maduro-Koskenniemi face-off.<sup>49</sup> Citing *MOX Plant* — decided later by the ECJ — Koskenniemi says:

The *MOX Plant* case is stunning because it falls squarely on the oldest and most conservative trajectory of European thinking about the role of international law and its relations with national law. It shows the ECJ imagining the European Union as a sovereign whose laws override any other legal structure.<sup>50</sup>

Maduro opined in *MOX Plant* as well: “Ireland has failed to fulfil its obligation under Article 292 EC and 193 EA.”<sup>51</sup> Though essentially a European debate, constitutionalism connects with the Third World due to its seductive potential. Baxi steps in at this point to declare that constitutionalism is “an unfamiliar guest to postcolonial discourse about the Third World.”<sup>52</sup> Constitutionalism, he says, provides narratives of both *rule* and *resistance*.<sup>53</sup>

Post-*Kadi*, a proposed regulation by the EC provides for “a listing procedure ensuring that the fundamental rights of defence and in particular the right to be heard are respected.”<sup>54</sup> According to some, this measure threatens “to take decision-making about sanctions out of the hands of the Security Council and into the hands of a regional

49 *MOX Plant Case (Ireland v. United Kingdom)* ITLOS (provisional measures order, 3 December 2001) 126 ILR 334.

50 Koskenniemi, EJLS, *supra* note 43. Also See Nikolaos Lavranos, *The MOX Plant And Ijzeren Rijn Disputes: Which Court Is The Supreme Arbiter?* 19 LEIDEN J. INT'L L. 223 (2006).

51 Opinion, Miguel Maduro, Case C-459/03, *Comm'n EC v. Ireland* (Delivered on 18 January 2006), § I, ¶ 6.

52 Baxi, *infra* note 165, at 540.

53 *Id.* at 548.

54 See COMM'N OF THE EC, 2009/0055 (CNS), *Proposal for a council regulation amending regulation (EC) no 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Osama bin Laden, the Al-Qaida network and the Taliban*, 5 (June, 28, 2010).

body.”<sup>55</sup> It is only predictable given the EU’s rise as our world’s biggest normative laboratory.

#### 4. THE STATE OF INTERNATIONAL LAW IN THREE CONSTITUENCIES

##### A. United States of America: The Courts and Scholars

Dennis Jacobs, an American judge thinks: “International law is not all about human rights, conflict, and the overlaying of international consensus on domestic law.”<sup>56</sup> International law, for the American judge, “is composed for the most part of well-developed, highly ramified systems of authority and order that facilitate life among nations.”<sup>57</sup> Despite recent polemics, according to some American scholars, “the use of international law in constitutional interpretation, as one factor among others, is highly traditional and eminently proper.”<sup>58</sup> Waldron asks of the value of customary international law, or of the enforceability of international law in American courts.<sup>59</sup> Such sentiments about international law vis-à-vis American constitutional law, however, constitute a small percentage of constitutional lawyers.

A set of nationalist American lawyers interprets the Presidential war powers as arresting international law unconditionally.<sup>60</sup> Jeremy Rabkin says that American “Self-Defense Shouldn’t Be Too Distracted By Interna-

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55 Hovell, *supra* note 39.

56 Dennis Jacobs, *What Is An International Rule of Law?* 30 HARV. J. L. & PUB. POL’Y 3 (2006).

57 *Id.* at 3.

58 Gerald L. Neuman, *International Law As A Resource In Constitutional Interpretation*, 30 HARV. J. L. & PUB. POL’Y 177 (2006). (Some international law is too important to the place of the United States in the world for our constitutional jurisprudence to ignore; some international law provides useful functional or normative insights on which constitutional adjudication can draw). William H. Pryor Jr., *Foreign And International Law Sources In Domestic Constitutional Interpretation*, 30 HARV. J. L. & PUB. POL’Y 173 (2006).

59 Jeremy Waldron, *The Rule of International Law*, 30 HARV. J. L. & PUB. POL’Y 15 (2006).

60 Michael S. Paulsen, *The Constitutional Power to Interpret International Law*, 118 YALE L.J. 1762 (2009); Curtis A. Bradley, *The Bush Administration and*

tional Law.”<sup>61</sup> Notably, American constitutional scholarship has recently been wielding its pen to arrest international law. The U.S. “Supreme Court has made it clear that both the President and Congress can break free of customary international law by simple decree.”<sup>62</sup> Rabkin challenges the critics’ underlying premise that “international law has the same sort of claim on [U.S.] government as domestic law and that war measures abroad can accordingly be judged in the same terms as police abuses at home.”<sup>63</sup> A series of U.S. Supreme Court cases has also supported this position, more so during the war on terror.<sup>64</sup> U.S. presidents have stretched or violated international law at significant moments in American history and international law has served as a political rallying point against the anti-terrorism policies of the Bush administration regarding the use of force, detention, interrogation, and military trial.<sup>65</sup> And,

Because “international law” has the same verbal form as “contract law” or “patent law,” it is easy to fall into the trap of assuming that it has the same clarity or reliability as other kinds of law. If one looks at actual treatises on international law in the nineteenth century and down to quite recent times, one almost always finds an initial discussion of an apologetic nature, trying to address doubts about whether international law should truly be considered real law. Yet critics who protest that the Bush administration has “defied international law” in its war policies

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*International Law: Too Much Lawyering and Too Little Diplomacy*, 4 DUKE J. CONST. L. & PUB. POL’Y 57 (2009).

- 61 Jeremy Rabkin, *American Self-Defense Shouldn’t Be Too Distracted By International Law*, HARV. J. L. & PUB. POL’Y 31 (2006).
- 62 Saikrishna Prakash, *The Constitutional Status Of Customary International Law*, 30 HARV. J. L. & PUB. POL’Y 65, 66 (2006); Michael D. Ramsey, *The Textual Basis Of The President’s Foreign Affairs Power*, 30 HARV. J. L. & PUB. POL’Y 141 (2006).
- 63 Rabkin, *supra* note 61, at 31.
- 64 *United States v. Al Bahlul*, 820 F.Supp.2d 1141 (C.M.C.R. 2011) (The U.S. Ct. of Military Comm’n Review held that the commission properly exercised jurisdiction over defendant); see John Kimpflen, *War*, 78 Am. Jur. 2d War § 32.
- 65 Robert J. Delahunty & John Yoo, *Executive Power V. International Law*, 30 HARV. J. L. PUBLIC POLICY 73 (2006).

speak as though international law has now achieved a degree of clarity, precision, and reliability that it never used to have. How could that be so?<sup>66</sup>

The American courts have also moved from their position in 1980 expressed in *Fernandez v. Wilkinson* that “even though the indeterminate detention of an excluded alien cannot be said to violate the United States Constitution or our statutory laws, it is judicially remedial as a violation of international law.”<sup>67</sup> Perhaps the most anti-international law judgment from a U.S. court came in *Citizens Living in Nicaragua* case where, *inter alia*, the Court said judgments of the ICJ “do not fall within the definition of *jus cogens* or peremptory norms of international law.”<sup>68</sup>

The spate of cases after the 9/11 incidents, such as *Khalid v. Bush*, led the Court to hold that the U.S. “President’s authority was not confined to capture and detention of persons on or near battlefields of Afghanistan.”<sup>69</sup> Invoking the separation of powers doctrine, the Court said that “it [is] impermissible to inquire into conditions of detention under international norms given President’s authorization from Congress to detain combatants.”<sup>70</sup> The U.S. Constitution was read as ossifying any cognizable constitutional rights of “non-resident aliens captured and detained outside” the U.S. in the war on terror.<sup>71</sup>

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66 Rabkin, *supra* note 61, at 34.

67 *Rodriguez Fernandez v. Wilkinson*, 505 F. Supp. 787 (D.C. Kan. 1980).

68 *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929 (D.C. Cir. 1988). The Court also held that “despite claim that the Contras had begun targeting Americans living in Nicaragua, the funding of the Contras did not constitute a due process violation;” a statute inconsistent with customary international law modifies or supersedes that law to the extent of inconsistency; article of the UN Charter as to respecting judgments of the International Court of Justice does not confer rights on private individuals.

69 *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005).

70 *Id.*

71 *Id.* *U.S. v. Hamdan*, 801 F. Supp. 2d 1247 USCMCR, (2011) held that the military commission, U.S. Naval Station at Guantanamo Bay, Cuba, had subject matter jurisdiction. *See also Al-Bihani v. Obama*, 619 F. 3d 1 (C.A.D.C. 2010).

As the idea of transporting constitutional law to an international platform “tends to menace their ontological premise, i.e., state-centeredness,”<sup>72</sup> American constitutional scholars offer a very minimum importance to this idea before international relations theory. Michel Paulsen and Curtis Bradley, standing on the extreme right, represent this brand of American view. They subordinate international law to the American constitution and the Presidential war powers.<sup>73</sup> “To the extent that the regime of international law,” Paulsen says, “yields determinate commands in conflict with the Constitution’s commands or assignments of power, international law is, precisely to that extent, *unconstitutional*.”<sup>74</sup> No doubt, such attempts reminisces early twentieth century statist writings.

Posner and Goldsmith, extending this view further, distinguish between American and European international law; America sees itself as an exceptional nation, not bound by the rules that bind others. “The enormously successful, decades-long process of treaty-based European integration has,” according to Posner and Goldsmith “led Europeans to identify peace and prosperity with a commitment to international law;”<sup>75</sup> often what is overlooked is that the treaties that established the EU “created institutions that jealously guard the interests of Europeans when these interests conflict with an international law that reflects global aspirations.”<sup>76</sup>

Accordingly, Paulsen thinks in general the charge that the U.S. has, in some respect or another, “violated international law” should have far “less rhetorical and political salience than it has had in public discourse.”<sup>77</sup> International law is not, in the main, *law* for the United States.<sup>78</sup> This per-

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72 Cho, *Global Constitutional Process*, *supra* note 3, at 622.

73 Paulsen, *supra* note 60, at 1762; Curtis A. Bradley, *The Bush Administration And International Law: Too Much Lawyering And Too Little Diplomacy*, 4 DUKE J. CONST. L. & PUB. POL’Y 57 (2009).

74 Paulsen, *supra* note 60, at 1762. Bradley, *ibid*, at 57.

75 Jack Goldsmith & Eric Posner, *Does Europe Believe in International Law?*, WALL ST. J., November 25, 2008, available at <http://online.wsj.com/article/SB122757164701554711.html>.

76 *Id.*

77 Paulsen, *supra* note 60, at 1822.

78 *Id.* (“Where there exists a conflict between the U.S. Constitution’s assignments of rights, powers, and duties, and the obligations of international law, U.S.

haps “impolitic proposition is one that nevertheless needs to be confronted and embraced.”<sup>79</sup> Now that Osama bin Laden is dead, finally,<sup>80</sup> the “war on terror,” of which Osama’s death is an integral part, exposes American exceptionalism’s disrespect for the international rule of law. Paulsen says: “Thus, whether Congress’s justification for the authorizations of war in the September 18, 2001,” and that vis-à-vis “the Iraq War satisfied international law requirements is of no consequence as a matter of U.S. law.”<sup>81</sup> *Constitutionally*, “these wars were legal, beyond question.”<sup>82</sup> The question of international law compliance “is one of international politics and international relations, not one of binding U.S. law.”<sup>83</sup> After all, “a treaty may not foreclose Congress’s constitutional power to declare war or the President’s executive power with respect to war.”<sup>84</sup>

The force of international law, as a body of law, upon the United States is thus largely an illusion. On matters of war, peace, human rights, and torture — some of the most valued matters on which international law speaks — its voice may be silenced by contrary U.S. law or shouted down by the exercise of U.S. constitutional powers that international law has no binding domestic-law power to constrain. International law, for the United States, is international policy and politics.<sup>85</sup>

Perhaps this is what Eric Posner reinforces, yet again, in his co-authored idea of universal exceptionalism.<sup>86</sup> America’s “refusal to go along with other democratic states can be seen as another manifestation of Ameri-

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government officials must, as a matter of legal obligation, side with the Constitution and against international law”). *Id.* at 1762.

79 *Id.*

80 *Osama bin Laden is dead, Obama announces*, THE GUARDIAN, 2 May 2011.

81 Paulsen, *supra* note 60, at 1823.

82 *Id.*

83 *Id.*

84 *Id.*

85 *Id.*, at 1844.

86 Eric Posner & Anu Bradford, *Universal Exceptionalism in International Law*, 52 HARV. INT’L L. J. 1 (2011). This position has been contested by Robert Ahdieh. See Robert Ahdieh, *A Response to Anu Bradford and Eric A. Posner*, OPINIO JURIS, available at [http://opiniojuris.org/2011/02/11/hilj\\_ahdieh-response-to-bradford-posner/](http://opiniojuris.org/2011/02/11/hilj_ahdieh-response-to-bradford-posner/).

can exceptionalism — here, “within the realm of judicial behavior and constitutionalism.”<sup>87</sup> In Osama’s killing, clearly there was a violation of international humanitarian law on display and the U.S. President, who ironically holds the Nobel Peace Prize, exalted in these violations. The U.S. Constitution, according to Paulsen, empowers its President and the army to violate international law as and when needed.<sup>88</sup> Fortunately, there are many scholars who think Paulsen is not correct.<sup>89</sup> However reckoning from the cases cited by scholars who favour the President and the Congress’ ultimate power in trumping international law, and the scholars cited in the judgements of the U.S. courts, there is a strong symbiotic cross feeding to sustain each other.<sup>90</sup>

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87 *Id.* at 11, ¶ 1.

88 Bradley guessed it right that “those who are assuming that President Obama will have radically different substantive positions on foreign policy than Bush may be disappointed.” Bradley, *supra* note 60, at 78.

89 Neither the writings of anti-internationalist scholars nor the parchment of the Constitution itself will suffice to sustain America’s (formerly) splendid constitutional isolation. This is the downside of formalism and the old constitutional law scholarship, which takes no account of learning from other disciplines or of empirical evidence. Developments on the ground are crucial to understanding the hydraulics by which international law will be imposed on the United States, constitutionally willing or not. Paulsen’s analysis suffers from an ivory-tower blindness; it is compelling in an antiquarian, parlor-game sort of way. Peter J. Spiro, *Wishing International Law Away*, 119 YALE L.J. ONLINE 23 (2009), available at <http://yalelawjournal.org/2009/09/29/spiro.html>. Pointing to lacunas in Paulsen’s advocacy, Ku says, “Yet obeisance to the Constitution does not render international law a meaningless illusion.” In fact, “the Constitution allocates to Congress and the President the power to transform international law into binding domestic law that is as binding as any other kind of U.S. law. For better *and* for worse, then, international law will continue its co-existence with constitutional law as an important form of law for the United States.” Julian Ku, *The Prospects for the Peaceful Co-Existence of Constitutional and International Law*, 119 YALE L.J. ONLINE 15 (2009), <http://yalelawjournal.org/2009/09/29/ku.html>. (emphasis in original).

90 For example, most of the cases that deal with war on terror detainees have cited Bradley, Goldsmith, Posner, and the like. See *Al-Bihani v. Obama*, 619 F. 3d 1 (C.A.D.C. 2010); *al-Marri v. Pucciarelli*, 534 F.3d 213, C.A.4 (S.C.), July 15, 2008

Quite remarkably, Karl Popper's attack on Hegel's constitutionalism becomes important here.<sup>91</sup> Popper explains that Hegel's support for equality and liberty came from his allegiance to Prussian absolutism of the totalitarian Frederick William III.<sup>92</sup> Just as Hegelian *équilibre* came from totalitarianism, American scholars' isolationism comes from well-known American exceptionalism.

## B. The European Union

In *NS v. Secretary of State for the Home Department*,<sup>93</sup> the ECJ in relation to the removal of an asylum seeker to Greece, held there was a strong but rebuttable presumption that a Member State would abide by the European Convention of Human Rights, as the common European asylum system was based on the assumption that states would abide by this Convention.

At issue here is the *raison d'être* of the European Union and the creation of an area of freedom, security and justice and, in particular, the Common European Asylum System, based on mutual confidence and a presumption of compliance, by other Member States, with European Union law and, in particular, fundamental rights.<sup>94</sup>

Most recently in *Pye Phyo Tay Za v. Council of the EU*,<sup>95</sup> the ECJ gave a judgment that in both procedure and substance is parallel to *Kadi*.<sup>96</sup> Typi-

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(NO. 06-7427). See Curtis A. Bradley, *Enforcing The Avena Decision In U.S. Courts*, 30 HARV. J. LAW & PUBLIC POLICY 119 (2006).

91 II KARL POPPER, *THE OPEN SOCIETY AND ITS ENEMIES: HEGEL AND MARX*, 47-48 (2010).

92 Paulsen, *supra* note 60, at 28.

93 *N.S. v Sec'y of State for the Home Dep't.* (C-411/10 and 493/10, 21 December 2011).

94 *Id.* at ¶ 83, quoted in *Krolik v Poland*, 2012 WL 3491932, [2012] EWHC 2357 (Admin) at ¶ 5.

95 *Tay Za v. Council of the EU* (C-376/10 P), the ECJ, (Grand Chamber) (Mar. 13, 2012).

96 In *Pye Phyo Tay Za*, the ECJ gave a judgment that in both procedure and substance is parallel to the *Kadi* and *Al Barakaat International Foundation v. Council and Commission*, Joined Cases C-402/05 P and C-415/05 P. The ECJ ruled that a measure to freeze funds and economic resources belonging to appellant *Pye Phyo Tay Za* "could have been adopted within the framework of a regulation intended

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to impose sanctions on a third country on the basis of Articles 60 EC and 301 EC only in reliance upon precise, concrete evidence which would have enabled it to be established that the appellant benefits from the economic policies of the leaders of the Republic of the Union of Myanmar.” *Id.* ¶ 70. (emphasis added). The General Court [earlier the Court of First Instance] erred in law in “presume[ing] that the family members of leading business figures benefit from the functions exercised by those businessmen, so that such family members also benefit from the economic policies of the government, and that there is therefore a sufficient link, for the purposes of Articles 60 EC and 301 EC, between the appellant and the military regime of Myanmar.” *Id.* ¶ 71. The General Court examined whether there was a sufficient link between the appellant and the leaders of Myanmar capable of justifying the adoption of restrictive measures in respect of the appellant on the basis of Articles 60 EC and 301 EC.” *Id.* ¶ 44. This was done in the light of *Kadi*. The issue for the ECJ in the *Tay Za* case was to determine whether “there is a presumption that the family members of those in charge of major businesses under the military regime in Myanmar benefit from the function performed by those persons, so that it is permissible to conclude that those family members also benefit from the economic policies of the government of that country.” *Id.* ¶ 45. The lower court, in the ECJ’s view “correctly applied the Court’s case law on the scope of Articles 60 EC and 301 EC, as established, in particular, by *Kadi*.” *Id.* In accordance with the Treaty on European Union, Article 301, relating to the common foreign and security policy, for an action by the Community to revise economic relations with third countries, the EC is to take the necessary urgent measures. *Id.* ¶ 48. For this however, it is necessary for this case, the ECJ ruled, “to ascertain whether, in reaching that conclusion, the General Court erred in law as regards the scope of Articles 60 EC and 301 EC, as interpreted by the case-law of the Court of Justice (see, inter alia, *Kadi*.)” *Id.* ¶ 59. When on the basis of Articles 60 EC and 301 EC a restrictive measure is imposed on third country or countries, “the measures in respect of natural persons must be directed only against the leaders of such countries and the persons associated with those leaders.” *Id.* ¶ 63. Naturally according to the existing EU Treaty, that requirement mandates the tangible link between the persons concerned and the third country targeted by the restrictive measures adopted by the EU, “precluding too broad an interpretation of Articles 60 EC and 301 EC which would therefore be contrary to the Court’s case-law.” *Id.* ¶ 64. Thus by “presum[ing] that the family members of leading business figures also benefit from the economic policies of the government, the General Court extended the category of natural persons who may be subject to targeted restrictive measures.” *Id.* ¶ 65. The application of such measures to natural persons the ECJ ruled, “on the sole ground of their family connection with persons

cally, western “constitutionalism views a constitution as the guardian of fundamental rights through constraining government power, including limited government, separation of powers, checks and balances, and judicial review.”<sup>97</sup> With the formation of the EU, naturally, an idea of a Europe-wide constitutional protection of fundamental rights is further reinforced. For instance, in 2012 the ECJ in *Germany v. B*, held because a person had been a member of an organisation which, by virtue of its involvement in terrorist acts, was on the European Commission’s (EC) particular list and that that person had actively supported the armed struggle waged by that organisation did not automatically constitute a serious reason for considering that that person had committed, *inter alia*, “acts contrary to the purposes and principles of the UN.”<sup>98</sup> *Germany v. B* is a logical continuation of the ECJ’s *Kadi* judgment.<sup>99</sup> Likewise in *Secretary of State for the Home Department*,<sup>100</sup> the UK High Court of Justice stopped short of recognizing a right to Internet access on a monitored computer to a British national of Iranian origin.

Thus the position of the ECJ is much more pro-human rights than the general position of the U.S. courts even in the wake of the ongoing war on terror.<sup>101</sup> Much of the American disrespect for international law, as seen in the interpretation of its constitution, comes from Europe’s normative

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associated with the leaders of the third country concerned, irrespective of the personal conduct of such natural persons, is at variance with the Court’s case-law on Articles 60 EC and 301 EC.” *Id.* ¶ 66. Moreover, the ECJ observed, “the criterion used by the General Court in order to include the family members of those in charge of businesses is based on a presumption for which no provision was made in the contested regulation or in Common Positions 2006/318 and 2007/750, to which that regulation refers, and which is inconsistent with the objective of the regulation.” *Id.* ¶ 69. (emphasis added).

97 Yeh & Chang, *supra* note 10, at 834.

98 This consideration was to be done within the meaning of article 12(2)(b)(c) of Council Directive 2004/83/EC and the list forming the Annex to Common Position 2001/931/CFSP. *Germany v. B* (C-57/09), [2012] 1 W.L.R. 1076.

99 *Kadi*, *supra* note 29.

100 *Sec’y of State for the Home Dep’t v. CE (Iran)*, 2011 WL 6329010, Queen’s Bench Division (Administrative Court).

101 See Kim Lane Scheppele, *Global Security and the Challenge to Constitutionalism after 9/11*, PUB. L. 353 (2011).

dominance of international law. Since the UN system is often seen as the puppet of the U.S., there are some obvious signs of anti-UN version of international law that the *Kadi* decision of the ECJ reflects.<sup>102</sup> *Kadi* stands to question Article 103 of the UN Charter that puts UN law above any other law, even EU constitutional priorities. From the point of view of individual human rights, given the UN terrorism committee's arbitrariness in listing terrorists for the freezing of funds, *Kadi* is certainly welcome. *Kadi* represents Europe's attitudes toward the international "rule of law."<sup>103</sup> The ECJ held that *Kadi* had the right to be heard and a listing of his name as a suspect terrorist was done arbitrarily, violating his fundamental rights enshrined in the EU constitutional process. Even for the EU, its constitutional law mandates the trumping of international law, although it seeks to safeguard individual human rights at the same time. Understandably, on the issue of *Kadi* the Americans and the Europeans stand on opposite sides of the battleground.<sup>104</sup>

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102 From a third world viewpoint, current literature on "pluralism" after *Kadi* simply recasts dualism. For centuries monism — employed by First World countries — has been identified with respect for international law. Dualism, in opposition to respect, reflects the Third World's scepticism about international law. New scholarship from the First World, therefore, does not want to accept its new dualism. According to Búrca, pluralist approaches to the international legal order "claim to preserve space for contestation, resistance and innovation and to encourage tolerance and mutual accommodation." Gráinne de Búrca, *The ECJ and the International Legal Order after Kadi*, 51 HARV. INT'L L. J. 1, 2 (2010). Discouraged by the impossibility of any viable global federal structure, Rosenfeld, a pluralist, advocates an ideological alternative to accommodate the plurality of legal regimes. One of the most "vexing problems facing the post-Westphalian legal order is the apparent demise of the Kelsenian model based on hierarchy, unity, and consistency." If unity could be replaced by plurality and consistency by comprehensive pluralism's standard of compatibility, Rosenfeld feels we can find an answer to the layered and segmented development of the evolving legal universe. Pluralism applauds diversity, competition, and lack of coordination in the global sphere. The chances, therefore, of a healthy degree of global accountability are higher in a pluralist reading of international law. Michel Rosenfeld, *Rethinking constitutional ordering in an era of legal and ideological pluralism*, 6 INT'L J. CONST. L. 415 (2008).

103 *Kadi*, *supra* note 29.

104 *See generally*, Goldsmith & Posner, *supra* note 75.

According to Posner and Goldsmith, based on the record, Europe “has no grounds to criticize the U.S.”<sup>105</sup> In other words, “European countries must disregard the UN Charter — the most fundamental treaty in our modern international legal system — when it conflicts with European constitutional order.”<sup>106</sup>

This is the third time in a decade that Europe has defied the U.N. Charter. In 1999, for example, European nations participated in NATO’s bombing of Kosovo without Security Council authorization. There was much hand-wringing in Europe at the time, but in the end other concerns trumped legal niceties. Similarly, when nations led by Europe created the International Criminal Court, they purported to limit the Security Council’s power to delay or halt ICC trials, also in disregard of the U.N. Charter, which states that Charter obligations trump the requirements of any other treaty.<sup>107</sup>

More particularly, the American dislike for a constitutional interpretation of WTO law and related agreements comes from its losses in several anti-dumping cases.<sup>108</sup> Little surprise then that after “losing a series of zeroing cases under the WTO dispute settlement mechanism, the United States proposed that zeroing be ultimately resolved through negotiations, instead of being left to adjudication.”<sup>109</sup>

What is nonetheless remarkable here is that European commentators do not see this as ECJ’s dualism. The ECJ, we are said, has been taking a pluralist approach. In the vocabulary of European lawyers, in *Kadi* the ECJ, “following the opinion of AG Maduro, adopted a robustly pluralist approach to the relationship between the EU and the international order.”<sup>110</sup> Pluralist approaches share with dualism the emphasis on separate and distinct legal orders.<sup>111</sup> Pluralism, however, “emphasizes the plurality of

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105 *Id.*

106 *Id.*

107 *Id.* ¶ 7.

108 Mark Wu, *Antidumping in Asia’s Emerging Giants*, 53 HARV. INT’L L. J 1 (2012).

109 Cho, *supra* note 3, at 649.

110 de Búrca, *supra* note 102, at 31-32.

111 *Id.*

diverse normative systems, while the traditional focus of dualism has been only on the relationship between national and international law.”<sup>112</sup>

Kettemann’s defence of the European approach to international law is good enough to tell the Third World about the kind of game international law is.<sup>113</sup> On the one hand, he refuses to accept Goldsmith and Posner’s interpretation of the *Kadi* judgment that “[l]ike the Bush administration, Europeans obey international law when it advances their interests and discard it when it does not.”<sup>114</sup> On the other hand, he concedes “that Europe’s approach to trade disputes in the framework of the WTO has not been exemplary.”<sup>115</sup> Admittedly, Europe made errors but also corrected some of it later.<sup>116</sup>

### C. India

As compared to the existing robust debate in Europe and America about their less-than-robust respect for international law, Indian views are hard to come by. The article will therefore construct this Indian view from court cases and writings of qualified publicist from India.<sup>117</sup> One is then tempted to compare the American and European approach to how Indian police captured Kasab, the terrorist who conducted the infamous 26/11 attacks in Mumbai, and chose to try him before district trial court under Indian criminal law for “murder, conspiracy and of waging war against the nation.”<sup>118</sup> India, unlike the EU, is clearly dualist and pluralism of legal order is part of its federal structure through the division of competencies in

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112 *Id.*

113 Matthias Kettemann, *International Law is like a Box of Chocolates*, THE RECORDS, Feb. 12, 2010, available at <http://hlrecord.org/?p=9560>.

114 *Id.*

115 *Id.*

116 *Id.*

117 V. G. Hegde, *Indian Courts, and International Law*, 23 LEIDEN J. INT’L L. 53-77 (2010).

118 NDTV, *26/11 Mumbai attack: Kasab’s trial* (Monday May 3, 2010). The *New York Times* reported “Even by the standards of terrorism in India, which has suffered a rising number of attacks this year, the assaults were particularly brazen in scale and execution.” See Somini Sengupta, *At Least 100 Dead in India Terror Attacks*, N. Y. TIMES, Nov. 27, 2008 at A1.

three lists of its constitution. They are union, state province) and concurrent list.<sup>119</sup> In article 51, the Indian constitution expects India's endeavour to:

- (a) promote international peace and security;
- (b) maintain just and honourable relations between nations;
- (c) foster respect for international law and treaty obligations in the dealings of organized peoples with one another; and
- (d) encourage settlement of international disputes by arbitration.<sup>120</sup>

Soon after Kasab's arrest, Indian lawyers noted, "certain basic procedural safeguards evolved by the Supreme Court have not been followed so far in the case of Kasab."<sup>121</sup> Natural justice entails some legal aid to the party to render her defence meaningful. The Indian Supreme Court has developed ample jurisprudence on the subject. The Court, in the case of *N Satpathy v. PL Dani*,<sup>122</sup> allowed legal representation during custodial interrogations. In *AK Roy v. Union of India*,<sup>123</sup> the Court held that even a détenu "who is statutorily denied legal representation is entitled to a common law right of representation through a friend."<sup>124</sup>

By including "the right to free legal aid" in Article 21 of the Constitution in the *MH Hoskot case*<sup>125</sup> the Court gives it a constitutional status. No doubt, the initial threats and intimidation of Indian lawyers who wanted to defend Kasab did bring some disrepute to the Indian legal system.<sup>126</sup> On

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119 INDIA CONST., *Seventh Schedule*, available at <http://lawmin.nic.in/coi/coiason29july08.pdf>, at pp. 316-29. The Union list has 97, state 66 and concurrent list has 47 items. When an issue is not part of the state or concurrent list, the Union of India automatically has the competence to legislate on this.

120 *Id.*

121 V. Venkatesan, *Due Process: There is a strong case under the country's laws for Kasab's right to legal assistance*, 26(2) FRONTLINE, Jan. 17-30, 2009, at ¶15 available at <http://www.hindu.com/fline/fl2602/stories/20090130260203300.htm>.

122 *Nandini Satpathy v. PL Dani*, (1978) 2 SCC 424 (India).

123 *A.K. Roy v. Union of India* 1982 AIR 710 (India).

124 Venkatesan, *Due Process*, *supra* note 121, at ¶ 15.

125 *MH Hoskot v. State of Maharashtra*, (1978) 3 SCC 544: AIR 1978 (India).

126 Venkatesan, *Due Process*, *supra* note 121, at ¶ 4.

September 18, 2012 Kasab moved a mercy petition praying for clemency against the death sentence awarded to him by the trial court, affirmed by the Bombay High Court, and upheld by the Supreme Court.<sup>127</sup>

*i. The Kasab Case*

In November 2008, Mohammad Ajmal Amir Kasab, allegedly a Pakistani national, was the sole survivor among the 10 gunmen who killed more than 160 people in the Taj Hotel, a Jewish center, and a busy railroad station in Mumbai, India. Police sprang into action and captured Kasab.

He was not killed the American way and India seemed to take a more European approach of protecting the due process rights as argued in *Kadi*. India, perhaps has learned its lessons from the infamous Indian Emergency of 25 June 1975 enforced by Prime Minister Indira Gandhi; that period was to become, as many regrettably admit, the darkest years of the Indian judiciary. Harking back to the criticisms of the infamous *A.D.M. Jabalpur case*<sup>128</sup> delivered by the Supreme Court during the Emergency, Venkatesan says

... [it] is clear that rights can exist outside Constitutions and one should be wary of arguments that seek to take away such rights.<sup>129</sup> In this case, the Indian Supreme Court held that “the legality of the order of detention issued during the Emergency could not be challenged in a court of law as the Presidential Order had suspended the right to move any court to enforce rights under Articles 14, 21 and 22 [of the Indian Constitution].<sup>130</sup>

From the time of his capture, there was an irrefutable case under the Indian Constitution for Kasab’s right to legal assistance and the Indian state’s duty to provide it. However, as was expected, Subramanian Swamy, a former visiting faculty at Harvard University and a right wing leader, suggested that Kasab could be considered an enemy alien under Article 22(3)(a) and deprived of the right to legal assistance. However, using constitutional logic,

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127 Mumbai Bureau, *Kasab’s plea forwarded to President*, THE HINDU, Sept. 18, 2012, available at <http://www.thehindu.com/news/national/article3910505.ece>.

128 *ADM Jabalpur v. Shiv Kant Shukla*, 1976 SCC (2) 521 (India).

129 Venkatesan, *supra* note 121, at ¶ 9.

130 *Id.*

his political claim may be negated.<sup>131</sup> The primary objection in treating Kasab as an enemy alien, Venkatesan opines, stems from Article 21 of the Indian constitution.<sup>132</sup> In the *Pratap Singh* case, the Supreme Court said that the Legislature did not make law in disregard of the constitutional provisions or the international law as also in the context of Articles 20 and 21 of the Constitution of India.<sup>133</sup> The law has to be understood, therefore, in accordance with international law.<sup>134</sup> Article 21 guarantees the right to life or personal liberty to even non-citizens.<sup>135</sup> Under this Article, no person shall be deprived of his life or personal liberty except according to procedure established by law.<sup>136</sup> It is true that the conventional understanding of war has changed. In the Parliament attack case,<sup>137</sup> the Supreme Court said that:

[for] invoking Section 121 of the Indian Penal Code (punishment for waging of war), a formal declaration of war was not required: a terrorist attack by militants from across the border, with their accomplices in India, on the symbols of state power was sufficient to infer that a war-like situation prevailed.<sup>138</sup>

Kasab and his accomplices could be said to have waged war with India for the purpose of their prosecution, “but they cannot be considered enemy aliens under international law and deprived of rights accorded to non-citizens under the Indian Constitution.”<sup>139</sup> Quite rightly, India did not even contemplate this option. The danger in treating Kasab as an enemy alien,

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131 Article 22(1) of the Constitution provides that no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds of such arrest, nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice. *Id.*

132 *Id.*

133 *Pratap Singh v. State of Jharkhand*, (2005) 3 SCC 551 (India) at ¶ 63.

134 *Id.*

135 *Id.*

136 *Id.*

137 Through Writ Petition (Crl. No.106/2007) the accused Afzal Guru approached the Supreme Court. His counsel, Mr. Bhushan, relied on *Shamnsaheb M. Multtani v. State of Karnataka*, AIR 2001 SC 921 (India).

138 Venkatesan, *supra* note 121.

139 *Id.*

Venkatesan thinks, would be that of setting an unhealthy precedent.<sup>140</sup> Before the Indian Supreme Court, Ramchandran, lawyer for Kasab, “submitted that the Appellant did not get a fair trial and added that the denial of fair trial, for any reason, wittingly or unwittingly, would have the same result: it would render the trial a nullity and no conviction or sentence based on such a trial would be legal or enforceable.”<sup>141</sup> He prefaced his submissions by gently reminding the Court that, “having taken the path of the rule of law, we must walk the full mile; we cannot stop halfway and fall short of the standards we have set for ourselves.”<sup>142</sup> In paragraph 586, the Indian Supreme Court, however, affirmed the convictions and death sentence of the Kasab passed by the trial court and affirmed by the High Court.

ii. *India's Attempt at Protecting International Law*

The *Kasab* case is important to distinguish between the Indian state and the Indian judiciary. The Indian state (bureaucracy) is dualist.<sup>143</sup> However, since the 1980s, the Indian judiciary, which has the power of judicial review, is gradually moving to monism as exhibited in over a dozen judgments. Overall, India is moving toward monism as far as terrorism and international human rights are concerned though much more remains to be done. Thus, between Osama, Kadi, and Kasab, the three jurisdictions' real respect for the rule of international law is exposed.

Larger questions emerge; who among the three respects the rule of law the most? Has not the Third World, India in particular, displayed a remarkable faith in the idea of law and justice through fair trial? Did not the EU violate international law in *Kadi* when it stood against its own constitutional priorities? Did not the American government violate international law in the killing of Osama?

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140 “Article 22 is not the sole repository of the right to counsel, especially for Kasab, who is not an Indian national. So, that provision is not the sole determinator of his rights. And, it would be patently unfair to subject him to the demands of that provision alone.” *Id.* ¶ 17.

141 Mohammed Ajmal Mohammad Amir Kasab @ Abu Mujahid v. State of Maharashtra, MANU/SC/0681/2012, (India) ¶ 408.

142 *Id.*

143 *Jolly George v. Bank of Cochin*, AIR 1980 SC 470 (India).

The *Kasab* case has led to the development of a very healthy debate on human rights in India. However, on August 29, 2012, the Supreme Court finally upheld *Kasab's* death sentence.<sup>144</sup> *Kasab's* case, Surendranath thinks, “is a significant setback for the move towards complete abolition of the death penalty in India.”<sup>145</sup> As though it is an acknowledgment “that there will be moments in our life as a nation where we will need to satisfy our need for collective revenge.”<sup>146</sup> By comparing *Kasab's* case with Judge Yagnik’s “invocation of human dignity while not awarding the death penalty in the Naroda-Patiya massacre case” India human rights lawyers talk about the “constitutional unviability of the death penalty in India.”<sup>147</sup> However, the President of India rejected *Kasab's* mercy petition on November 5, and subsequently he was hanged on November 21, 2012.

## 5. DEVELOPING COUNTRIES AND CONSTITUTIONALISM

### A. Monism, Dualism and Constitutionalism

The ECJ is the epitome of the collective EU view; it has emerged as the chief protagonist of a pluralist view of the international legal order. *Kadi* and *MOX Plant*<sup>148</sup> are two of the many such cases discussed later. These two cases also amplify the ECJ’s increasing importance in international law’s overhauling. As a result, the old monism-dualism prism to refract a country’s adherence to international law is under fire today. Bogdandy, chief architect of this view, thinks, “as theories, monism and dualism are today unsatisfactory.”<sup>149</sup>

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144 *Mohammed Ajmal Mohammad Amir Kasab @ Abu Mujahid v State of Maharashtra*, MANU/SC/0681/2012.

145 Anup Surendranath, *Death is Entirely Discriminatory*, THE HINDU, Sept. 17, 2012, at <http://www.thehindu.com/opinion/lead/article3904606.ece>.

146 *Id.*

147 *Id.*

148 *Case C-459/03, Eur. Comm’n v Ireland*, 30 May 2006.

149 Armin von Bogdandy, *Pluralism, Direct Effect, and the Ultimate Say: On the relationship between International and Domestic Constitutional law*, 6 INT’L J. CONST. L. 397-413, 400 (2008). De Búrca and Gerstenberg have argued on similar lines. They think “international adjudication should be conceived of as having a

Core assertions behind monism-dualism, he maintains, “are little developed and opposing views are simply dismissed as illogical, and they are not linked with the contemporary theoretical debates.”<sup>150</sup> As a doctrine, monism-dualism is likewise unsatisfactory since it does not help in solving legal issues.<sup>151</sup> Thus monism and dualism should cease to exist as doctrinal and theoretical notions for discussing the relationship between international and internal law.<sup>152</sup> However, Somek questions Bogdandy’s excessive liberty taken in replacing the monism-dualism prism by pluralism or cosmopolitanism.<sup>153</sup>

Nonetheless, this European shift from the monism-dualism doctrine seems suspect as, historically speaking, the developed world offered a monist and the non-developed a dualist treatment to international law. This is also the EU’s centrifugal constitutionalism on display; a kind of constitutional advocacy where the European concerns colour the EU’s international advocacy. The domestic norms of Europe govern its compatibility with international norms. Thus, the nations that historically offered a monist treatment to international law have moved to dualism. But instead of clearly admitting it, EU scholars claim to have moved to pluralism. Therefore, these developments need an evaluation from a Third World angle.

A constitution, as understood in national terms, is the best form of the legal tool that works discursively to limit the use of power in a democracy. Arguably, it is an effort to clothe global regulation by a network of legality.<sup>154</sup> It is also an ideology or a juristic export of a constitutional vision to

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persuasive function and not an overriding one. International and constitutional norms should be understood as contextually competing rule-of-law values rather than as conflicting legal sources vying against one another” in Gráinne de Búrca and Oliver Gerstenberg, *The Denationalization of Constitutional Law*, 47 HARV. INT’L L. J. 243-62 (2006).

150 See Bogdandy, *ibid.*

151 *Id.*

152 *Id.*

153 Alexander Somek, *Monism: A Tale of the Undead*, Univ. Iowa Legal Stud. Research Paper No. 10-22, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1606909](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1606909).

154 PHILIP BOBBITT, TERROR AND CONSENT 485 (2008).

the international plane. But very often the interpretations of a constitution evidence an unabashed reflection of contemporaneous politics, rather than the pursuit of a legal doctrine.

The situation is no different at international *fora* — the Security Council, the WTO, and many other international bodies. Before the WTO Appellate Body (AB), in *India-Quantitative Restrictions on Imports Of Agriculture, Textile and Industrial Products* (India-QRs)<sup>155</sup> India read the WTO treaty as a constitution and the AB as an international constitutional court.<sup>156</sup> Indeed as Indian experience has shown, “under certain circumstances global organizations may self-generate constitutional norms in an effort to regulate states’ behaviors that ambiguous treaty provisions may not fully capture.”<sup>157</sup> This case is stunning given not many developing countries exhibit such a faith in international constitutional architecture.<sup>158</sup> Cho further demonstrates “why, and how, the recent WTO zeroing jurisprudence can be appreciated as a form of constitutional adjudication.”<sup>159</sup>

## B. Constitutional Interpretations as a Value Question

The Third World embraced constitutionalism throughout the 1960s and 1980s with much pain and political upheavals. These constitutional concepts and structures had actually migrated from the colonisers. Baxi has observed the transformations “which newly independent nations such as India have worked on supposedly universal standards of legal rights in writing and amending their national constitutions.”<sup>160</sup> However, as discussed

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155 Report of the Appellate Body, *India-Quantitative Restrictions on Imports Of Agriculture, Textile and Industrial Products* WT/DS90/AB/R (23 Aug. 1999).

156 Dunoff, *supra* note 3, at 657-58.

157 Cho, *supra* note 3, at 622.

158 Colin Picker argues, “To the extent that international trade and development policy employs legal methods, institutions and participants, there is a need to take into account the role of legal culture.” See Picker, *International Trade and Development Law: A Legal Cultural Critique*, 4 (2) L. DEV. REV., Article 4 (2011), available at <http://www.bepress.com/ldr/vol4/iss2/art4/>.

159 Cho, *supra* note 3, at 676.

160 Baxi, *infra* note 165, at 540.

later, Third World constitutionalism still suffers from colonial marks and memories. In *Premanand v. Mohan Koikal*,<sup>161</sup> Justice Katju reminded:

[t]he Constitution of India [does not say] that only Maxwell's Principles of Interpretation can be utilised. We can utilise any system of interpretation which can help to resolve a difficulty. Principles of interpretation are not principles of law but are only a methodology for explaining the meaning of words used in a text ... [in the current case] literal rule of interpretation will prevail over all other [Mīmāṃsā] principles, e.g., *Linga, Vakya, Prakarana, Sthana, Samakhya*.

Jaimini's (ca. 3rd to 1st century BCE) *Purva Mīmāṃsā Sūtras* is the primary text of the Mīmāṃsā School. Later in *Kumārila Bhata* and *Prabhākara*, this school reached its pinnacle (fl. ca. 700 CE).<sup>162</sup> Actually in 1892 Sir John Edge, the then Chief Justice of Allahabad High Court, was the first and the last English judge to apply Mīmāṃsā rules of interpretation in *Beni Prasad v. Hardai Bibi*<sup>163</sup> as the case involved a family issue needing reference to Hindu personal laws. Since then *Mīmāṃsā* has been seen not as a secular but a Hindu rule of interpretation. This position is contested, as *Mīmāṃsā* has been a tool of Indian linguistics and not religion.

However, one of the major problems with the use of *Mīmāṃsā* is that it is not a set of legal rules of interpretation; it is primarily is a tool to deconstruct Sanskrit sentences for further interpretation, social and philosophical. Apart from the nationalistic urge to go back to the golden times of ancient India, the judges of the Indian Supreme Court, especially Justice Katju, have not been able to justify its use over the regular methods and rules of interpretation. It is because of this that *Mīmāṃsā* has not been used even once in international courts for interpretation. *Mīmāṃsā* in that sense appears only a value based tool for interpretation.

Nonetheless, one may note that Article 31(3)(c) of the Vienna Convention on the Law of Treaties has been pulled out of oblivion only recently, and international institutions in the past have shown scanty respect for alternative methods, means, and interpretations. This is the only article that

161 MANU/SC/0249/2011 (India); ¶¶ 24, 25, 38.

162 See *Vijay Narayan Thatte and Ors. v. State of Maharashtra and Ors.*, 9 SCC 92, ¶ 8 (2009) (India).

163 1892 ILR 14 All 67 (FB).

could be used towards importing non-European perspectives, *Mīmāṃsā* for example, into the decision making of international bodies.<sup>164</sup> Yet there remains a less than robust case for *Mīmāṃsā* replacing the regular rules of interpretation. It nonetheless is a promising research area for developing secular rules of legal interpretations.<sup>165</sup>

With the idea of constitutionalism now firmly rooted in the Third World, the Indian Supreme Court opined that regrettably, Indian lawyers mostly quote western authorities at the expense of *Mīmāṃsā*, the Indian rules of interpretation.<sup>166</sup> Katju, the more dominant supporter of these alternative Indian rules of interpretation, is not alone to have asserted a local approach to constitutionalism.<sup>167</sup> Referring to the scepticism about the Caribbean Court of Justice being the final appellate court for the Caribbean countries, Justice Ivor Archie, remarked in a rather postcolonial mood: “If we have the moral and intellectual capacity to run our own

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164 See Campbell McLachlan, *The Principals of Systemic Integration and Art. 31.3.(C) of the Vienna Convention*, 54 INT’L & COMP. L. Q. 297 (2005).

165 Some of the basic books on interpretations were both translated and authored by Dr. Sir Ganganath Jha during 1900-25. Jha has discussed many interpretive methods of pre-British Vedic India where *Mīmāṃsā* was a method of interpretations. See VEPA SARATHI, *STATUARY INTERPRETATIONS*, 8-10, (5<sup>th</sup> ed., 2010). First, the Indian Supreme Court enunciated in the seventies an unusual province and function for judicial review by declaring that the power of Parliament to amend the Constitution was subject to judicial review: it may not extend to alteration of the essential features of the basic structure of the Constitution. What these “essential features” were, was left for the Justices to enunciate from time to time, but these included the “rule of law,” “republican form of government,” “federalism,” “democracy,” “socialism,” “secularism,” and above all the power of judicial review. The doctrine was not merely enunciated; it was also applied to invalidate several amendments ... And this form of adjudicatory activism has, in turn, traveled to Pakistan, Bangladesh, and Nepal. Upendra Baxi, *Postcolonial Legality, in, A COMPANION TO POSTCOLONIAL STUDIES*, 548 (Henry Schwarz, Sangeeta Ray eds. 1999).

166 See Tannu Sharma, *To settle case, SC turns to Mimamsa*, THE INDIAN EXPRESS, March 14, 2008.

167 M. KATJU, *MĪMĀNSĀ RULES OF INTERPRETATION* (2008).

countries in the region, why can we not judge ourselves?”<sup>168</sup> “That somehow we will receive a superior kind of justice from London bespeaks of self-doubt and an unwillingness to take responsibility for our jurisprudential self-determination.”<sup>169</sup>

## 6. A THIRD WORLD APPROACH TO CONSTITUTIONALISM

The existence of a constitution and the separation of powers — legislative, administrative, and judicial — have a strong bearing on India’s advocacy in international courts, e.g., the WTO. The *India-QR case*, as discussed below, is a testimony to that. The constitutional addiction of the Third World is simply remarkable; a case of trope taken seriously by the Third World at a time when international law’s makers are swapping its position on international law. As pointed out earlier, India’s obsession with a constitutional imagery — this comes from India’s remarkable experience with its judiciary — was rejected and discouraged by the WTO AB. Yet, as Cho thinks, “the AB’s anti-zeroing position ... is tantamount to “constitutional lawmaking” in its determined endeavor to contain WTO members’

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168 Ivor Archie, *There Must Be A Change in Culture*, THE GUARDIAN, Trinidad and Tobago, Sept. 17, 2010.

169 *Id.* Such experiences with constitutional grafting and jurisprudential self-determination, as judge Archie puts it — which may easily be generalised for the rest of the Third World with its regional flavours — prefaces Hirschl’s remark about the rise of “Constitutional Theocracy.” See Ran Hirschl, *The Rise of Constitutional Theocracy*, 49 HARV. INT’L L. J. ONLINE 72, 73 (2008). He observes the resurrection of theocratic forces within the democratic setup around the world. A closer look tells us that these states are mostly Third World states. The world has, Hirschl remarks, witnessed the rapid spread of constitutionalism and judicial review. *Id.*, at 73. Such developments have put the Third World into a spot of bother. Evidently, the entire army of constitutionalists, pluralists, and anti-constitutionalists are constituted of European or American scholars. The focus of this article is on how the Third World has received two separate normative regimes from Europe — international and constitutional law — that have proliferated due to colonisation. See Anthony Anghie, *Finding the peripheries: Sovereignty and Colonialism in Nineteenth Century International Law*, 40 HARV. INT’L L. J. 1(1990).

manipulative use of zeroing methodologies under the subterfuge of the textual ambiguity of the relevant WTO norms.”<sup>170</sup>

### A. The Rainbow Warrior Case

It is apt here to mention the *Rainbow Warrior* case between New Zealand and France that also involved separation of power issues.<sup>171</sup> This case involved the sinking of a vessel in New Zealand waters by French agents on the direction of its government. The Chief Justice of New Zealand sentenced the two agents to life imprisonment. France negotiated their release, which New Zealand denied on the basis of “separation of power” arguments.<sup>172</sup> New Zealand was worried about the undermining of its judiciary and it wanted the accused French agents to serve the term without interference of the New Zealand government — separation of the judiciary from the executive and legislature. It argued that working on the order of higher officials was not an excuse and that its law still considered the agents liable. Citing the Nuremburg Trials it stated that even under international law such a principle was not recognised.<sup>173</sup>

Thus New Zealand seemed to have put up a case for its monist approach to international, i.e., France needed to find other ways to secure their release. According to New Zealand law, the two French agents could not buy freedom. However, under Section 22 of the *New Zealand Immigration Act 1964*, they could be transferred to a prison in France.<sup>174</sup> But under Article 327 of the *French Penal Code*; the agents could not serve a term in France pursuant to a New Zealand court’s decision. The UN Secretary-General finally ruled for transfer to an isolated island with periodic supervision and reporting by France to New Zealand.<sup>175</sup>

The *Rainbow Warrior* represents the issues of constitutional conflicts in international law; sovereigns random derogate from their own constitu-

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170 Cho, *supra* note 3, at 624, ¶ 2.

171 UN Secretary General, *Ruling On the Rainbow Warrior Affair between France & New Zealand*, 26 ILM 1346 (1987).

172 *Id.* However, New Zealand later conceded that its constitution did mandate the transfer of prisoners of foreign nationality but the government was unwilling.

173 *Id.* at 1357.

174 *Id.* at 1365

175 *Id.* at 1370.

tions. *India-QRs* is a step further; it is not about defending its constitution like in *Rainbow Warrior* but taking the separation of power argument before an international court. Much before the WTO “cultivat[ed] a new hermeneutics on the WTO Antidumping Agreement, one that envisions new institutional meanings and possibilities within the WTO that resonate with its telos,”<sup>176</sup> cases such as *Rainbow Warrior* must have played a norm creating role that bulldozed the constitutional roads through the power obsessed international legal structure.

### B. India-QRs Case: India's Constitutionalism Rejected

The principle of institutional balance has an important role to play in the WTO context as well.<sup>177</sup>... [t]he Panel’s view [refuting] the distribution of powers between the judicial and the political organs of the WTO is inconsistent with the practice under the GATT 1947.<sup>178</sup> ... India disagrees ... that assigning legal functions to other WTO bodies is only relevant if there is an express provision that limits the panel’s competence. Domestic courts and the ECJ have developed doctrines providing for deference by courts to political institutions without there being an explicit limitation on their competence. There is, therefore, no reason why panels and the AB could not do the same.<sup>179</sup>

The AB decided that dispute settlement panels are competent to review matters concerning balance of payments (BOP) restrictions, and rejected India’s argument that a principle of institutional balance requires that matters relating to BOP restrictions be left to the relevant political organs — the BOP Committee and the General Council. The AB did not see any “separation of powers” envisaged by the framers of the WTO agreement.<sup>180</sup> Notably in opposition to this view, Bogdandy explicitly talks about the separation of power within the WTO.<sup>181</sup> His elaborately advanced thesis

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176 Cho, *supra* note 3, at 626.

177 India-QRs, *supra* note 155, at ¶ 10.

178 *Id.* ¶ 11.

179 *Id.* ¶ 23.

180 Lorand Bartels, *The Separation of Powers in the WTO: How to Avoid Judicial Activism*, 53 INT’L COMP. L. Q. 861-895 (2004).

181 Bogdandy, *supra* note 3, at 614.

warrants greater attention. Like many German scholars before him, he displays a robust liking for a constitutional view of international economic law.

He observes that the “WTO agreement reproduces the traditional conceptual distinction developed by the theory of the state with respect to the functions of public authority in a surprisingly faithful way.”<sup>182</sup> Three sub-articles of Article III hint at the executive, legislative, and administrative functions of this international trade body.<sup>183</sup> But this puzzles Dunoff, “neither WTO texts nor practice suggest that the WTO is a constitutional entity.”<sup>184</sup> The disjunction between scholarship and practice, he thinks, is remarkable. He asks, “Why would scholars debate the WTO’s (non-existent) constitutional features?”<sup>185</sup>

The refusal of India’s arguments, in my view, stands as a burning example of the unlearning of international laws’ many classic concepts by the First World. The AB’s rejection of India’s separation of power arguments looks all the more suspect since in *Brazil-Export Finance Programme for Aircraft*; a WTO Panel invoked a separation of power argument to Canada’s benefit.<sup>186</sup> Babu says that the Panel in this case ignored the special and differential treatment conditionality that ought to be read into the WTO law’s interpretation.<sup>187</sup> Instead, the Panel reasoned that the question of “development need” was a political and economic question, which the WTO’s Subsidies Committee, and not the Panel should consider, given the Panel’s function is fundamentally legal.<sup>188</sup> While in *India-QRs* the AB rejected a developing country’s constitutional separation of power argument, the *Brazil-Export* Panel invoked the same argument in Canada’s favour.<sup>189</sup> Furthermore, in the *Kadi* case the EU is unlearning monism,

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182 *Id.* at 614.

183 *Id.*

184 Dunoff, *supra* note 3, at 647.

185 *Id.*

186 Report of the Appellate Body, *Brazil-Export Finance Programme for Aircraft*, WT/DS46/AB/R. 2 Aug. 1999.

187 R. Rajesh Babu, *Interpretation of the WTO Agreements, Democratic Legitimacy and Developing Nations*, 50 INDIAN J. INT’L L. 45, 83 (2010).

188 *Id.*

189 Report of the Panel, *Brazil - Export Financing Programme For Aircraft*, 14 April 1999, WT/DS46/R, ¶ 7.89 (“an examination as to whether export subsidies are

an old doctrine within international law bolstered by Bogdandy's argument that monism-dualism as a tool to study the relationship of states to international law are no more useful.<sup>190</sup> In India-QRs, India argued that:

[c]onstitutions of modern democracies provide for a separation of legislative, executive and judicial powers and establish systems of checks and balances designed to avoid a concentration of governmental power. In addition, a doctrine of institutional balance has been developed by the Court of Justice of the European Communities in cases involving the question whether organs of the Communities have exceeded their powers or have infringed upon the powers of the other organs.<sup>191</sup>

India is a country known for its powerful judiciary and constitution. Separation of powers is central to India's administrative routine. Her extraordinary belief in the power of constitutionalism (which comes from its colonial teachings) reflected in her arguments before the AB in *India-QRs*. In her advocacy at the AB, India tried to see the WTO as a constitution while distinguishing between the political and judicial wing of the WTO, which of course was rejected. As a common law country, the Indian approach has always been adversarial. Nonetheless Third World's constitutional advocacy — Indian advocacy is only an example — reinforces what the EU's constitutional experience erodes.

There is a reason behind this. There are now instances of non-convergence of legal systems inside the EU though and, maybe this new European dualist or pluralist approach to international law is a result of this internal non-convergence.<sup>192</sup> EU countries have a mix of common and civil law systems. This creates an internal fork in the road for EU's international advocacy. Contrarily, India has a clear adversarial approach. Existing First World constitutional scholarship seems almost like a design, or a kind of mandated writing that has decided to express itself in a limited vocabulary.

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inconsistent with a developing country Member's development needs is an inquiry of a peculiarly economic and political nature, and notably ill-suited to review by a panel whose function is fundamentally legal.”).

190 Bogdandy, *supra* note 149, at 223.

191 India-QRs, *supra* note 155, ¶¶ 2-10.

192 Pierre Legrand, *European legal systems are not converging* 45 INT'L & COMP. L. Q. 52 (1996).

- a. When the Third World sees the EU disrespecting international law at the cost of its constitutional law, it stands confused. Europe has to be more careful in unlearning certain doctrines.
- b. The American scholars' international relations approach to international law is a dangerous trend. Their rejection of constitutionalisation of international law is an assertion of the non-legality of international law's management.
- c. This unbundles the work of the Third World scholars who—as judges in the ICJ, the ITLOS, the WTO DSB, etc., or law professors in various universities — have, over the years, worked to assimilate non-European norms into the original construct to create plural norms.

Judgments like *MOX Plant* and *Kadi* disappoint the Third World because of the unlearning of constitutional norms after teaching it to the rest of the colonised world. The EU disrespects international law because the European law project, deduced from the ECJ decisions, enjoys precedence over international law and the primacy of European law is imposed as a constitutional necessity.<sup>193</sup> It is apparent beyond doubt that the discourses of constitutionalism have been conducted without a mention of non-Western concerns. Constitutionalism, here, as a binary Euro-American discourse becomes an exercise in re-asserting Eurocentricism.

Constitutionalism is also an effort in claiming superiority over the power of norm creation in international law with first mover's advantage.<sup>194</sup> This ongoing constitutionalism debate will now set the norm for what should be the authentic constitutional vocabulary for offering resistance. Thus the Third World has to engage in this debate, and not just ignore it, to find a worthwhile conclusion.

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193 See Koskenniemi, *supra* note 43.

194 There are ample examples of what first mover's advantage in international law is. Žižek brings this out with poignance. See S. Žižek, *The Obscenity of Human Rights: Violence as Symptom*, ¶ 7, LACAN.COM (2005), available at <http://www.lacan.com/zizviol.htm>.

## 7. CONCLUSION

International law is under severe attack today.<sup>195</sup> European constitutionalism expects to travel from the “international” to the “global.”<sup>196</sup> It seems improbable though as the baton seems to have been snatched by pluralism.<sup>197</sup> Rosenfeld rightly says that “when the safe harbours of national identity, common history, and national patriotism loosen and wane, it seems much more unlikely that a working minimum number of points of material convergence can be achieved consistently.”<sup>198</sup> Admittedly, thus the “world may be headed for a war among legal regimes that could culminate in an erosion of the rule of law itself.”<sup>199</sup> Any “pluralist constitutional ordering” therefore, “will require harmonization through the spread of normative congruence that weaves together a plurality of legal regimes and world

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195 For instance, states prefer to resolve cases that involve national security outside of the international legal framework. See, e.g., *Cuban Liberty And Democratic Solidarity (Libertad) Act of 1996*, PL 104–114, March 12, 1996, 110 Stat 785. “In the light of all of the above, the EU agrees to the suspension of the proceedings of the WTO panel. The EU reserves all rights to resume the panel procedure, or begin new proceedings, if action is taken against EU companies or individuals under Title III or Title IV of the Libertad Act or if the waivers under [Iran and Libya Sanctions Act] referred to above are not granted or are withdrawn.” *European Union-United States: Memorandum of Understanding Concerning The U.S. Helms-Burton Act And The U.S. Iran And Libya Sanctions Act*, April 11, 1997, 36 ILM. 529.

196 See generally, James Tully, *The Imperialism of Modern Constitutional Democracy*, in *THE PARADOX OF CONSTITUTIONALISM*, 315-39 (Martin Loughlin & Neil Walker ed., 2007).

197 Pluralism is very desirable. Human rights on the domestic level seek to protect this. However, the same human rights, when it takes on its international avatar, manifests into the responsibility to protect where hundreds of people are bombed in the war on terror. Human rights become an “[a]libi for militarist interventions, sacralization for the tyranny of the market, ideological foundation for the fundamentalism of the politically correct.” Žižek asks, “can the ‘symbolic fiction’ of universal rights be recuperated for the progressive politicization of actual socio-economic relations?” See Slavoj Žižek, *Against Human Rights*, 34 *NEW LEFT REV.* 115-131 (2005).

198 Rosenfeld, *supra* note 102, 423, ¶ 4.

199 *Id.* at 421.

views.”<sup>200</sup> What among the options, constitutionalism and pluralism, should be the Third Worlds’ preferred approach? And suddenly Gandhi’s *Talisman* that we, back in high school, used to skim, came as a possible silver lining in the cloud of normative confusion. Gandhi said:

I will give you a talisman. Whenever you are in doubt, or when the self becomes too much with you, apply the following test. Recall the face of the poorest and the weakest man [woman] whom you may have seen, and ask yourself, if the step you contemplate is going to be of any use to him [her]. Will s/he gain anything by it? Will it restore him [her] to a control over his [her] own life and destiny?<sup>201</sup>

Actually, Gandhi, in a sociological way, calls for an individual’s standing in the cosmos. In legal terms, this concern translates into the advocacy of Klabbers, Peters, and Ulfstein about the role of individuals before international law and courts.<sup>202</sup> This reading of an old *Gandhian* thought struck me also because of its “philosophical pluralism” that sits comfortably with Rosenfeld’s idea of the “combination of legal and philosophical pluralism.”<sup>203</sup>

The Third World, as the representative of the destitute, the abider and the eternal listener, has to conduct a constant introspection to know which way to go.<sup>204</sup> The problem of the lawyers is that they debate in the vocabulary of rights, obligations, and offences. International law’s interaction with constitutional law has to also embrace the *Gandhian Talisman* of conducting an introspection keeping the poorest souls globally in their mind. This *Talisman* is a great way to avoid the discursive trap of legal

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200 *Id.* at 417.

201 Gandhi International Institute for Peace, *Essential Quotes of Mahatma Gandhi*, available at <http://www.gandhianpeace.com/quotes.html>.

202 See JAN KLABBERS, ANNE PETERS, & GEIR ULFSTEIN, *THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW* (2009).

203 Rosenfeld, *supra* note 102, at 417, ¶ 3.

204 See Prabhakar Singh, *The Scandal of Enlightenment and the Birth of Disciplines: Is International Law a Science?* 12 (1) INT’L CMTY. L. REV., 5-34 (2010). A new literature has emerged that suspects human rights. See Ian Balfour & Eduardo Cadava, *The Claims of Human Rights: An Introduction*, 103 (2-3) SOUTH ATLANTIC Q. 277-296 (2004).

formalism. As a lens, this *Talisman*'s ability to magnify international law's hidden injustices in its political overtures is very high.

The Third World has been a major importer of knowledge since colonisation began, and constitutional norms are its examples.<sup>205</sup> It continues to do so. Therefore the First World has to be careful in what to *offer* and what not to *unlearn*. Today, when globalisation is unbundling a sovereign state and constitutionalism has emerged as a good tool for its re-organisation, it is high time that the constitutional lessons learned in the Third World find a role in this new re-organisation of sovereign.<sup>206</sup> We have to wait to see whether, for the Third World, the takeover of dualism by pluralism, on account of — as Bogdandy puts it — “internationalisation of constitutional law” is better or worse.<sup>207</sup> Constitutionalism has a co-optive potential and its ability to offer resistance and emancipate marginalized subjects within international law remain very limited.

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205 See for a full scale debate, RICHARD FALK, BALAKRISHNAN RAJAGOPAL, JACQUELINE STEVENS, *INTERNATIONAL LAW AND THE THIRD WORLD: RESHAPING JUSTICE* (2008).

206 See, e.g., R.P. Anand, *The Formation of International Organizations and India: A Historical Study*, 23 LEIDEN J. INT'L L. 5-21 (2010).

207 Bogdandy, *supra* note 149, 397.

# Recent Developments in Pakistan

*Javaid Rehman & Eleni Polymenopoulou*<sup>1</sup>

## THE QUESTION OF PRESIDENTIAL IMMUNITY

### Introduction

On the 16th January 2012, the Supreme Court of Pakistan (SC) issued a notice against Pakistan's Prime Minister (PM), Syed Yousaf Raza Gillani to reopen a criminal case against the spouse of a former PM of Pakistan, Benazir Bhutto - and the current President of Pakistan, Asif Ali Zardari.<sup>2</sup> The notice was drafted by a seven judges Bench under the 2003 Contempt of Court Ordinance (CCO) and referred to an older money-laundering scandal involving both Zardari and his late wife, Benazir Bhutto.<sup>3</sup> The PM

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  - 2 Vide order dated 16 January 2012 under Section 17(1) of the Contempt of Court Ordinance, following the *Appeal on the Criminal Miscellaneous Application No. 486 of 2010* in Criminal Appeal No. 22 of 2002, dated 10 January 2012. In the appeal judgement, the SC had noted a "brazen and blatant failure or refusal of the Federal Government to obey and execute the relevant judgement and directions of this Court the buck stops at the office of the Chief Executive of the Federation, i.e. the Prime Minister."
  - 3 *Gillani v. Pakistan*, Criminal Original Petition No 06 of 2012, ¶ 4 noting that the debate culminated when the former Pakistani Attorney General (himself also involved in scandals) withdrew Pakistan's agreement on providing legal assistance to the Swiss Courts, as a result of what, the proceedings were abandoned. Benazir Bhutto and her husband Asif Ali Zardari had been found guilty in absentia by a Swiss Court of money laundering in 2003, while they were in government. Zardari and Bhutto had been also convicted of similar scandals in the past: e.g., on the 15 April 1999, they had been sentenced by the Lahore High Court to five years in prison, a 8.6 million dollars fine and other measures. See Details of Justice (R)

did not comply with this judgement<sup>4</sup> and, on 2nd February 2012, the SC issued an order that a charge be framed against him under the CCO. On the 10th February 2012, the PM challenged this order by filing an Intra-Court appeal, claiming first, the PM's immunity (special privilege) as a matter of law and, second, that there would be a serious danger of political instability if such charges against the President were to be framed.<sup>5</sup> The SC dismissed the appeal by issuing a 15 page ruling, suggesting that the PM's immunity should be put aside for a number of reasons such as the prevalence of the principle of the rule of law and the principle of citizens' equality as envisaged by Pakistan's constitution and the Islamic religion.<sup>6</sup> This note discusses this important, yet weak and somehow "flowery" SC order, as being indicative of the tensions in Pakistan between the executive and the judiciary. Moreover, it suggests that the SC delicately avoided judging the vexed question, which was none other than presidential immunity in the light of international law.

### 1. Background of the Case

In 2007, the former Pakistani president, General Parvez Musharraf, created a legal mechanism, the "National Reconciliation Ordinance" (NRO), which enabled selected individuals to escape accountability.<sup>7</sup> Given that this act had been promulgated in an election year<sup>8</sup>, and that General Musharraf

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Malik Muhammad Qayyum, *available* at <http://www.pakistanherald.com/Profile/Justice-R-Malik-Muhammad-Qayyum-378>.

4 The PM proclaimed instead that he would resign if the Supreme Court convicted him under the CCO. *See, Will resign if convicted: Yousuf Raza Gilani*, HINDUSTANI TIMES, 13 Feb. 2012, *available* at <http://www.hindustantimes.com/world-news/Pakistan/Will-resign-if-convicted-Gilani/Article1-810571.aspx>.

5 SC Pakistan, Intra Court Appeal 1/2012 [Against the order dated 02.02.2012 passed by the Court in Criminal Original No. 06/2012] *Syed Yousaf Raza Gillani, Prime Minister of Pakistan v. Supreme Court of Pakistan & another*, 10 February 2012, at para. 17.

6 *Id.* at ¶ 17 et seq.

7 *Gillani*, ¶ 3.

8 Mainly to benefit one political party; *see* PILDAT [Pakistan Institute of Legislative Development and Transparency]: Citizens' Group on Electoral Process National Reconciliation Ordinance - NRO 2007, Analysis and the Impact on the General

claimed its constitutionality by taking measures to make it permanent legislation, the act provoked enormous controversy.<sup>9</sup>

The issue was finally brought before the SC, and with an important judgement at the end of 2009 (*Dr. Moshabir Hassan* judgement), the SC declared both the Act and Musharraf's measures unconstitutional and non-existent (illegal, *mala fide*, and *void ab initio*).<sup>10</sup> The present Pakistan Peoples Party government sought to re-examine the case by submitting a "review petition;" however, the SC dismissed this petition with a short order, and declared the NRO judgement "final and binding, including its directives [...] to take immediate steps as ordered."<sup>11</sup>

## 2. Analysis of the Judgement

The government submitted that the impugned order should be set aside and that both the procedure and the merits should be decided at the case's main hearing. The government advanced three arguments: that there was no "wilful disobedience" of the NRO Judgement; that the government did not benefit from a "full hearing;" and that the impugned order did not cite any reasons in support of its conclusions.<sup>12</sup> The Supreme Court retorted the following arguments: first, that although the appellant was legally bound to obey the ruling in the NRO Judgement, he admitted his inaction and his "intention not to disobey;"<sup>13</sup> second, that the appellant's "factual

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Election, Islamabad, 2007, available at <http://www.pildat.org/publications/publication/elections/NROPaper.pdf>.

- 9 The act, which the Parliament also refused to legitimate, granted "amnesty to politicians, political workers and bureaucrats who were accused of corruption, embezzlement, money laundering, murder and terrorism," see, *Supreme Court releases detailed judgement on NRO review petition*, PAKISTAN HERALD, 16 December 2011, available at <http://www.pakistanherald.com/Articles/Supreme-Court-releases-detailed-judgement-on-NRO-review-petition-2928>.
- 10 *Dr. Mobashir Hassan & others v. Federation of Pakistan & others* (2010) PLD (SC) 265 (Pak.). *Supra* note 4 and also, *NRO judgment: Shall it be implemented?*, THE NATION, Dec. 2, 2011, available at [http://www.pmln.org/media/nd\\_3810\\_nro-judgment-shall-it-be-implemented.pmln](http://www.pmln.org/media/nd_3810_nro-judgment-shall-it-be-implemented.pmln).
- 11 *Civil Review Petition No.129 of 2010*, Nov. 25, 2011, cited in the judgement, ¶ 4.
- 12 *Gillani*, ¶ 6.
- 13 *Id.* at ¶¶ 7-8.

defences” could not have been addressed and answered in a preliminary hearing;<sup>14</sup> and third, that the Court is not required to consider all the facts in depth, rather it has to satisfy itself whether an arguable case exists according to its previous jurisprudence.<sup>15</sup>

Furthermore, and most notably, the government claimed that the PM enjoys immunity from prosecution while in office. Specifically, the PM asked the SC to “*show greater restraint and forbearance with respect to a duly elected Prime Minister. ... when the very stability of the democratic system obtained by the people of Pakistan after so much sacrifice, may depend on the outcome of this case.*”<sup>16</sup>

The SC defined this immunity as a “*special privilege* that accords the appellant preferential treatment by sheltering him from receiving equal treatment in accordance with the law and the constitution and thereby allowing him to disregard the orders of the Court because of his office”<sup>17</sup> and deduced that the government “called upon the Court to formulate its opinion, not in accordance with the mandate of law as applicable on the facts of this appeal, but in fear and anticipation of a possible outcome that may flow out of a decision, which may be arrived at by the learned trial Bench on the basis of the law and the Constitution.”<sup>18</sup>

The SC, relying on certain “constitutional imperatives,” judged the immunity argument unconstitutional. It advanced, in this respect, four arguments:

#### A. THE PRINCIPLE OF EQUALITY

The SC argued that an “exceptionalism” has no constitutional grounds on the equality principle. The latter stems in the judges’ view from: a) the Constitution, particularly article 5 (“*obedience to the Constitution and law is the inviolable obligation of every citizen wherever he may be ...*”) and article

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14 *Id.* at ¶¶ 9-10.

15 *Imran Ullah v. The Crown*, 1954 FC 123 (Pak.) cited in ¶ 13.

16 *Gillani*, ¶ 17. However, the immunity seems to have been an explicit argument according to the government’s spokesmen. *Pakistan court: Zardari corruption case “must be reopened,”* BBC NEWS, Mar. 8, 2012, available at <http://www.bbc.co.uk/news/world-asia-17296602>.

17 *Id.* at para. 17.

18 *Id.*

25 (“[a]ll citizens are equal before law and are entitled to equal protection of law”);<sup>19</sup> and b) Islam.<sup>20</sup>

#### B. THE FIDUCIARY DUTIES OF THE “CONSTITUTIONAL OFFICE-BEARERS”

Based on its previous jurisprudence, the SC argued that there is a special constitutional duty of “consciousness” for public officials and politicians.<sup>21</sup> In this respect, the SC also stressed that article 190 of the Constitution required that “all executive and judicial authorities throughout Pakistan shall act in aid of the Supreme Court.”<sup>22</sup> It also referred to previous politicians’ speeches, highlighting that the essence of Pakistan’s “Constitutional and democratic dispensation” was based on the rule of law.<sup>23</sup>

The SC cited also, in this respect, another Islamic saying (“*The leader of a people is their servant*”)<sup>24</sup> along with its previous jurisprudence (“*has the absence of the rule of law within the upper echelons and formal structures of the State generated [...] the lawlessness?*”),<sup>25</sup> a 2012 US Supreme Court ruling (“*if the government becomes a lawbreaker... it invites every man to become a law unto himself; it invites anarchy*”)<sup>26</sup> and some sage advice of Sheikh Saadi (“*if the ruler plunders but five eggs, his minions will plunder a thousand roosters.*”)<sup>27</sup>

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19 *Id.* at ¶ 18.

20 Citing the *hadith* of Hazrat Umar, a woman from a powerful Arabian tribe was found to have committed theft.

21 “Holders of public office have to remain conscious that in terms of the Constitution ‘it is the will of the People of Pakistan’ which has established the Constitutional Order under which they hold office. As such they are, first and foremost fiduciaries and trustees for the People of Pakistan [...]” *Id.* at ¶ 24.

22 *Id.* at ¶ 24.

23 Such as the former PM Liaqat Ali Khan or Mr. Sirish Chandra Chatapadhaya, citing *id.* at ¶¶ 24-25.

24 *Id.* at ¶ 26.

25 *Sindh High Court Bar Association v. Federation of Pakistan*, PLD 2009 SC 879 (Pak.) cited in ¶ 28.

26 *Olmstead v. US*, 277 U.S. 438 (1928) quoted recently by Khosa, J. in *Crl. M.A 486 of 2010 in Criminal Appeal No. 22 of 2002 etc.* cited in para. 27.

27 *Gillani* ¶¶ 28-29.

### C. THE PRINCIPLE OF THE RULE OF LAW

A great importance was placed on the link between democracy and the rule of law. Democracy and rule of law are complex subjects and have remained a challenge in the context of a State with political and constitutional history of substantial violations of rule of law, arbitrary rule and endemic corruption. In highlighting the significance of democratic governance and rule of law, the SC noted that “it is the strict adherence to [rule of law], which has fostered the revival of democracy in Pakistan, and upon which its survival still depends” and highlights once more that it was precisely the exercise of the rule of law which was being undertaken by the Trial Court.<sup>28</sup>

### D. THE PRINCIPLE OF DEMOCRACY AND CONSTITUTIONALITY

The SC made two important statements in respect to democracy and constitutionality, namely that “all state organs and holders of high public office derive their legitimacy from the Constitution” and that “all executive and judicial authorities throughout Pakistan shall act in aid of the Supreme Court.”<sup>29</sup> Therefore, in the eyes of the SC judges, the PM, according to the Constitution and especially articles 90 and 204 (which refers to the contempt of Court<sup>30</sup>), should only act for the benefit of the people of Pakistan, as circumscribed in the Constitution.

For all of the above reasons, the SC dispelled the appellant’s claim for privilege and ordered that it will be for the learned trial Bench to decide on the merits of such a plea when it resumes hearing the case, which is for the moment still pending.

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28 *Id.* at ¶ 26, citing p 481 of the judgment.

29 *Id.* at ¶ 35.

30 *Id.* In this respect, the Court says: “[t]he Prime Minister... shall not be answerable to any court for the exercise of powers and performance of functions of [his] office[...]... or for any act done or purported to be done in the exercise of those powers and performance of those functions...” It suggests therefore that even though the appellant is a duly elected Prime Minister and deserves respect, no restraint and forbearance on account of his position can be given.

### 3. Concluding Remarks

It is indeed remarkable that this time the SC goes further than the previous NRO judgement *Dr. Mobashir Hassan*,<sup>31</sup> raising more reasons for which presidential immunity was invalid. However, there are some weaknesses and incongruities in this decision:

The *first* of these is that there is no reference to the vexed question, which is the *presidential* immunity (from the corruption charges and his criminal liability) rather than the *government's* immunity (from the contempt of court proceedings). The Court deduced only that there is “a *prima facie* case to be made that the obligation to obey the directions of this Court may have been violated [by the appellant] and that legal scrutiny is clearly warranted.”<sup>32</sup>

Second, there is no reference either to the academic debate<sup>33</sup> or to international customary law,<sup>34</sup> or to comparative law elements with regard to immunity.<sup>35</sup>

Third, the principles enunciated in the judgement do not correspond to specific obligations for the individuals and particularly the Heads of State that could be used in a future case. There is some confusion with respect to the sources of the domestic law, something that raises questions on the interrelation between domestic and international law in Pakistan, between religious and secular law, and, ultimately, the quality of the democracy in this state. Indeed, the SC justifies its decision by all possible means, citing rather selectively its own jurisprudence, the American SC's jurisprudence,

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31 *Supra* note 8.

32 *Gillani* ¶ 28.

33 See Masaya Uchino, *Prosecuting Heads of State: Evolving Questions of Venue - Where, How, and Why?*, 34 HASTINGS INT'L & COMP. L. REV. 341- 385 (2011).

34 It is surprising that the SC does not refer to the extensive ICJ jurisprudence on the issue, especially since the Case Concerning the *Arrest Warrant of 11 April 2000* (Congo v. Belg.), 2002 I.C.J. 3, at ¶ 5 (Feb. 14).

35 See e.g., *R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3)*, [1999] 2 All E.R. 97 (H.L.) (*hereinafter Pinochet trial*); see *Fujimori pleads guilty to bribery*, BBC NEWS, 28 September 2009, available at <http://news.bbc.co.uk/1/hi/world/americas/8279528.stm>; *Prosecutor v. Charles Ghankay Taylor, Case No. SCSL-03-I, Indictment (Mar. 3, 2003)*, (*hereinafter Taylor's trial in Liberia*).

British academia (HLA Hart), Prophet's sayings on equality and Sheikh Saasi's advice (*if the ruler plunders but five eggs*). One could also admire the persistence of the Islamic law and *hadiths* along with the reminding of the value of the Constitution, which expresses the peoples' will. In this respect, it is rather mysterious why the judgement does not even mention binding international legal instruments.

Consequently, the judgement demonstrates some good will, especially by placing the emphasis on the rule of law; the elegant dismissal of the government's political argument of "consequentialism;" the highlighting of the need for transparency in the actual context; and the will that the role of the constitution and the judiciary becomes the people's "arms" *vis-a-vis* a corrupted government. It shows, however, also a weakness of the Pakistani highest judiciary organ to follow the development of international law, whilst, from a political standpoint, it allows the government to maintain its argument on presidential immunity.

## BLASPHEMY LAWS, RELIGIOUS MINORITIES AND THE CASE OF AASIA BIBI

### Introduction

Aasia Noreen (or Aasia Bibi), a Christian woman living in Pakistan, has become famous worldwide for being condemned to death for blasphemy.<sup>36</sup> Although the international community has repeatedly called upon Pakistan not to execute the verdict, the appeal before the Supreme Court which has been initiated by her husband is still pending<sup>37</sup> and Aasia Bibi remains

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36 Pakistan's blasphemy laws (Pakistan Penal Code §§ 295-98) prohibit blasphemy against the Prophet and are applied equally to all religions. These laws came into effect under the military dictatorship of General Zia who adopted a puritanical overview of Islam, and introduced amendments or increased the penalties of the existing blasphemy laws. *See e.g.*, D. Forte, *Apostasy and Blasphemy in Pakistan*, 10 CONN. J. INT'L L. 27 (1994-95); J. REHMAN & S. BREAU, *INTRODUCTORY REMARKS IN RELIGION, HUMAN RIGHTS AND INTERNATIONAL LAW: A CRITICAL EXAMINATION OF ISLAMIC STATE PRACTICES* (2007).

37 *See* HUMAN RIGHTS COMMISSION OF PAKISTAN (HRCP) REPORT, STATE OF HUMAN RIGHTS IN 2010 (2011) at 55, 134 et seq., available at <http://www.hrcp-web.org/archive.html>; *Asia Bibi, Pakistan Blasphemy Case Defendant, Death*

imprisoned.<sup>38</sup> The impact of this incident has been dramatic since both the Punjab Governor, Salman Taseer and Shahbaz Bhatti, the Christian Federal Cabinet Minister of Minority Affairs, who defended her case and campaigned for the reform of Pakistan's blasphemy laws, were assassinated.<sup>39</sup>

### 1. Facts of the Case & Background

Mrs. Aasia Bibi was working as a farmhand in Ittan Wali, a village 60 miles west of Lahore. During her work in the fields she was asked by a landlord to fetch water.<sup>40</sup> She complied, but the other women she was working with – all Muslims – refused to touch the water bowl and drink the water: as it had been touched by a Christian, it was considered to be “unclean.”<sup>41</sup> The incident was forgotten and a few days later, a Muslim mob was initiated in

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*Sentence Handed Down*, HUFFINGTON POST, 25 May 2011, available at [http://www.huffingtonpost.com/2010/11/11/asia-bibi-pakistan-blasph\\_n\\_782297.html](http://www.huffingtonpost.com/2010/11/11/asia-bibi-pakistan-blasph_n_782297.html); F. Hassan, *Blasphemy in Pakistan*, 28 PEACE MAGAZINE, Jan. - Mar. 2012.

- 38 Until Mar. 25, 2012, it has been also reported that Ms. Bibi faces the threat of a suicide attack in jail. See U.N.H.R. COUNCIL, REPORT OF THE SPECIAL RAPPORTEUR ON THE PROMOTION AND PROTECTION OF THE RIGHT TO FREEDOM OF OPINION AND EXPRESSION, ¶ 1753, U.N. DOC. A/HRC/17/27/ADD.1 (MAY 27, 2011) (PREPARED BY FRANK LA RUE).. See, Frank La Rue, *Petition for Asia Bibi on its way to one million signatures*, Jan. 20, 2012, <http://christiannewsbuzz.com/2012/01/petition-for-asia-bibi-for-release-reaches-half-a-million/> and, *Fear for Pakistan's death row Christian woman*, BBC NEWS, Dec. 6, 2010, <http://www.bbc.co.uk/news/world-south-asia-11923701>.
- 39 Salman Taseer was assassinated by his own guard for defending her case and as a punishment for his campaign to reform Pakistan's blasphemy laws, as it was the case two months later also for Shahbaz Bhatti, the Christian Federal Cabinet Minister of Minority Affairs. See also Navi Pillay, *UN Human Rights Chief Condemns Pakistan Assassination, Urges Reform of Blasphemy Laws*, Mar. 2, 2011, available at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10784&LangID=E>.
- 40 J. Perlez, *Pakistani Sentenced to Death May Get a Pardon*, NY TIMES, Nov. 22, 2010, available at <http://www.nytimes.com/2010/11/23/world/asia/23pstan.html>; *Christian woman sentenced to death in Pakistan for blasphemy*, THE TELEGRAPH, Nov.9, 2010, available at <http://www.telegraph.co.uk/news/religion/8120142/Christian-woman-sentenced-to-death-in-Pakistan-for-blasphemy.html>.
- 41 *Id.*

Sheikhupura. Mrs. Bibi was taken to the police station, allegedly for her own safety.<sup>42</sup> Blasphemy charges were subsequently framed against her: she was prosecuted under article 295-C of the Pakistan Penal Code for insulting the prophet and, on the 7 November 2010, she was sentenced to death (hanging) by the local court of Sheikhupura.<sup>43</sup> A few days later, the Lahore High Court (LHC) restrained both the Pakistan President Zardari and the late Punjab Governor, Salman Taseer, from pardoning her or from taking part in any activity aimed at securing pardon for her.<sup>44</sup> Further, on the 6 December, the LHC dismissed a petition that sought a direction to parliament to desist from amending the blasphemy provisions of the Penal Code and confirmed the death sentence<sup>45</sup> and on the 8 December 2010, Yousuf Qureshi, Imam of Mohabat Khan mosque in Peshawar, who gained his notoriety from his incitement to “kill the Danish illustrators,”<sup>46</sup> pronounced a reward of Rs. 500,000 for anyone who kills her if the verdict is not applied.<sup>47</sup> Similarly, the cleric Maqsood Ahmed Masoomi, stated that anyone who commits blasphemy in the village “should be killed on the spot.”

## 2. Remarks & Analysis of the Case

As noted by the UN High Commissioner for Human Rights, Mrs. Navi Pillay, the case of Bibi and the two assassinations that followed are symp-

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42 *Id.*

43 Frank La Rue, *supra* note 38 at 247, para. 1751.

44 See HRCP Report, *supra* note 37 at 55, 134 et seq., and also *supra* note 34.

45 *Id.*

46 *Denmark closes Pakistan embassy*, BBC News, available at [news.bbc.co.uk/2/hi/south\\_asia/4725116.stm](http://news.bbc.co.uk/2/hi/south_asia/4725116.stm). J. Klausen, *The Danish Cartoons and Modern Iconoclasm in the Cosmopolitan Muslim Diaspora*, 2009 HARV. MIDDLE EASTERN AND ISLAMIC REV. 8, 86–118 (1992).

47 According to HRCP REPORT, *supra* note 37, Qureshi said, “No president, no parliament and no government has the right to interfere in the tenets of Islam. Islamic punishment will be implemented at all costs [...] We will strongly resist any attempt to repeal laws which provide protection to the sanctity of Holy Prophet Muhammad. Anyone who kills Aasia will be given Rs. 500,000 in reward from Masjid Mahabat Khan [...] We expect her to be hanged and if she is not hanged then we will ask the mujahideen and the Taliban to kill her.”

omatic of the “pervasive violence against religious minorities in Pakistan and a lack of protection for their places of worship.”<sup>48</sup> Indeed, this case was not a solitary incident.<sup>49</sup> Although based on a religious identity, Pakistan founder, Mohammad Ali Jinnah conceived Pakistan as a modern liberal State, where in minority rights would be fully ensured and protected. However, in modern-day Pakistan, the population is 96 percent Muslim<sup>50</sup> and religious minorities have historically been subject to discrimination and even prosecuted, as a result of the incremental growth in religious intolerance and religious extremism.<sup>51</sup> In a country with almost 177 mil-

48 Further, Pillay urged the Government of Pakistan to honour Bhatti and Taseer by supporting their position on the blasphemy laws and she called on the Government to declare a moratorium on application of the blasphemy laws and commission a comprehensive review by independent and impartial experts. See UN Press Release, Pakistan: UN officials condemn assassination of Government minister, U.N. News Centre (Mar. 2, 2011), available at <http://www.un.org/apps/news/story.asp?NewsID=37659&Cr=Pakistan&Cr1>.

49 On other similar blasphemy cases in Pakistan, see Frank La Rue, *supra* note 38 at 244-46; U.N. Comm’n on H.R., Summary of cases transmitted to Governments and replies received, at 264-76, especially ¶¶ 1212, 1254-55 on the cases of Samuel Masih and Diwan Hashmat Hayat, U.N. Doc. E/CN.4/2005/62/Add.1 (Mar. 30, 2005) (prepared by Theo Van Boven), at 264-76 especially ¶¶ 1212, 1254-55 on the cases of Samuel Masih and Diwan Hashmat Hayat; Petition for Relief Pursuant to Resolution 1997/50 and 2000/36 submitted by the NGO Freedom Now to the UN Working Group on arbitrary detention for the case of *Ayub Masih v. Government of Pakistan*, available at [www.freedom-now.org/.../Masih-Petition-to-the-WGAD-10.8.01.pdf](http://www.freedom-now.org/.../Masih-Petition-to-the-WGAD-10.8.01.pdf). See also J. Rehman, *Islam, War on Terror and the Future of Muslim Minorities in the United Kingdom: Dilemmas of Multiculturalism in the Aftermath of the London Bombings*, 29 HUM. RTS. Q. 831, 831-78 (2007) and generally, I. H. Malik, *Religious Minorities in Pakistan*, in *London: Minority Rights Group International* (2002).

50 Preamble of the Constitution of Pakistan, Apr. 12, 1973. According to its Constitution, “Muslims shall be enabled to order their lives [...] in accordance with the teachings and requirements of Islam as set out in the Holy Quran and Sunnah.”

51 As Theodor Gabriel reveals, minorities such as the Christians or the Ahmadis were discriminated against in all aspects of social, political and financial life. See T. Gabriel, *Christian Citizens in an Islamic State*, cited by S. Shackle, *Extreme injustice*, NEW STATESMAN, Aug. 8, 2011, at 36.

lion citizens, this 4 percent minority of potential victims represents 7 million people.<sup>52</sup>

In the north and tribal areas of Pakistan, impunity and lawlessness are still today a frequent phenomenon. Minorities, particularly Christians and Ahmaddiyyas,<sup>53</sup> are increasingly exposed to violence and intimidation from persons “whose mind-set is centred more and more on an extremist form of Islam.”<sup>54</sup>

From an international law standpoint, the efforts of Pakistan to avoid its obligations under international human rights law are striking. This state has one of the worst human rights records, especially those related to religious freedom and women’s rights.<sup>55</sup> Pakistan’s pressure within the UN General Assembly and the UN Human Rights Council to make blasphemy laws (i.e., the “defamation of religions”) a part of international law is a *par excellence* indication of this problem.<sup>56</sup> Even upon the signature of the International Covenant on Civil and Political Rights (ICCPR), Pakistan has

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52 This is almost the whole population of Austria or Israel and more than the population of Lebanon or Finland.

53 According to the HRCP, 99 Ahmadiis were killed in faith-based violence and at least 64 people were charged under the blasphemy law, including Aasia Bibi. 73 members of religious minority communities committed suicide and 21 attempted it. See HRCP Report, *supra* note 37.

54 *Was Shahbaz Bhatti a Martyr?*, AMERICA, Mar.21, 2012 at 6, available at [www.americamagazine.org/content/signs.cfm?signid=661](http://www.americamagazine.org/content/signs.cfm?signid=661).

55 On the country’s record on human rights, see, e.g., the comments issued by the ICERD and the CEDAW Committee and the Human Rights Council: see e.g., U.N. H.R. Council, Communications Report of Special Procedures, at 38, U.N. Doc A/HRC/18/51 (Sept. 9, 2011); also Comm. on the Elimination of Racial Discrimination, 74th Sess., Feb. 16-Mar. 6, 2009, U.N. Doc. CERD/C/PAK/CO/20 (Mar. 16, 2009). Indicatively ¶ 17: “Notwithstanding the measures taken by the State party such as the amendments of the Criminal Law Act 2004 and the Protection of Women Act 2006, the Committee expresses concern about acts of violence against women, especially those of minority background.”

56 See the decades of resolutions which have been promoted within the UN General Assembly and the UN Human Rights Council (and, previously, the UN Commission on Human Rights) at the behest of Pakistan and the Organization of the Islamic Cooperation, after the first one in 1999. See A.G. Belnap, *Defamation of Religions: A Vague and Overbroad Theory that Threatens Basic Human Rights*,

expressed reservations in respect of various provisions of the Covenant, to an extent that it is “unclear to what extent the Islamic Republic of Pakistan considers itself bound by the obligations of the treaty and raises concerns as to the commitment of the Islamic Republic of Pakistan to the object and purpose of the Covenant” as noted by the representative of the Netherlands.<sup>57</sup>

Subjected to intense objections from the international community regarding reservations based upon the *Sharia* and constitutional provisions, and immediately risking the European Union’s ineligibility criterion of the European Union’s Generalised System of Preferences (GPS Plus Status), on 22 June 2011, Pakistan’s Prime Minister, Syed Yousaf Raza Gilani, affected the withdrawal of the majority of Pakistan’s reservations to the ICCPR including article 18, freedom of religion.<sup>58</sup>

The imprisonment and death sentence imposed on Aasia Bibi undermine not only the matrix principles of equality and justice, but also the inherent dignity of the human person itself, all of which are proclaimed in the UN Charter<sup>59</sup> and the UN Declaration of Human Rights, the international bill of rights<sup>60</sup> and are by now, an essential part of customary

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BYU L. REV. 635–86 (2010); S. Parmar, *The challenge of “defamation of religions” to freedom of expression and the international human rights* EHRLR 353-75 (2009).

57 Pakistan has expressed reservations with regard to articles 3, 6, 7, 12, 13, 18, 19 and 25 of the Covenant. These reservations include the principle of equality between men and women, the right to life and restrictions on the imposition of the death penalty, and naturally, religious freedom, and the competence of the Human Rights Committee to review and comment State periodic reports. The States’ reservations on treaties and representatives’ comments are generally *available at* [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en#34](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#34).

58 Pakistan decides to withdraw most of the Reservations on ICCPR, UNCAT, The Nation, 23 June, 2011 *available at* <http://www.nation.com.pk/pakistan-news-newspaper-daily-english-online/Regional/Islamabad/23-Jun-2011/Pakistan-decides-to-withdraw-most-of-reservations-on-ICCPR-UNCAT>.

59 The Preamble of the United Nations Charter (1945) states: “We, the people of the United Nations determined [...]reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women.”

60 The Universal Declaration of Human Rights (1948) preamble states that: “Whereas recognition of the inherent dignity and of the equal and inalienable rights of all

international law.<sup>61</sup> Her treatment, as both a woman and a member of a religious minority, is in breach of specific human rights proclaimed in a series of instruments that it has ratified and, most notably, the right not to be discriminated against on religious grounds as enunciated in article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).<sup>62</sup> Her prosecution *as such* is also contrary to the ICCPR<sup>63</sup> and especially article 20 para. 2 on the prohibition of incitement to religious hatred and article 26 on the prohibition of any form of discrimination against religious minorities.<sup>64</sup> Human dignity, freedom and the principle of non-discrimination are such norms, and Pakistan should have international responsibility for human rights violations: not only for not respecting this woman's human rights, but also for ignoring the whole international human rights system itself.

After the ICCPR's ratification, there have been indeed some indications that Pakistan's record on human rights would improve. Likewise, the fact that no "defamation of religions" resolutions passed in 2011 was a blissful surprise.<sup>65</sup> Many efforts have been deployed in this respect, including those

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members of the human family is the foundation of freedom, justice and peace in the world."

61 See, e.g., C. TOMUSCHAT, HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM (2004).

62 The ICERD was ratified by Pakistan on the 21 Sep. 1966. Bibi's imprisonment as a woman and mother of five children, apart from the religious discrimination she suffered, could also be read as contrary to the CEDAW (ratified by Pakistan on the Mar.12, 1996), according to which "discrimination" should be interpreted in a broad sense ("enjoyment or exercise by women [...] of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.").

63 The ICCPR was ratified by Pakistan on June 23, 2010.

64 See also H. R. Comm., General Comment no. 22 on the right to freedom of thought, conscience and religion (art. 18), ¶¶ 7-8, U.N. Doc. CCPR/C/21/Rev.1/Add.4, 7-8 (July 30, 1993); H. R. Comm., General Comment no. 23 on the rights of minorities (art. 27 of the ICCPR), ¶ 6(1), U.N. Doc. CCPR/C/21/Rev.1/Add.5 (Apr. 8, 1994).

65 In 2011 no "defamation of religions" was voted neither within the UN General Assembly nor within the UN Human Rights Council, *supra* note 56. See instead the adoption of the more "generic" resolutions, UN Doc. A/HRC/RES/16/18 (Mar. 24, 2011): "Combating intolerance, negative stereotyping and stigmatization of,

of human rights organizations and UN mandate holders, especially from former UN Rapporteur Asma Jahangir.<sup>66</sup> However, violence, intolerance, and extremism in Pakistan have not been reduced.<sup>67</sup> On the ground, any legal or political attempt to reform blasphemy laws results in an impasse. On the one hand, fanatic hate preachers stir up religious hatred, resulting in the perception of fanatics as “heros” for their peers.<sup>68</sup> On the other,

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and discrimination, incitement to violence, and violence against persons based on religion or belief” and also likewise, the UN G.A. Resolution entitled United against racism, racial discrimination, xenophobia and related intolerance A/RES/66/3 ( Sep. 22, 2011).

- 66 See e.g., the Special Rapporteurs joint statement (Githu Muigai, Asma Jahangir and Frank La Rue) “Freedom of expression and incitement to racial or religion hatred” OHCHR side event during the Durban Review Conference, Geneva (Apr. 22, 2009). Asma Jahangir has also received the Four Freedoms Award for Freedom of Worship in 2010.
- 67 HRCP reports that in 2010 “impunity for perpetrators of violence against minority communities continued” and that “little progress was made in bringing to justice those involved in violence and arson targeting an entire Christian locality in Gojra, Punjab in 2009;” see HRCP *supra* note 37. Likewise, both the UN High Commissioner and the UN Special Rapporteur on Freedom of Expression have noted a rise of extrajudicial killings, abductions and disappearances of minority leaders and political activists in Balochistan province in 2010, noting that 50 such cases had been reported between October 2010 and March 2011; see UN *supra* note 14 and Frank La Rue *supra* note 38 para. 1754 and 1756-1757 on other blasphemy cases in 2011. Also, NGOs such as Human Rights Watch report that Sunni militant groups, such as the supposedly banned Lashkar-e Jhangvi, still operate with impunity across Pakistan and violent attacks, including killing, against Shia, Ahmadis, members of the Hazara community and other vulnerable groups is frequent. See HUMAN RIGHTS WATCH: WORLD REPORT 2012 (Pakistan), available at <http://www.hrw.org/world-report-2012/world-report-2012-pakistan>; see D. Walsh, *Salmaan Taseer, Asia Bibi and Pakistan’s struggle with extremism*, THE GUARDIAN, Jan. 8, 2011, available at <http://www.guardian.co.uk/world/2011/jan/08/salmaan-taseer-blasphemy-pakistan-bibi>.
- 68 See the HRCP REPORT *supra* note 37; *The Hanif Qureshi’s sermon which made Mumtaz Qadri to Kill Salman Taseer Gustakh-e-Rasool*, available at [http://www.wichaar.com/videos/hanif-qureshis-sermon-which-made-mumtaz-qadri-to-kill-salman-taseer-gustakh-e-rasool/hanif-qureshis-sermon-which-made-mumtaz-qadri-to-kill-salman-taseer-gustakh-e-rasool-video\\_e0c6e14bd.html](http://www.wichaar.com/videos/hanif-qureshis-sermon-which-made-mumtaz-qadri-to-kill-salman-taseer-gustakh-e-rasool/hanif-qureshis-sermon-which-made-mumtaz-qadri-to-kill-salman-taseer-gustakh-e-rasool-video_e0c6e14bd.html); O.B. Jones,

within a social system which enhances extremist views, it is extremely hard for lawyers to defend a blasphemy case,<sup>69</sup> as it is for politicians to be opposed to blasphemy laws,<sup>70</sup> or for judges to issue acquitting judgement in the relevant cases.<sup>71</sup> It seems, therefore, that alternative advice and reform are necessary, as well as more effective lobbying in order to promote the respect, the protection and fulfilment of women's and religious minorities' rights.<sup>72</sup> The civil society's efforts seem crucial at this point in time.

## SHARIA LAW & HUMAN RIGHTS: THE CASE OF MUKHTAR MAI

### Introduction

On the 21<sup>st</sup> April 2011, the Supreme Court of Pakistan by two votes against one reversed the Appeal Court's decision that had found the appellants

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*How Punjab governor's killer became a hero*, BBC News, available at <http://www.bbc.co.uk/news/magazine-16443556>.

- 69 J. Khan, *Death Threats for Asia Bibi's Lawyer and Human Rights Activists*, Jan. 7, 2012, <http://www.asianews.it/news-en/Lahore:-death-threats-for-Asia-Bibi%27s-lawyer-and-human-rights-activists-23630.html>; See also From Shaheed Justice Arif Iqbal Bhatti to Shaheed Salman Taseer: PPP's struggle against the Ziaist Blasphemy Law, Jan. 7, 2011.
- 70 Journalists argue that, after Salman Taseer and Shahbaz Bhatti, the "next on the list" might be the ruling party's legislator Sherry Rehman, who tried to table an amendment to blasphemy laws. D Walsh, *Pakistan MP Sherry Rehman drops Effort to Reform Blasphemy Laws*, THE GUARDIAN, Feb. 3, 2011, available at <http://www.guardian.co.uk/world/2011/feb/03/pakistan-blasphemy-laws-sherry-rehman>.
- 71 It is reported, however, that the LHC prosecutor has had some regrets: *D Wooding, Asia Bibi's accuser is said to have admitted that his charges are phony*, ASIAN NEWS, Jan. 22, 2012, <http://www.assistnews.net/Stories/2012/s12010128.htm>; M. Tossati, 'Strange developments in the Asia Bibi case', <http://vaticaninsider.lastampa.it/en/homepage/world-news/detail/articolo/pakistan-asia-bibi-cristiani-christians-cristianos-12175/>.
- 72 See e.g. A. Quraishi, *What if Sharia weren't the enemy?: rethinking international women's rights advocacy on Islamic Law*, 22 COLUM. J. GENDER & L. 1, 173-249 (2010), who argues that a modern apprehension of women's rights in the countries which apply Sharia law should be initiated with the assistance of women activists.

guilty of the gang rape of Mukhtaran Bibi (or Mukhtar Mai<sup>73</sup>), an incident that had taken place in June 2002, in the Meerwala village in the area of Punjab in North Pakistan.<sup>74</sup> The judgement provoked the outrage of the international human rights community and is indicative of the failure to guarantee equality and respect for women in Pakistan.<sup>75</sup>

### 1. Facts and Background of the Case

The case commenced when one of the brothers of Naseem-Salma, a girl belonging to the “influential” *Mastoi* tribe (a branch of the *Baloch* tribe) reported to the police on the 30<sup>th</sup> June 2002 that his sister maintained “illicit relations” with Abdul Shaqoor, a 12 year old boy belonging to a “humble family of Gujjar.”<sup>76</sup> The boy was, in reality, a victim of a sexual assault and

73 Mukhtār Mā’ī became a symbol for many women in Pakistan and is now a world-renowned human rights activist. In 2003, she started the Mukhtar Mai Women’s Welfare Organization to defend women’s rights and education, especially in the Southern region of Punjab Province (Pakistan) “a region with some of the world’s worst examples of women’s rights violations, such as rape, gang rape, domestic violence, honour killing, vani (exchange of women in settling the disputes), forced and child marriages.” Mukhtar Mai has also won the North-South Prize from the Council of Europe, see, MUKHTAR MAI WOMEN’S ORGANISATION, <http://www.mukhtarmai.org>.

74 Supreme Court of Pakistan: *State v. Abdul Khaliq and others* (Criminal Appeals No.163 to 171 and S.M. Case No.5/2005). See also U.N. C.H.R., REPORT OF THE SPECIAL RAPPORTEUR ON VIOLENCE AGAINST WOMEN, ¶ 151, U.N. DOC. E/CN.4/2003/75/ADD.2 (JAN. 14, 2003) (PREPARED BY RADHIKA COOMARASWAMY). See also, U.N. H.R. COUNCIL, REPORT OF THE SPECIAL RAPPORTEUR ON TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, U.N. DOC. A/HRC/13/39/ADD.1 (FEB. 25, 2010) (PREPARED BY MANFRED NOWAK). See also *Reuters, Pakistan court acquits suspects in Mukhtaran Mai case*, DAWN.COM, Apr. 11, 2011, <http://www.dawn.com/2011/04/21/supreme-court-upholds-lhc%E2%80%99s-verdict-in-mukhtaran-mai-case.html>.

75 See Siobhan Mullally, *Women, Islamisation and Human Rights in Pakistan*, in RELIGION, HUMAN RIGHTS AND INTERNATIONAL LAW: A CRITICAL EXAMINATION OF ISLAMIC STATE PRACTICE 379-408, especially 405 et seq. (JAVAIID REHMAN & SUSAN C. BREAU, eds., 2007).

76 *State v. Abdul Khaliq*, *supra* note 74, at ¶¶ 4-5, 14.

sodomy by these men.<sup>77</sup> One week earlier, on the 22<sup>nd</sup> June 2002, a tribal council had been conveyed (*panchayat*), with the participation of another two of the *Mastoi* tribe as “arbitrators.” The latter had also obliged the boy to stay confined in their house as a punishment for his alleged “illicit relations,” something which would allow the family to continue the boys’ sexual harassment with the *panchayat*’s blessings.<sup>78</sup>

As a remedy for these alleged “illicit relations,” the *panchayat*, without conducting any kind of investigation, allegedly ordered “exchange marriages” to be arranged between the brothers of Naseem and Shaqoor’s sister, Mukhtaran Bibi, something that is a common practice in the village.<sup>79</sup> However, the arbitrator who was acting on behalf of Shaqoor declined the offer and Mukhtaran Bibi went, according to the village’s tradition, to visit the *Mastoi* house and seek forgiveness for her brother.<sup>80</sup> During this visit, a gang rape (*Zina-bil-jabr*) was committed against her.<sup>81</sup>

Mukhtaran Bibi accused 14 men of being involved in her raping and in 2002 an investigation took place. The 14 men were led to the police and charged with the offences described in the relevant legislation (i.e., Sections

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77 During the trial, Shaqoor denied the fact that he had illicit relations with Naseem and claimed that he was sodomized by one of her brothers and the two other men acting on behalf of the *Mastoi* family during the *panchayat*. This claim was also the object of a debate during the proceedings (§ 17 et seq.), despite the fact that the doctors noted that “a positive report of sexual intercourse was produced.”

78 *Abdul Khaliq, supra* note 74, at §§ 4-5.

79 Also, interestingly, some of the witnesses of the case (e.g., Witness no. 13, § 21) submitted that the *panchayat* commanded that *ziadati* be committed with Mukhtaran May. Such an atrocity is a common practice in this area of Pakistan. Moreover, it is expected that the woman who is the victim is killed afterwards or commit suicide, again in order to preserve the honour of the male members of the two families involved. In general on the women’s situation in the tribal areas, see Rebecca Conway, *Rape, mutilation: Pakistan’s tribal justice for women*, REUTERS, Aug. 12, 2011, <http://www.reuters.com/article/2011/08/12/us-pakistan-women-idUSTRE77B63I20110812>, and Waheed Khan, *Pakistani rape victim says attacks increasing*, REUTERS, Feb. 1, 2007, <http://uk.reuters.com/article/2007/02/01/idUKISL9288020070201>.

80 *Abdul Khaliq, supra* note 74, at, § 2-3: “all dragged her into the room of Khaliq’s house, where zina- bil-jabbar was committed with her by all of them.” *Id.* at § 4-5.

81 *Id.*

19(4), 11 of the Offence of *zina* (Enforcement of Hudood) Ordinance VII of 1979, combined with Section 149, 354-A<sup>82</sup> and 109 of the Pakistani Penal Code and under Sections 10 and 7(c) of the 1997 Anti-Terrorism Act).<sup>83</sup> The Anti-Terrorist First Instance Court hence sentenced the six men to death and acquitted the other eight citing a “lack of evidence” and the benefit of Section 382-B Pakistani Criminal code.<sup>84</sup>

The judgement of this Court was challenged before the Lahore High Court(LHC) by both parties. Five of the six men were acquitted of all charges citing a lack of evidence and advancing a number of reasons.<sup>85</sup> Only one man’s conviction was upheld, converted, however, from Section 10 paragraph 4 of the Ordinance to Section 10 paragraph 3 (reducing the capital punishment from death to life imprisonment).<sup>86</sup> The SC judgement said that the LHC had provided sufficient proof, noting that the HC’s con-

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82 The article 354-A is entitled “Assault or use of criminal force to woman and stripping her of her clothes” says that “whoever assaults or uses criminal force to any woman and strips her of her clothes and in that condition, exposes her to the public view, shall be punished with death or with imprisonment for life, and shall also be liable to fine.”

83 Article 6(c) of the Terrorist Act states that: “A person is said to commit a terrorist act if he, (c) commits an act of gang rape, child molestation, or robbery coupled with rape as specified in the Schedule to this Act.” On 1 September 2002, the anti-terrorism Court in Punjab decided that six of the fourteen accused had “conveyed Panchayat, mostly of their Mastoi Baluch tribe of the area, along with others [...] and coerced, intimidated, overawed the complainant party, and the community; created a sense of fear and insecurity in society; and thereby committed the [related] offences.”

84 *State v. Abdul Khaliq*, *supra* note 74, at ¶ 5.

85 Among the reasons cited: “sole testimony of the prosecutrix to prove the occurrence, no one else had seen it and hence is insufficient to establish the guilt of the accused;” “the DNA and SEMEN tests were not conducted to prove the gang rape;” “there are contradictions and inconsistencies in the statements of the witnesses inter se and also with their previous statements;” “the occurrence has not taken place in the manner as is stated by the PWs;” “there are no significant marks or injuries on the body of the prosecutrix, which is very unusual in [a case of this kind].”

86 *Id.* at ¶ 6.

clusions “should [generally] not be upset, except when palpably perverse, suffering from serious and material factual infirmities.”<sup>87</sup>

Consequently, the SC found no error in the application of the law, opining that the “factual conclusions” of the LHC “[did] not suffer from any factual or legal vice.”<sup>88</sup> In this respect, it agreed with the appreciations of the Lahore Court in all points related to the procedure<sup>89</sup> and dismissed the appeal.<sup>90</sup>

## 2. COMMENTS ON THE SUPREME COURT’S JUDGEMENT

The Supreme Court’s decision raises a number of questions, which can be only succinctly addressed here and which mark a long way for the judiciary’s fight in the building of a better human rights record. It is optimistic however to note that most of these points are raised by Justice –Nasire ul-Mulk in his 36 pages dissenting opinion.

### *a. Incompatibility of the Islamic system of proof with human rights law*

The Quran provides for a strict and rigid system of proof, incompatible with human rights law. The syllogism followed by the SC was based on a *lato-sensu* presumption of innocence for the accused rapists (paragraphs 17-31), something that makes particularly difficult to produce proof in cases regarding both violence and the most intimate sphere of a person.<sup>91</sup> In this respect, the CS could have also advanced previous jurisprudence of

87 *Id.* at para. 15. Following several arguments on the version of the truth (5-17), the SC observed that “the foundational facts of the case [...] make the prosecution version implausible, flimsy and un-canny as set forth.” (¶ 20).

88 *Id.* at ¶ 22.

89 *E.g.*, the Court admitted that the delay of a lodging of a complaint by a rape victim is fatal to the prosecution or the fact that the testimony of a rape victim is not sufficient in a rape case.

90 *Id.* at ¶¶ 26-34.

91 This point is observed correctly only by the dissenting judge Nasir-ul-Mulk who highlighted that the High Court had erred in holding that the delay in lodging of F.I.R. was fatal to the prosecution case and insisted on the fact that in such cases there is no need that the testimony of the rape victim is corroborated. In this respect, Justice Ul-Mulk cited a number of related judgements of both the

international instances, such as the European Court of Human Rights 92 and the Committee Against Torture (CAT).<sup>93</sup>

b. *Incompatibility of the zina offense, in particular, with human rights law and procedural guarantees*

Under Islamic law, any extramarital intercourse constitutes the Islamic sin of *zina* (illegal adultery).<sup>94</sup> An unproved imputation of *zina* is in itself a *had* offense, sometimes punishable by lashes, or even by lapidation (although the latter is not explicitly stated in the Quran).<sup>95</sup> However, this kind of understanding and interpretation of sexual relations and this system of proof have extremely damaging consequences, since a rape (which is a *zina*) would remain unpunished (since it is improbable to have four eye-witnesses), whereas a sexual intercourse of two adolescents (which is also a *zina*) could

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Pakistani and the Indian Supreme Court. See para. 19-20 and 35 of the dissenting opinion.

- 92 The European Court has (1) assimilated rape with torture in specific cases as provoking a serious and inhuman treatment and (2) in assessing both written and oral evidence, the Court generally applies a “beyond a reasonable doubt” rule: “Such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see, e.g., *Ireland v. United Kingdom*, App. No. 5310/71, 2 EUR. H.R. REP. 25 (1978); *Ilascu and Others v. Moldova and Russia*, App. No. 48787/99, 40 EUR. H.R. REP. 46 (2004); more recently, *Zontul v. Greece*, App. No. 12294/07 (2012).
- 93 General Comment no. 2, CAT/C/GC/2, (Jan. 24, 2008) points 10-11: “in comparison to torture, ill treatment differs in the severity of pain and suffering and may not require proof of impermissible purposes;” See also a multiple rape case, *V.L. v. Switzerland*, CAT 262/2005 (Nov. 20, 2006).
- 94 Islamic law disposes for six hadd offenses theft, rebellion, illicit sexual intercourse, apostasy, the consumption of alcohol (wine: *sharb al khamr*), false accusation or unlawful sexual intercourse (*qudf*). See MASHOOD A. BADERIN, INTERNATIONAL HUMAN RIGHTS AND ISLAMIC LAW, 79 et seq. (2005); NISRINE ABIAD, SHARIA, MUSLIM STATES AND INTERNATIONAL HUMAN RIGHTS TREATY OBLIGATIONS: A COMPARATIVE STUDY (British Institute of International and Comparative Law, 2008).
- 95 See Noel J. Coulson, *Regulation of Sexual Behavior under Traditional Islamic Law*, in SOCIETY AND THE SEXES IN MEDIEVAL ISLAM 63-68 (AFAF LUFTI AL-SAYYID MARSOT, ed., 1979).

be punished by a violent physical assault (lashes) or death (lapidation). One should equally note that the repression of sexual tendencies as well as the extreme repression of sexuality (including homosexuality<sup>96</sup>) in the context of Islamic states such as Pakistan, naturally has extreme consequences, such as sexual assault and rape, as in the present case.

c. *Incompatibility of Some Traditions in Pakistan and Particularly the Panchayat Institution with Pakistan's Human Rights Obligations*

There is some confusion in the judgement with regard to the place of tribal justice, and especially tribal practices such as the *panchayat*, which are contrary to human rights standards. The Supreme Court does not explicitly condemn the *panchayat*, even though this institution, subject to an extreme “patriarchal mindset,” is a *per se* violent institution against women, which applies harsh and partial tribal laws, and does not represent any standard of “fair justice,” as it is shown in the present case.<sup>97</sup>

d. *Incompatibility of Islamic Law with Human Rights Law with Respect to Zina, “Illicit Relations” And Marital Rape Of Girls Over 12 (Which is Allowed According to Pakistani Laws)*

At the time of the incident, Mukhtaran Bibi was 16 year old and her brother 12 year old. Pakistan failed to protect both of them and there is not a single reference to human rights in the judgement. The fact that an “exchange

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96 The Quran provides that a *zina* offense should be brought before a Court only when it is committed in a shameless and immodest way and there are four witnesses for it, while in all other cases, *zina* is not punishable by a Court. Further, as to male to male sexual intercourse in particular, in contrast with the Quran, which is (supposedly) hostile against homosexuality, and in contrast with several conservative Islamic scholars, this is an extremely common, yet extremely restricted, practice in several areas of South Asia, not acknowledged as such and punishable sometimes by death. See e.g., KHALED EL-ROUAYHEB, BEFORE HOMOSEXUALITY IN THE ARAB ISLAMIC WORLD, 1500-1800 (University of Chicago Press, 2005); ISLAM AND HOMOSEXUALITY, VOL 2 (Samar Habib ed., Greenwood, 2010).

97 This point of view is also supported by I Ahsan. See, *Irum Ahsan, Panchayat and jirgas (lok adalats): Alternative Dispute Resolution System in Pakistan*, in STRENGTHENING GOVERNANCE THROUGH ACCESS TO JUSTICE, 27, 27-37 (AMITA SINGH & NASIR ASLAM ZAHID, EDS., 2009).

marriage,” i.e., a gang rape of a 16 year old girl is allowed under tribal and national laws in Pakistan,<sup>98</sup> especially under the *panchayat* pretext to “seek forgiveness,” is an extreme violation of human rights law in the light of the UN human rights charter, the UDHR, the recently ratified ICCPR, the ICERD (non- discrimination is included within the definition of discrimination, since it prohibits acts when carried out for “any reason based on discrimination of any kind...”) and both the CEDAW and the CRC.

e. *Disregard for Women, Children's Rights, and for the Human Rights International System And Civil Society*

The fact that the SC disregarded the facts of a case of a woman against whom the SC itself acknowledges that “a blatant, heinous and untoward incident” took place, who herself became a symbol of the human rights struggle and for whom the international community of activists raised 1 million of signatures, is *per se* a flagrant disrespect for women’s value and rights, as proclaimed, for example, in article 4(c) of the UN GA Declaration on the Elimination of Violence against Women.<sup>99</sup> Judged at a public hearing (as opposed to a doors closed), with the rapists present and with Mukhtar Mai’s own absence, is inevitably also indicative of the failure to preserve a person’s right to privacy in the *par excellence* most intimate aspect of one’s private life.<sup>100</sup> In issues regarding to women’s and children’s rights there is unfortunately a long way to go for Pakistan to comply with international human rights law. For the moment, the hope is to be found in the judicial activism, and in the personal ethos of selective judges, who accomplish their mandate without fearing reprisals from religious extremists.

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98 In Pakistan, marital rape is recognised only when the girl (wife) is under 12 years according to section 376 of the Penal Code (imprisonment for maximum 2 years and fine). See also, the World Organisation Against Torture, Rights of the Child in Pakistan, Report on the implementation of the Convention on the Rights of the Child by Pakistan, prepared for the Committee on the Rights of the Child (34th sess. – Geneva, Sept. 2003), *available at* [www.juvenilejusticepanel.com/.../OMCTAltRepRChildPakistan03EN](http://www.juvenilejusticepanel.com/.../OMCTAltRepRChildPakistan03EN).

99 Declaration on the Elimination of Violence against Women, G.A. Res. 48/104, U.N. Doc. A/RES/48/104 (Feb. 23, 1994).

100 The judgement itself is a breach of Mukhtar Mai’s intimacy, characterizing her: “an unmarried virgin victim of a young age, whose future may get stigmatized.”



# LEGAL MATERIALS



# Participation In Multilateral Treaties<sup>1</sup>

## 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 2010. 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*, <http://treaties.un.org>.
- Where reference is made to the Hague Conference on Private International Law (HcCH), data were derived from [http://www.hcch.net/index\\_en.php?act=conventions.listing](http://www.hcch.net/index_en.php?act=conventions.listing)
- Where reference is made to the International Atomic Energy Agency (IAEA), data were derived from <http://ola.iaea.org/OLA/treaties/index.asp>
- Where reference is made to the International Civil Aviation Organization (ICAO), data were derived from <http://www2.icao.int/EN/LEB/Pages/TreatyCollection.aspx>
- Where reference is made to the International Committee of the Red Cross (ICRC), data were derived from [http://www.icrc.org/IHL.nsf/\(SPF\)/party\\_main\\_treaties/\\$File/IHL\\_and\\_other\\_related\\_Treaties.pdf](http://www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf) and/or the Swiss Ministry of Foreign Affairs <http://www.eda.admin.ch/>
- Where reference is made to the International Labour Organization (ILO), data were derived from <http://www.ilo.org/ilolex/english/convdisp1.htm>

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1 Compiled by Dr. Karin Arts, Professor of International Law and Development at the International Institute of Social Studies of Erasmus University Rotterdam (ISS), based in The Hague, The Netherlands.

- Where reference is made to the International Maritime Organization (IMO), data were derived from <http://www.imo.org/About/Conventions/StatusOfConventions/Documents/Status%20-%202012.pdf>
- Where reference is made to the United Nations Educational, Scientific and Cultural Organization (UNESCO), data were derived from [http://portal.unesco.org/en/ev.php-URL\\_ID=12025&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=-471.html](http://portal.unesco.org/en/ev.php-URL_ID=12025&URL_DO=DO_TOPIC&URL_SECTION=-471.html)
- Where reference is made to WIPO, data were derived from <http://www.wipo.int/treaties/en/documents/pub423.html> and/or <http://www.wipo.int/treaties/en>
- Reservations and declarations made upon signature or ratification are not included.
- Sig. = Signature; Cons. = Consent to be bound; Eff. date = Effective date; E.i.f. = Entry into force; Rat. = Ratification or accession; Min. age spec. – Minimum age specified.

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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.

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<i>State</i>	<i>Sig.</i>	<i>Cons</i>
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(Status as provided by UNESCO)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Nepal		15 Jun 2010
Tajikistan		17 Aug 2010

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(Continued from Vol. 15 pp. 213-214)  
(Status as provided by UNESCO)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Korea (Rep.)		1 Apr 2010

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Amendments to the Charter of the Asian and Pacific Development Centre, 1998: see Vol. 10 p. 267.

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(Corrected from Vol. 14 p. 228)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Japan		9 Jul 2007

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Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972, as amended: see Vol. 7 p. 325.

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- Convention for the Protection of the Ozone Layer, 1985: see Vol. 15 p. 215.
- 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.
- International Convention on Oil Pollution Preparedness, Response, and Cooperation, 1990: see Vol. 12 p. 237.
- Amendment to the Montreal Protocol, 1990: see Vol. 15 p. 216.
- Framework Convention on Climate Change, 1992: see Vol. 13 p. 266.
- Amendment to the Montreal Protocol, 1992: see Vol. 15 p. 216.
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- UN Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, 1994: see Vol. 11 p. 247.
- Amendment to the Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1995: see Vol. 12 p. 238.
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- Stockholm Convention on Persistent Organic Pollutants, 2001: see Vol. 15 pp. 217.

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<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
Laos		28 May 2010

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(Corrected from Vol. 15 p. 216)

<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
Brunei		27 May 1993

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(Continued from Vol. 14 p. 229)

<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
Laos		21 Sep 2010

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(Corrected and continued from Vol. 15 p. 216)

(Status as provided by IMO)

<i>State</i>	<i>Cons.</i>	<i>E.i.f.</i>
Turkmenistan	21 Sep 2009	21 Sep 2010

**Protocol to the Framework Convention on Climate Change, 1997**

(Corrected from Vol. 15 p. 216)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Kazakhstan	12 Mar 1999	19 Jun 2009
Tajikistan		29 Dec 2008
Timor-Leste		14 Oct 2008

**Amendment to the Montreal Protocol, 1997**

(Continued from Vol. 15 p. 217)

<i>State</i>	<i>Cons.</i>
China	19 May 2010

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Certain Hazardous Chemicals and Pesticides in International Trade,  
1998**

(Continued from Vol. 13 p. 267)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Laos		21 Sep 2010

**Amendment to the Montreal Protocol, 1999**

(Continued from Vol. 15 p. 217)

<i>State</i>	<i>Cons.</i>
Bangladesh	24 Aug 2010
China	19 May 2010

**International Convention on Civil Liability for  
Bunker Oil Pollution Damage**

London, 23 March 2001

Entry into force: 21 November 2008

<i>State</i>	<i>Cons.</i>	<i>E.i.f.</i>
China	9 Dec 2008	9 Mar 2009
Korea (DPR)	17 Jul 2009	17 Oct 2009
Korea (Rep.)	28 Aug 2009	28 Nov 2009
Malaysia	12 Nov 2008	12 Feb 2009
Singapore	31 Mar 2006	21 Nov 2008
Vietnam	18 Jun 2010	18 Sep 2010

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Convention on the Law Applicable to Maintenance Obligations, 1973: *see* Vol. 6 p. 244.

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(Corrected from Vol. 15 p. 218 and Continued from Vol. 13 p. 267).

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Nepal		28 Apr 2009
Vietnam		7 Dec 2010

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<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
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Convention on the Rights of the Child, 1989: *see* Vol. 11 p. 251.

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Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 2002: *see* Vol. 14 p. 232.

### **Convention against Discrimination in Education, 1960**

(Continued from Vol. 7 p. 328)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Afghanistan		1 Jan 2010

**International Covenant on Civil and Political Rights, 1966**

(Continued and corrected from Vol. 15 p. 218)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Pakistan	17 Apr 2008	23 Jun 2010

**Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984**

(Continued from Vol. 15 p. 219)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Laos	21 Sep 2010	
Pakistan	17 Apr 2008	23 Jun 2010

**Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, 1989**

(Continued from Vol. 14 p. 232)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Kyrgyzstan		6 Dec 2010

**Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, 1999**

(Continued from Vol. 15 p. 219)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Cambodia	11 Nov 2001	13 Oct 2010

**Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 2000**

(Continued from Vol. 15 p. 219)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Iran	21 Sep 2010	

**Convention on the Rights of Persons with Disabilities, 2008**

(Continued from Vol. 15 p. 220)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Bhutan	21 Sep 2010	
Malaysia	8 Apr 2008	19 Jul 2010
Maldives	2 Oct 2007	5 Apr 2010
Nepal	3 Jan 2008	7 May 2010

**Optional Protocol to the Convention on the Rights of Persons with Disabilities, 2008**

(Continued from Vol. 15 p. 220)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Turkmenistan		10 Nov 2010

**International Convention for the Protection of All Persons from Enforced Disappearance**

Entry into Force: 23 December 2010

(Continued from Vol. 15 p. 220)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
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Geneva, 8 December 2005

Entry into force: 14 January 2007

(Status as Provided by ICRC)

<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
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Philippines	13 Mar 2006	22 Aug 2006
Singapore	2 Aug 2006	7 Jul 2008
Timor Leste	8 Dec 2005	

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Convention Establishing the World Intellectual Property Organization, 1967: see Vol. 12 p. 245.

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Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms, 1971: see Vol. 12 p. 245.

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(Status as provided by WIPO)

<i>State</i>	<i>Cons. Agreement</i>	<i>Cons. Protocol</i>
Kazakhstan	25 Dec 1991	8 Dec 2010

**WIPO Performances and Phonograms Treaty**

Geneva, 10 December 1996

Entry into force: 20 May 2002

(Status as provided by WIPO)

<i>State</i>	<i>Cons.</i>
China	9 Jun 2007
Indonesia	15 Feb 2005
Japan	9 Oct 2002
Kazakhstan	12 Nov 2004
Korea (Rep.)	18 Mar 2009
Kyrgyzstan	15 Aug 2002
Mongolia	25 Oct 2002
Philippines	4 Oct 2002
Singapore	17 Apr 2005

**Patent Law Treaty**

Geneva, 1 June 2000

Entry into force: 28 April 2005

(Status as provided by WIPO)

<i>State</i>	<i>Cons.</i>
Kyrgyzstan	28 Apr 2005
Uzbekistan	19 Jul 2006

**Singapore Treaty on the Law of Trademarks**

Singapore 27 March 2006

Entry into force: 16 March 2009

(Status as provided by WIPO)

<i>State</i>	<i>Cons.</i>
Kyrgyzstan	16 Mar 2009
Singapore	16 Mar 2009

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Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 1968: *see* Vol. 6 p. 254.

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- Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organized Crime, 2000: *see* Vol. 15 p. 224.
- Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention Against Transnational Organized Crime, 2001: *see* Vol. 14 p. 238.
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<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
Singapore		22 Oct 2010

**Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988**

(Continued from Vol. 13 p. 272)

(Status as provided by IMO)

<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
Iran	30 Oct 2009	28 Jan 2010

**Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, 1988**

(Continued from Vol. 15 p. 223)

(Status as provided by IMO)

<i>State</i>	<i>Cons. (Deposited)</i>	<i>E.i.f.</i>
Iran	30 Oct 2009	28 Jan 2010

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(Continued from Vol. 13 p. 273)

<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
Bangladesh	16 Sep 1999	23 Mar 2010
Seychelles	28 Dec 2000	10 Aug 2010

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(Continued from Vol. 15 p. 224)

<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
Pakistan	14 Dec 2000	13 Jan 2010

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Especially Women and Children, supplementing the  
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<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
China		8 Feb 2010

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(Continued from Vol. 14 p. 238)

<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
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(SEE ALSO: PRIVILEGES AND IMMUNITIES)**

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Electronic Communications in International Contracts**

New York, 23 November 2005

Entry into force: not yet

<i>State</i>	<i>Sig.</i>	<i>Cons</i>
China	6 Jul 2006	
Korea (Rep.)	15 Jan 2008	
Philippines	26 Sep 2007	
Singapore	6 Jul 2006	7 Jul 2010
Sri Lanka	6 Jul 2006	

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(Status as provided by the HcCH)

<i>State</i>	<i>Cons.</i>	<i>E.i.f.</i>
Kyrgyzstan	15 Nov 2010	

**Convention on the Taking of Evidence Abroad in  
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(Corrected from Vol. 15 p. 225)

<i>State</i>	<i>Cons.</i>	<i>E.i.f.</i>
Korea (Rep.)	14 Dec 2009	12 Feb 2010

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(Status as provided by the ILO)

<i>State</i>	<i>Rat. registered</i>
Afghanistan	7 Apr 2010

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(Status as provided by the ILO)

<i>State</i>	<i>Rat. Registered</i>	<i>Min. age spec.</i>
Afghanistan	7 Apr 2010	14

**Promotional Framework for Occupational Safety and  
Health Convention (ILO Conv. 187)**

Geneva, 15 June 2006

Entry into force: 20 February 2009

(Status as provided by the ILO)

<i>State</i>	<i>Rat. Registered</i>
Japan	24 Jul 2007
Korea (Rep.)	20 Feb 2008

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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.

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Convention on Civil Liability for Nuclear Damage, 1963: *see* Vol. 6 p. 265.

Joint Protocol Relating to the Application of the Vienna Convention (and the Paris Convention on Third Party Liability in the Field of Nuclear Energy), 1980: *see* Vol. 6 p. 265.

Convention on Nuclear Safety, 1994: *see* Vol. 12 p. 252.

Protocol to amend the 1963 Convention on Civil Liability for Nuclear Damage, 1997: *see* Vol. 8 p. 188.

**Convention on the Physical Protection of Nuclear Material, 1980**

(Continued from Vol. 12 p. 252)

(Status as provided by IAEA)

<i>State</i>	<i>Sig.</i>	<i>Cons. (deposit)</i>
Laos		29 Sep 2010

**Convention on Early Notification of a Nuclear Accident, 1986**

(Continued from Vol. 9 p. 295)

(Status as provided by IAEA)

<i>State</i>	<i>Sig.</i>	<i>Cons. (deposit)</i>
Kazakhstan		10 Mar 2010

**Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, 1986**

(Continued from Vol. 9 p. 295)

(Status as provided by IAEA)

<i>State</i>	<i>Sig.</i>	<i>Cons. (deposit)</i>
Kazakhstan		10 Mar 2010

**Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management, 1997**

(Continued from Vol. 15 p. 228)

(Status as provided by IAEA)

<i>State</i>	<i>Sig.</i>	<i>Cons. (deposit)</i>
Kazakhstan	29 Sep 1997	10 Mar 2010

**Convention on Supplementary Compensation for Nuclear Damage,  
1997**

(Continued from Vol. 8 p. 189)

(Status as provided by IAEA)

<i>State</i>	<i>Sig.</i>	<i>Cons. (deposit)</i>
India		27 Oct 2010

**Amendment to the 1980 Convention on the Physical Protection of  
Nuclear Material, 2005**

(Continued from Vol. 15 p. 228)

(Status as provided by IAEA)

<i>State</i>	<i>Sig.</i>	<i>Cons. (deposit)</i>
Indonesia		27 May 2010

**OUTER SPACE**

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.

**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**  
(Corrected from Vol. 15 p. 228 and continued from Vol. 6 p. 266)

<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
Korea (Rep)		5 Mar 2009

### **PRIVILEGES AND IMMUNITIES**

Convention on the Privileges and Immunities of the United Nations, 1946: see Vol. 14 p. 242.

Convention on the Privileges and Immunities of the Specialized Agencies, 1947: see Vol. 7 p. 338.

Vienna Convention on Diplomatic Relations, 1961: see Vol. 13 p. 277.

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. 13 p. 278.

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. 7 p. 338.

## SEA

Convention on the Territorial Sea and the Contiguous Zone, 1958: *see* Vol. 6 p. 271.

Convention on the High Seas, 1958: *see* Vol. 7 p. 339.

Convention on Fishing and Conservation of the Living Resources of the High Seas, 1958: *see* Vol. 6 p. 271.

Convention on the Continental Shelf, 1958: *see* Vol. 6 p. 271.

Optional Protocol of Signature concerning the Compulsory Settlement of Disputes, 1958: *see* Vol. 6 p. 272.

United Nations Convention on the Law of the Sea, 1982: *see* Vol. 10 p. 285.

Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, 1994: *see* Vol. 12 p. 255.

Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea (...) relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 1995: *see* Vol. 15 p. 230.

## 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.

International Convention for Safe Containers, as amended 1972: *see* Vol. 10 p. 286.

Convention on the International Regulations for Preventing Collisions at Sea, 1972: *see* Vol. 15 p. 231.

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.

Protocol Relating to the International Convention on Load Lines, 1988: *see* Vol. 12 p. 256.

Protocol Relating to the International Convention for the Safety of Life at Sea, 1988: *see* Vol. 14 p. 231.

## SOCIAL MATTERS

International Agreement for the Suppression of the White Slave Traffic, 1904, amended by Protocol 1949: *see* Vol. 6 p. 278.

International Convention for the Suppression of the White Slave Traffic, 1910, amended by Protocol 1949: *see* Vol. 6 p. 278.

Agreement for the Suppression of the Circulation of Obscene Publications, 1910, amended by Protocol 1949: *see* Vol. 6 p. 278.

International Convention for the Suppression of the Traffic in Women and Children, 1921: *see* Vol. 6 p. 277.

Convention for the Suppression of the Traffic in Women and Children, 1921, amended by Protocol in 1947: *see* Vol. 6 p. 277.

International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications, 1923: *see* Vol. 6 p. 277.

Convention for the Suppression of the Circulation of, and Traffic in, Obscene Publications, 1923, amended by Protocol in 1947: *see* Vol. 6 p. 277.

International Convention for the Suppression of the Traffic in Women of Full Age, 1933: *see* Vol. 6 p. 277.

Convention for the Suppression of the Traffic in Women of Full Age, 1933, amended by Protocol, 1947: *see* Vol. 6 p. 277.

Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1950: *see* Vol. 12 p. 257.

Final Protocol to the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1950: *see* Vol. 12 p. 257.

## TELECOMMUNICATIONS

Constitution of the Asia-Pacific Telecommunity, 1976: *see* Vol. 13 p. 280.

Convention on the International Maritime Satellite Organization (INMARSAT), 1976 (as amended): *see* Vol. 8 p. 193.

Amendment to Article 11, Paragraph 2(a), of the Constitution of the Asia-Pacific Telecommunity, 1981: *see* Vol. 8 p. 193.

Amendments to articles 3(5) and 9(8) of the Constitution of the Asia-Pacific Telecommunity, 1991: *see* Vol. 9 p. 298.

Agreement establishing the Asia-Pacific Institute for Broadcasting Development, 1977: *see* Vol. 10 p. 287.

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. 12 p. 258.

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. 13 p. 281.

Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques, 1976: *see* Vol. 12 p. 258.

Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed Excessively Injurious or to have Indiscriminate Effects, and Protocols, 1980: *see* Vol. 11 p. 263.

Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 1993: see Vol. 12 p. 259.

Comprehensive Nuclear Test Ban Treaty, 1996: see Vol. 12 p. 259.

Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 1997: see Vol. 13 p. 281.

Amendment of Article 1 of the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed Excessively Injurious or to have Indiscriminate Effects, 2001: see Vol. 12 p. 259.

**Convention on Cluster Munitions, 2008**

Entry into Force: 1 August 2010

<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
Seychelles	13 Apr 2010	20 May 2010

# STATE PRACTICE



## State Practice of Asian States in the Field of International Law

### EDITORIAL NOTE

The Editorial Board has decided to reorganize the format of this section from this issue onwards. Since the Yearbook's inception, state practice has always been reported and written up as country reports. While this format has served us well in the intervening years, we felt that it would make a lot more sense if we reported state practice *thematically*, rather than geographically. This way, readers will have an opportunity to zoom in on a particular topic of interest and get a quick overview of developments within the region. Of course, this reorganization cannot address our lack of coverage in some Asian states. We aim to improve on this in forthcoming volumes and thank the contributors to this section for their tireless and conscientious work.

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## Courts and Tribunals

### SINGAPORE

#### FOREIGN JUDGMENT IN PERSONAM – ENFORCEABILITY – RECOGNITION OF FOREIGN JUDGMENT

***Poh Soon Kiat v Desert Palace Inc (trading as Caesars Palace)*; Civil Appeal No 113 of 2008; 8 December 2009; [2010] 1 SLR 1129; [2009] SGCA 60. Chan Sek Keong CJ, Andrew Phang Boon Leong JA and V K Rajah JA**

#### *Facts*

The respondent sought to recover a foreign gambling debt of some US\$2 million incurred by the appellant, Poh when gambling at the respondent's Caesars Palace casino in Las Vegas. This was done by a suit filed in the Singapore High Court on the basis of a 2001 judgment of the Superior Court of the State of California for the County of Santa Clara. This judgment set aside a fraudulent transfer of Poh's interest in a piece of property, and ordered that the property be sold to satisfy the judgment debt, and further held Poh liable for any shortfall. The Singapore High Court held that the Californian judgment was enforceable and that Poh had no defence to its enforceability. On appeal, Poh argued that the respondent's claim was time-barred by the Limitation Act (Cap 163, 1996 Rev Ed) and that it was unenforceable as section 5(2) of the Civil Law Act (Cap 43, 1999 Rev Ed) forbade any action to "be brought or maintained in the court for recovering any sum of money or valuable thing alleged to be won upon any wager or which has been deposited in the hands of any person to abide the event on which any wager has been made."

#### *Judgment*

#### THE LAW ON THE ENFORCEABILITY OF FOREIGN JUDGMENTS IN SINGAPORE

We propose to consider, first, ... the question of whether the 2001 California Judgment was a foreign judgment that could be sued upon under Singapore law. The law on the enforceability of foreign judgments in Singapore is not in doubt, and is summarised in, *inter alia*, DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS (Sir Lawrence Collins, ed.), Vol 1, ¶ 14-020

(Sweet & Maxwell, 14th ed., 2006) (hereinafter “DICEY, MORRIS AND COLLINS”) as follows:

For a claim to be brought to enforce a foreign judgment, the judgment must be for a definite sum of money, which expression includes a final order for costs, e.g. in a divorce suit. It must order X, the defendant in the [enforcement] action, to pay to A, the claimant, a definite and actually ascertained sum of money; but if a mere arithmetical calculation is required for the ascertainment of the sum it will be treated as being ascertained; if, however, the judgment orders him to do anything else, e.g. specifically perform a contract, it will not support an action, though it may be *res judicata*. The judgment must further be for a sum other than a sum payable in respect of taxes or the like, or in respect of a fine or other penalty.

An *in personam* final and conclusive foreign judgment rendered by a court of competent jurisdiction, which is also a judgment for a definite sum of money (hereafter called a “foreign money judgment”), is enforceable in Singapore unless:

- (a) it was procured by fraud; or
- (b) its enforcement would be contrary to public policy; or
- (c) the proceedings in which it was obtained were contrary to natural justice.

Thus, in *Hong Pian Tee v Les Placements Germain Gauthier Inc* [2002] 1 SLR(R) 515, this court stated (at [12]):

Quite apart from the arrangements under the RECJA or the [Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed)], it is settled law that a foreign judgment in personam given by a foreign court of competent jurisdiction may be enforced by an action for the amount due under it so long as the foreign judgment is final and conclusive as between the same parties. The foreign judgment is conclusive as to any matter thereby adjudicated upon and cannot be impeached for any error, whether of fact or of law: *Godard v Gray* (1870) LR 6 QB 139. In respect of such an action, an application for summary judgment may be made on the ground that the defendant has no defence to the claim: *Grant v Easton* (1883) 13 QBD 302. The local court will only refrain from enforcing a foreign judgment if it is shown that the plaintiff procured it by fraud, or if its enforcement would be contrary to public policy or if the proceedings in which the judgment was obtained were

opposed to natural justice: see HALSBURY'S LAWS OF ENGLAND vol 8(1) (Butterworths, 4th Ed) (1996 Reissue) paras 1008-1010.

[The Court went on to hold that the Californian judgment of 2001 was not a judgment for a fixed sum of money but was instead intended to set aside a fraudulent transfer in Poh's interest in a property. It did not create a fresh obligation on the part of Poh to pay the balance of his debt to the respondent. As such, an action for the enforcement of the foreign judgment could not be commenced by way of a common law action. Since a common law action to enforce a foreign judgment was in this case an action on an implied debt, it was subject to limitation of six years under section 6(1) (a) of the Limitation Act. The Court further held that that section 5(2) of the Civil Law Act would appear to bar a common law action on a foreign judgment whose underlying cause of action was a gambling debt.]

## Criminal Law

### PHILIPPINES

#### OBLIGATIONS RELATING TO CORRUPTION AND TRANSNATIONAL CRIME – INQUIRIES IN AID OF LEGISLATION

***Spouses Pnp Director Eliseo D. Dela Paz (Ret.) Aand Maria Fe C. Dela Paz v. Senate Committee on Foreign Relations and the Senate Sergeant-at-Arms Jose Balajadia, Jr.*** [GR No. 184849. 13 February 2009]

Retired Philippine National Police Director Eliseo D. Dela Paz was found in possession of 150,000 euros in an airport in Moscow. He was apprehended by local authorities at the airport departure area for failure to declare the amount. Together with his delegation, he was detained in Moscow for questioning. They were allowed to return to the Philippines, but the Russian government confiscated the money. Awaiting Dela Paz and his wife were subpoenae issued by the Committee. The authority of the Senate Committee on Foreign Relations to probe the incident was questioned. The Supreme Court held that the Committee has jurisdiction to investigate the matter in aid of legislation.

The Court reasoned, among others, that the matter affects Philippine international obligations. It took judicial notice of the fact that the

Philippines is a state-party to the United Nations Convention Against Corruption and the United Nations Convention Against Transnational Organized Crime. The two conventions contain provisions dealing with the movement of considerable foreign currency across borders.<sup>1</sup> The matter would reflect on the country's compliance with the obligations required under the conventions.

#### **CHILD PORNOGRAPHY**

An Act defining and penalizing the crime of Child Pornography, prescribing penalties therefor and for other purposes

#### **Republic Act No. 9775**

The Anti-Child Pornography Act was signed into law on 17 November 2009. This penalizes, among others, several unlawful or prohibited acts covered under child pornography, including syndicated child pornography. It declares as policy for the Philippines to comply with international treaties to which the Philippines is a signatory or a state party concerning the rights of children which include, but not limited to, the CRC, the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, the International Labor Organization Convention No. 182 on the Elimination of the Worst Forms of Child Labor and the Convention Against Transnational Organized Crime.

Additionally, it *inter alia* provides for duties of an internet content host not to host any form of child pornography on its internet address, the authority of local governments to regulate internet cafés or kiosks to prevent violations of the Act, and the confiscation or forfeiture of the proceeds, tools, and instruments used in child pornography.

Pursuant to the Convention Against Transnational Organized Crime, the Act empowers the Department of Justice to request assistance of a foreign state for assistance in the investigation or prosecution of any form of child pornography. The DOJ, in consultation with the Department of

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1 The Supreme Court cited Art. 14(2) of the United Nations Convention Against Corruption and Art. 7(1) of the United Nations Convention Against Transnational Organized Crime.

Foreign Affairs (DFA), shall also endeavor to include child pornography among extraditable offenses in future treaties.

## Diplomatic & Consular

### SINGAPORE

#### DIPLOMATIC IMMUNITY – HIT & RUN – ROMANIAN CHARGE D’AFFAIRES

#### **The Ionescu Affair: Statement by the Ministry of Foreign Affairs, 16 April 2010**

In the early hours of 15 December 2009, three pedestrians were knocked down in a hit-and-run. One person died while the other two were injured. The vehicle, a black Audi A6 with diplomatic plates, had beaten two red lights before knocking down the pedestrians. The car was later identified as that driven by Dr Silviu Ionescu, the Chargé d’Affaires ad interim of the Romanian Embassy in Singapore. About 40 minutes after the incident, Ionescu reported the vehicle stolen and the car was found abandoned near some four hours later. Ionescu left Singapore three days after the incident and refused to return to face criminal charges after a Coroner’s inquiry determined that the car had not been stolen and that it was driven by Ionescu at the time of the incident. The fact that Ionescu was allowed to leave Singapore angered members of the public, leading to the Ministry of Foreign Affairs issuing the following statement on 16 April 2010:

We should not confuse the privileges and immunities which diplomats enjoy during their posting in a country to which they are accredited with the privileges and immunities they enjoy after leaving the country of accreditation at the end of their postings.

They are different situations and the Vienna Convention on Diplomatic Relations clearly recognises these differences.

Article 39(1) of the Vienna Convention states that a diplomat’s privileges and immunities begin from the moment he enters the receiving State to take up his post. These privileges and immunities include freedom from detention and arrest (Article 29) and immunity from the jurisdiction of the criminal courts of the receiving State (Article 31(1)).

As long as a diplomat remains accredited to a receiving State, his privileges and immunities in that State would apply to all his actions, whether official or private.

So even if Dr Ionescu did not leave Singapore after the accident, as an accredited diplomat we cannot arrest him unless the Romanian government waives his immunity. His immunity then covered anything he did, whether official or private.

But as you know, Dr Ionescu left Singapore on 18 December 2009, three days after the accident.

At that time he was still a diplomat officially accredited to Singapore and therefore could not be prevented from leaving.

Furthermore, the police had at that time not completed their investigations and it was not yet established that Dr Ionescu was the driver of the vehicle that caused the accident on 15 December.

The situation now is different and a different provision of the Vienna Convention now applies.

Article 39(2) of the Vienna Convention stipulates that, after a diplomat's posting ends and he leaves his country of accreditation, some of his privileges and immunities would also end. To be more specific, while he would still enjoy immunity for official acts, he would no longer enjoy immunity for private acts.

The Romanian government has now officially withdrawn Dr Ionescu from Singapore, thus ending his posting with effect from 5 January 2010. He is no longer an accredited diplomat in Singapore. The Coroner's Inquiry has concluded that Dr Ionescu was the driver of the vehicle that caused the accident and that he was acting in a private capacity and engaged in private and not official activity at that time.

Therefore Dr Ionescu does not now enjoy and cannot now claim immunity for the accident. Diplomatic immunity is no longer a relevant issue.

I can understand how these legal technicalities may be confusing to anyone who is not a lawyer or diplomat. I can understand their frustration about how they seem to be preventing justice being done. And we certainly share the outrage all Singaporeans feel about Dr Ionescu's actions and wild statements.

But Singapore's high international reputation as a country that respects the law is a precious asset and we must always observe the law and due process.

We have stressed to the Romanian government many times that it should persuade Dr Ionescu to return to Singapore to stand trial or, if this is not possible, to expeditiously investigate and prosecute

him under Romanian law. As I have said before, we are ready to assist the Romanian authorities to the fullest extent under our law.

And as I said yesterday, we are waiting for the Romanian authorities to propose specific dates for their relevant officials to visit Singapore so that we can share the evidence we have with them. We hope they will visit Singapore soon.

Let me emphasize that the Romanian authorities have acted entirely properly so far and have repeatedly stressed that they share our interest in seeing that justice is served. It is not in Romania's own interest to allow the actions of one individual to continue to disgrace the entire country.

In Bucharest, Ionescu was arrested and charged by the State Prosecutor on 1 July 2010 for culpable homicide, grievous bodily harm with intent, deserting the place of an accident and providing the police with false evidence. In March 2013, he was sentenced to 3 years' jail.

## Economic Law

### NEPAL

#### APPLICABILITY OF UNCITRAL ARBITRATION RULES - CONSISTENCY WITH 1982 ARBITRATION ACT

***Damodar Ropeway & Construction Co. v. Nepal Orient Magnesite Pvt. Ltd. and Others.*** Division Bench of the Supreme Court of Nepal, (Rt. Hon. Chief Justice Ram Prasad Shrestha & Hon. Justice Prem Sharma), decided on July 7, 2010.

#### *Facts*

The petitioner, Damodar Ropeway & Construction Co., an Indian company and Nepal Orient Magnesite Pvt. Ltd., a Nepali company entered into an agreement regarding the sale and purchase of goods and services. The agreement stipulated a provision regarding that Nepalese law to be the applicable law and UNCITRAL Arbitration Rules to be the applicable rules in governing the arbitration process. Also, both parties had agreed to decide their disputes by an arbitration tribunal. A dispute ensued between the parties on the payment of the turnkey project. As stipulated in the agreement, the arbitration tribunal was established and the petitioner's claim

was approved by the majority of the arbitration tribunal. The defendant appealed to the Appellate Court asking to annul the arbitration award on two major grounds among others. First, the arbitration tribunal followed the UNCITRAL Arbitration Rules governing procedural matters in contravention to the Arbitration Act of Nepal. Second, without the completion of the project, the arbitration tribunal mistakenly awarded full payment to the petitioner. The Appellate Court revoked the award of the arbitration tribunal. Finally, the petitioner approached the Supreme Court challenging the decision of the Appellate Court asking the Supreme Court to uphold the award of the arbitration tribunal.

### *Judgment*

The Supreme Court of Nepal delivered its decision primarily on two issues. First, it determined the legal validity of the application of the UNCITRAL Arbitration Rules. Second, it decided whether the arbitration tribunal could make its award on the basis of a counter claim. The Supreme Court found the decision of the Appellate Court inconsistent with the 1982 Arbitration Act of Nepal.<sup>2</sup> The Appellate Court found the decision of the arbitration tribunal unjustifiable because the arbitration tribunal adopted a process under the UNCITRAL Arbitration Rules allowing counter claims, which in the opinion of the Appellate Court was not consistent with the 1982 Arbitration Act. The Supreme Court, however, found that the 1982 Arbitration Act provided no specific provision on the matter of a counter claim process. Nevertheless, the making of a claim; response to the claim; counter claim; and response to the counter claim are established processes in any arbitration that are impliedly covered by the Arbitration Act in the provision regarding claims and responses. The Supreme Court thus found that the acceptance of a counter claim by the arbitration tribunal under the UNCITRAL Arbitration Rules was not inconsistent with the Arbitration Act of Nepal. However, the Supreme Court justified the decision of the Appellate Court to the extent that an arbitration tribunal could not make its award on a counter claim equivalent to a fresh claim consisting of a new claim amounting to additional liabilities.

The Supreme Court further provided that the parties of an agreement retain the autonomy to choose arbitration as a mode of dispute settlement

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2 The 1999 Arbitration Act has superseded the 1982 Arbitration Act.

and can fix the procedural aspect of the arbitration. However, the parties exclusively can only exercise this autonomy. Arbitrators cannot assume the role of the parties and enjoy this autonomy. Further, the Supreme Court noted that the UNCITRAL Arbitration Rules do not hold an equivalent status with domestic law. Therefore, the UNCITRAL Arbitration Rules cannot be applied as a substitute for the substantive provisions of domestic law.

The Supreme Court also instructed that arbitrators are not supposed to apply UNCITRAL Arbitration Rules to fill in gaps in domestic law to the detriment of limiting the scope of domestic law. If arbitrators apply UNCITRAL Arbitration Rules to a situation that is not imagined by domestic law, it will ultimately aggravate a situation of judicial anarchy. Arbitrators can apply UNCITRAL Arbitration Rules on procedural matters as agreed to by the parties of an agreement where domestic law is silent.

## PHILIPPINES

### INFRINGEMENT OF BROADCASTING RIGHTS (INTELLECTUAL PROPERTY) – APPLICATION OF THE 1961 ROME CONVENTION

#### ***Abs-Cbn Broadcasting Corporation (Abs-Cbn) v. Philippine Multi-Media System, Inc. (PMSI)* [GR No. 175769-70. 19 January 2009]**

The Supreme Court resolved, inter alia, the contention that the retransmission of ABS-CBN's signals by PMSI was a violation of the former's broadcasting rights under the Intellectual Property Code of the Philippines (IP Code). In finding no merit in this contention, the Court reasoned in part that the acts of PMSI did not constitute rebroadcasting because the services it rendered fall under cable "retransmission" as described in the Working Paper prepared by the Secretariat of the Standing Committee on Copyright and Related Rights within the context of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961 Rome Convention).<sup>3</sup> It was not the

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3 WIPO (The Secretariat of the Standing Comm. on Copyright and Related Rights), Protection of Broadcasting Organizations: Terms and Concepts, WIPO Doc. No. SCCR/8/INF/1 (Aug. 16, 2002), available at [http://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_8/sccr\\_8\\_inf\\_1.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_8/sccr_8_inf_1.pdf).

origin nor did it claim to be the origin of the programs broadcasted by ABS-CBN. It did not make and transmit on its own but merely carried the existing signals of ABS-CBN.

As defined in the IP Code, broadcasting is the “the transmission by wireless means for the public reception of sounds or of images or of representations thereof; such transmission by satellite is also ‘broadcasting’ where the means for decrypting are provided to the public by the broadcasting organization or with its consent.”<sup>4</sup> Under the 1961 Rome Convention,<sup>5</sup> rebroadcasting refers to “the simultaneous broadcasting by one broadcasting organization of the broadcast of another broadcasting organization.”<sup>6</sup>

The Court held that while the 1961 Rome Convention gives broadcasting organizations the right to authorize or prohibit the rebroadcasting of its broadcast, this protection does not extend to cable retransmission. It added that PMSI is not a broadcasting organization within the meaning of the Working Paper,<sup>7</sup> and therefore, does not have the responsibilities attached to such organizations.

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4 Intellectual Property Code, § 202.7, Rep. Act 8293 (Phil.).

5 Entered into force on September 25, 1984, *available at* [http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=17](http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=17) (last visited Sept. 25, 2012).

6 1961 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations art. 3(g), Oct. 26, 1961, 496 U.N.T.S. 43.

7 The Secretariat of the Standing Comm. on Copyright and Related Rights, *supra* note 1.

## Environmental Law

### PAKISTAN

#### ENVIRONMENTAL PROTECTION ACT - PRECAUTIONARY PRINCIPLE OF ENVIRONMENTAL REGULATIONS - RIGHT TO LIFE

#### **Suo Motu Case No. 25 of 2009, 15 September 2011 (Cutting of Trees for Canal Widening Project Lahore)**

##### *Facts*

In 2005, the Government of Punjab planned to open a 14 km long Canal Bank Road along the Bambawali-Ravi-Bedian Canal, in the section between Dharampura Underpass and Thokar Niaz Baig, in Lahore. This project, known as the Canal Road Project, was challenged by several organizations, not only on the grounds of environmental and ecological concern, but also due to the absence of real urban planning and the project's inadequacy in solving Lahore's traffic congestion. The project would amount to a loss of more than 3.000 kilometres of exceptionally beautiful landscape.

The principle petitioner in this case was the Lahore Bachao Tehrik (Save Lahore Movement), an "umbrella" organization, along with several others. The petitioners claimed a violation of the right to life, as guaranteed under the Pakistani Constitution,<sup>8</sup> as well as a violation of the Precautionary Principle of environmental regulations<sup>9</sup>, according to which it is imperative "to first consider the welfare and safety of the human beings and the environment and then to pick up a policy and execute the plan which is more suited to obviate the possible dangers or make such alternate precautionary measures which may ensure safety."

More specifically, the petitioners claimed that the Environmental Impact Assessment (EIA) that had approved the Canal Road was flawed, since it did not consider other existing alternatives to alleviate traffic congestion. More specifically, the petitioner claimed that the environmental approval

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8 The violation of the right to life was founded on the argument that the trees and plants contribute significantly towards purification, since they make their food from carbon dioxide and release oxygen for us to breathe.

9 Referring to the Supreme Court's jurisprudence in the *Shehla Zia Case; Zia v. WAPDA, PLD (SC) 693 (1994) (Pak.)*.

granted to the Canal Road Project was illegal, void, and of no legal effect because the Environmental Protection Agency in Punjab (“EPA-Punjab”) unlike the Pakistan Environment Protection Agency (“PakEPA”) set up under section 5 of the Pakistan Environmental Protection Act, 1997 (“PEPA”), was not independent, but was entirely attached to the government. Finally, the petitioners brought up the concept of “Public Trust,” which “enjoins city fathers to maintain guardianship and stewardship of the people’s priceless and historic natural resources.”

The respondent provincial government, on the other hand, claimed that the Canal Road Project would widen the existing lane by 18 feet and therefore was designed in the public’s interest and with a view to improve drastically the traffic conditions on the Canal Road. The government also advanced the argument that the project was useful, in view of the expected growth of Pakistan’s population in the following years, and had been conceived specifically in order to accommodate the growing population of Lahore. According to the government, the Canal Road is the main artery and the spine of Lahore, with approximately 100,000 vehicles per day. In their view, the Canal project was necessary to improve the traffic conditions on the Canal Road, especially since other measures taken (public transport, environmentally friendly busses, etc.) had been proved to be useless. Furthermore, the government claimed that the EIA was duly prepared by the National Engineering Services of Pakistan (“NESPAK”) and submitted in January 2007, in accordance with the Punjab Environmental Protection Agency (“PEPA”) and other relevant regulations.

Given the controversy surrounding the project, a judicial mediation procedure was put in place by the Supreme Court. More specifically, on the 14 February 2011, a Bench of that Court, with the consent of the Government, had nominated Dr. Pervez Hassan, an expert in environmental law,

as a mediator. The Court had ordered him to find a suitable solution, in association with any other person, expert, or government he thought useful.

Hence, Dr. Pervez Hassan formed a Committee, consisting of eight members having “illustrious background of public service in various fields.” This Committee submitted a detailed report of recommendations (the Mediation Committee Report) to the Court three months later on 14 May 2011. After analysing the urban and ecological issues at stake, the Report found that the Canal project had serious flaws, specifically referencing the proposed widening and the commercial growth of each Section of the Canal. The Committee also noted that its recommendations should be applied as a “complete package” and with no “cherry picking.”<sup>10</sup> As noted by the Committee, this widening would, in the absence of other required mitigating measures, serve the traffic needs only for the next 4-5 years. In effect, we would need more lanes in the future. This way, most of the green belt of the Canal Bank Corridor, a valuable part of Lahore’s legacy and heritage, could be lost for future generations.

However, given that the recommendations had been taken by consensus, not all of the members of the committee fully agreed with their own Report. Dr. Pervez himself, already one of the petitioners, objected to the proposed widening. Further, the petitioners claimed that only two members of the Committee were professional experts, while all others had political affiliations with the Provincial Government.

### *Judgment*

The detailed judgment, delivered by Justice Jillani, starts with a quotation from the famous architecture critic and writer, Ada Louise Hustable: “Any

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10 Among other things, the Committee recommended to declare the Lahore Canal Area a Heritage Urban Park, to correct the “incorrect underpasses” on the Canal Road and re-engineer the junctions, to construct Service Roads and Implement Traffic Management Programs, and to divert the Through-Traffic on the Canal Road onto New Traffic Corridors. The report included general recommendations, such as “to treat the Lahore Canal in a holistic manner, so that the Canal Road is considered in its entirety from where it begins near the BRB-Link Canal through the Thokar Niaz Beg overpass” or “to restore the communal Life.” The report also included specific and forfeit-like provisions: “For each tree felled in any sector of the Lahore Canal Road, the Punjab Government will plant at least a hundred (100) mature trees in replacement.”

city gets what it admires and what it pays for and ultimately deserves. And we will probably be judged not for the monuments we build but the monuments we destroy.”

However, in the rest of the judgement, the Court fully accepts the Government’s argument that the project would improve Lahore’s traffic congestion, according to the initial study prepared in accordance with the relevant regulations.

The Court referred to all the relevant regulations of the Federal Government, including the Environmental Protection Act (the PEPA, precited), the “EPA-Punjab,” and the PakEPA’s Regulations (“IEE and EIA Regulations”) and found that there was no illegality—or rather that the Government “fully complied” with all the Regulations (para 15).

An examination of the material placed before this Court reveals that the afore-referred provisions of the Act and the Regulations framed thereunder were strictly complied with. Admittedly, the project designed by TEPA was initially approved by the Provincial Government and then was referred to EPA-Punjab which in terms of Sub-section (3) of Section 12 read with Rule 4 of the Regulations carried out public hearing. It also constituted a committee consisting of ten experts in terms of Regulation No. 11 (2) of Review of IEE and EIA Regulations who were consulted before the grant of approval and in terms of Rule 13. The EPA-Punjab also laid down stringent conditions/precautionary measures as also ameliorative steps to minimize the effect of cutting of some trees and damage to the green belt on both sides of the road.

As to the “environmental disaster,” and especially the deforestation, the Court took it as a given that this would constitute a violation of “the Fundamental Right to Life (Article 9 of the Constitution) that could have the effect of degrading human existence (violation of Article 14 of the Constitution, with regard to human dignity).” In its reasoning, the Court largely quoted the *Shehla Zia* (1994) decision, a case related to the hazards of electromagnetic fields from grid stations: “The word ‘life’ is very significant as it covers all facts of human existence [...] any action taken which may create hazards of life will be encroaching upon the personal rights of a citizen to enjoy the life according to law.”<sup>11</sup>

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11 *Zia*, PLD (SC) 693 (Pak.).

However, noted that this jurisprudence was in casu irrelevant (para 17). The Court found no violation of the right to life (Article 9 of the Constitution) or to the right of human dignity (Article 14). The Canal Road Project is neither a plant omitting hazardous gases nor releasing pollutants in the canal water. It aims at widening the road on both sides of the Canal Bank which of necessity would cause some damage to the green belt and thereby affect environment.

Further, it observed that there was no certain proof (no “incontrovertible material”) that the project would seriously affect the “human condition.” It also accepted that the project’s impact was of a “minimum damage to ecology and environment” in comparison to its benefits, noting also that any project of this kind would have some “adverse impact on environment” (para 17).

The apprehended change or damage which has neither been quantified nor ascertained per se may not be violative of Fundamental Right of Right to Life (Article 9 of the Constitution) unless it is shown by placing incontrovertible material before this Court that it would lead to hazardous effects on environment and ecology to an extent; that it would seriously affect human living. A close perusal of Canal Road Project indicates that before its approval, TEPA referred the matter to NESPAK which carried out the requisite studies and after detailed analysis came to the conclusion that the Canal Road Project is environmentally viable [...]

The argument that the widening of roads on both side of the Canal would be devastating and would have irreparable effects on ecology has been attended to, both while granting environmental clearance by the competent authority and also by the report of the Mediation Committee. Every project of this kind would have some adverse impact on environment but that would be negligible as compared to the ameliorative effects it is expected to have on traffic congestion and convenience of commuters and on improvement in traffic safety levels.

As to the petitioner’s argument on Public Trust, after a detailed reference to the Supreme Court of India’s jurisprudence<sup>12</sup>, an article by Prof.

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12 *Moulvi Iqbal Haider v. Capital Dev. Auth.*, PLD (SC) 394 (2006) (Pak.); *Rural Litig. & Entitlement Kendra v. State of Uttar Pradesh*, A.I.R. 1985 S.C. 652, 656 (India); In *Charan Lal Sahu v. Union of India* (Bhopal Disaster case), A.I.R. 1990 S.C. 1480 (India); *M.I. Builders Pvt. Ltd. v. Radhey Shyam Sahu*, (1999) 6 S.C.C. 464 (India);

Sax entitled, “The Public Trust Doctrine in Natural Resource Law”<sup>13</sup>, as well as its own jurisprudence, the Court found that there was no violation of this “concept.” Likewise, it found no violation of the “concept” of sustainable development.

The Court did, however, suggest some “mitigative measures” and “precautions” to ensure that there was minimum damage to the ecology and environment of the area. These measures (para 18) were in conformity with the measures described in the Mediation Committee Report, in which the Court placed a lot of significance. After referring to an ICJ decision<sup>14</sup> to legitimate the mediation procedure followed, as a procedure in “public interest litigation,” it noted that both the petitioner and the respondent had accepted the report of the Mediation Committee. In this respect, it was recognized that the Canal is a Public Trust and should be treated as Heritage Urban Par.

Consequently, the Court ordered that the widening should be done in conformity with the Committee’s recommendations. Most notably, it ordered the Punjab Government to ensure that minimum damage is caused to the green belt, that every tree cut is replaced by four trees between six and seven feet in height, and that the Registrar of the Court is notified of this process through press releases sent to its Registrar. Also, the Chief Secretary of the Government was directed to prepare a comprehensive action plan and submit it to the Court within six weeks of the receipt of the judgment.

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*M.C. Mehta v. Kamal Nath*, 1 S.C.C. 388 (1997) (India); *Th. Majra Singh v. Indian Oil Co.*, A.I.R. 1999 J. & K. 81 (India).

13 Justified the doctrine by holding that, “some public interests in the environment are intrinsically important, the gifts of nature’s bounty ought not be constrained for private use, and some uses of nature are intrinsically inappropriate.”

14 *The Gabčíkovo-Nagymaros Project Dispute (Hung. v. Slov.)*, 1997 I.C.J. 7 (Sept. 25).

## PHILIPPINES

## CLIMATE CHANGE – LEGISLATION – AGENDA 21

**Republic Act No. 9729**

The Climate Change Act of 2009 declares the policy of the state to afford full protection and the advancement of the right of the people to a healthful ecology in accord with the rhythm and harmony of nature. To note, the Philippines has previously adopted the Philippine Agenda 21 framework which espouses sustainable development, to fulfill human needs while maintaining the quality of the natural environment for current and future generations. The state also declares the adoption of the principle of protecting the climate system for the benefit of humankind, on the basis of climate justice or common but differentiated responsibilities and the Precautionary Principle to guide decision-making in climate risk management.

Furthermore, the Act states that as a party to the United Nations Framework Convention on Climate Change, the state adopts the ultimate objective of the Convention. Likewise, as a party to the Hyogo Framework for Action, the state likewise adopts the strategic goals in order to build national and local resilience to climate change-related disasters. Among others, it also states that the state shall cooperate with the global community in the resolution of climate change issues as it recognizes the vulnerability of the Philippine archipelago and its local communities to potential dangerous consequences of climate change. There is recognition in the Act that climate change and disaster risk reduction are closely inter-related and effective disaster risk reduction will enhance climate change adaptive capacity.

The law provides corresponding meanings to terms relating to climate changes, defined under it as “change in climate that can be identified by changes in the mean and/or variability of its properties and that persists for an extended period typically decades or longer, whether due to natural variability or as a result of human activity.”<sup>15</sup> A Climate Change Commission was established to be an independent and autonomous body with the same status as that of a national government agency and attached to the

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15 Climate Change Act of 2009, Rep. Act No. 9729, §3(d) (Oct. 23, 2009) (Phil.).

Office of the President. The Commission is the sole policy-making body of the government which shall be tasked to coordinate, monitor and evaluate the programs and action plans of the government relating to climate change pursuant to the provisions of this Act. A Climate Change Office was also created to assist the Commission.

The powers and functions of the Commission *inter alia* include ensuring the mainstreaming of climate change, in synergy with disaster risk reduction, into the national, sectoral and local development plans and programs; coordination and synchronization of climate change programs of national government agencies; and formulation of a Framework Strategy on Climate Change to serve as the basis for a program for climate change planning, research and development, extension, and monitoring of activities on climate change. In order to ensure the effective implementation of the framework strategy and program, different government agencies were entrusted with functions relating to climate change. Additionally, a Joint Congressional Oversight Committee was formed to monitor the implementation of the Act.

#### DISASTER MANAGEMENT AND EMERGENCY RESPONSE

##### **ASEAN Agreement on Disaster Management and Emergency Response (AADMER), Philippine Senate Resolution No. 202, 14 September 2009**

The Philippine Senate concurred with the ASEAN Agreement on Disaster Management and Emergency Response (AADMER) which was signed on 26 July 2005 in Vientiane, Lao PDR. The concurrence with the AADMER is largely seen as an impetus for change in the legal framework in the Philippines that deals with climate change and disaster risk reduction and management.

In the resolution concurring with AADMER, the Senate affirms that the AADMER aims to provide a comprehensive regional framework for substantial reduction of disaster losses in lives and in the social, economic and environmental assets of ASEAN states, and to jointly respond to disaster emergencies through national efforts and intensified regional and international cooperation. The AADMER establishes an ASEAN Coordinating Centre for Humanitarian Assistance on disaster management and an ASEAN Disaster Management and Emergency Relief Fund.

## BIODIVERSITY

### **Host Country Agreement Between the Government of the Republic of the Philippines and the ASEAN Centre for Biodiversity, 14 September 2009**

The ASEAN Centre for Biodiversity (ACB) was established to facilitate cooperation and coordination among ASEAN states and with relevant national government, regional and international organizations, on the conservation and sustainable use of biological diversity and the fair and equitable sharing of benefits arising from the use of such biodiversity within the region.<sup>16</sup> The centre was formerly known as the ASEAN Regional Centre for Biodiversity Conservation (ARCBC) which was a European Union-assisted project from 1999 to 2004. It was also hosted by the Philippines.

ASEAN states decided to continue and institutionalize the functions of the ARCBC through the establishment of the ACB which will have a legal personality of its own, under the auspices of the ASEAN. The host agreement was signed on 8 August 2006 in Manila and it was transmitted to the Philippine Senate on 22 August 2007 for concurrence.

## Human Rights

### BANGLADESH

#### CHILDREN'S RIGHTS - CHILD PROTECTION - ADMINISTRATION OF JUVENILE JUSTICE - IMPLEMENTATION OF CRC AND OTHER INTERNATIONAL INSTRUMENTS- CHILD'S BEST INTERESTS IN CUSTODY MATTERS

***State v. Secretary, Ministry of Law, Justice & Parliamentary Affairs and others*, 30 BLD (HCD) (2010), 369; 38 CLC (HCD) (2009). Supreme Court of Bangladesh, High Court Division (Criminal Appellate Jurisdiction)**

#### *Facts*

A television news broadcast on Channel I at about 9.00 p.m. on 10.04.2009 (April 10, 2009) about the rape of minor girl caught the attention of the

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16 Host Country Agreement between the Government of the Republic of the Philippines and the ASEAN Centre for Biodiversity, art. III, Aug. 8, 2006.

learned Court. It was reported that a minor girl by the name of “S” (identity withheld) was allegedly raped by her neighbour and distant relative (identity withheld). The parents of the girl, after getting her treated in a local clinic, took her for better treatment to the Osmani Medical College Hospital, Sylhet and, thereafter, took her to the Osmani Nagar Police Station on 27.03.2009 (March 27, 2009) in order to lodge a First Information Report (F.I.R.). The police, after recording the case, sent the girl to the Court of the learned Magistrate, who ordered the girl, 7 years of age, to be kept in safe custody at the Safe Home in Bagbari, Sylhet, managed by the Department of Social Welfare.

It further transpired from the report that the parents were not allowed to visit the girl and the Magistrate would not give the girl to the Jimma (custody) of her father. It was also reported that a well-wisher in the locality spent Tk. 26,500/- for publishing the matter in a newspaper addressing the Prime Minister hoping for some intervention but that initiative too failed.

Finding the course of events rather disturbing, especially as it appeared that the little girl was being held in safe custody without lawful authority while her parents, who were willing and capable of keeping and caring for her, were allegedly denied her custody, the Court issued a *Suo Motu* Rule upon the respondents to show cause as to why “S” shall not be released from the Safe Home of the Department of Social Welfare and be dealt with in accordance with law. Pending hearing of the Rule, “S” was directed to be released from custody forthwith to the Jimma (custody) of her father.

In due course, the Court also sought an explanation from the learned Magistrate who had sent the victim girl to safe custody instead of complying with the parents’ request to place her in their care. The Magistrate maintained that no prayer was made by the parents or nearest relatives of the victim seeking her custody and, as a result, he had no alternative but to send her to the approved home managed and controlled by the Ministry of Social Welfare under section 58(a) of the Children Act, 1974.

### *Judgment*

Recognising the seriousness of the issues pertaining to the incident, the Court deemed it fitting and necessary to deal with the matter in considerable detail. The Court referred to existing case law that underscored the significance of conforming to relevant international legal instruments and rectifying prevalent anomalies in national laws. The Court observed:

Having considered the submissions of the learned advocates and keeping in mind the various recommendations and directions issued by this Court with regard to the provisions of the Children Act and international instruments containing beneficial provisions in the best interests of the child, we are somewhat perturbed to note that the authorities concerned and the agencies involved in dealing with children are still unfortunately unaware of the relevant provisions of the law and international instruments which are in a way binding upon us. Whether or not provisions of international instruments are binding was discussed in the case of *State v. Metropolitan Police Commissioner*, 60 DLR 660. In this regard we may again refer to the decision in the case of *Hussain Muhammad Ershad v. Bangladesh and Others*, 21 BLD (AD) 69, where his lordship B.B. Roy Chowdhury, J. pointed out that although the provisions of international instruments are not binding unless they are incorporated in the domestic law, they should not be ignored. His Lordship went further to say that beneficial provisions of the international instruments should be implemented as is the obligation of a signatory State. We note that in the same vein we mentioned in the case of *State v. Metropolitan Police Commissioner*, 60 DLR 660 that as signatory Bangladesh is obliged to implement the provisions of the CRC. We also stated in that case that if the beneficial provisions of the international instruments do not exist in our law and are not in conflict with our law, then they ought to be implemented for the benefit and in the greater interests of our children. But sadly the provisions of the International Instruments are rarely, if at all, implemented. Moreover, proper implementation of the provisions of our existing law is sadly lacking and often ignored.

We find that the neglect of the Bangladesh Government to implement the provisions of the CRC has led to numerous anomalies in our judicial system when dealing with cases where an offender and/or the victim are children. A glaring example can be found in the Railways Act, 1890 where in section 130 (1) the provisions of sections 82 and 83 of the Penal Code have been overridden, thus making children below the age of 9 years liable to be prosecuted and punished for offences under the Railways Act. Quite clearly this is patently contrary to the intent and purpose of the provisions relating to children both in the Children Act and the international instruments. Had there been a proper assimilation of our laws then such a glaring discrepancy or incongruity would not have arisen. Another glaring anomaly is found in the Children Rules, 1976 where the punishment that can be awarded to a child who attempts to run away in violation of the Code of Conduct of the

Detention Centre, is caning. This is in stark contradiction with the UN Instrument relating to punishment for children and the prohibition of corporal punishment.

A number of the anomalies and inconsistencies have already been highlighted in the case of Roushan Mondal, cited above, and hence it was suggested and recommended that our law should be amended or a new law formulated in conformity with the provisions of the CRC. However, many years have passed and still we appear to be far away from implementing the provisions of the CRC.

We would, therefore, strongly recommend that immediate steps must be taken by the Government to enact laws or amend the existing law in order to ensure implementation of all the provisions of the CRC, which are beneficial to children and also to minimise the anomalous situations which arise when dealing with children. In particular, in order to avoid further complications in the proper application of the existing laws, prompt action must be taken to ensure that the definition of 'child' is uniformly fixed in all statutes as anyone below the age of 18 years [Art.1 CRC]; the date relevant for considering the age of the accused is the date of commission of the offence, which is fundamental to the concept of protection of children who are not fully mature and do not appreciate the consequence of their actions [explained in detail in the Roushan Mondal case]; in all matters where a child is an accused, victim or witness, the best interests of the child shall be a primary consideration [Art.3 CRC]; that a child's views shall be considered by the Court [Art.12 CRC]; in ALL cases where a child is accused of commission of any offence under the Penal Code or under any special law he is to be tried by a Juvenile Court or any other appropriate Court or Tribunal in accordance with the provisions of the Children Act and Children Rules [discussed in Roushan Mondal]; the use of children for the purpose of carrying drugs or arms or in any other activity which exposes them to physical and moral danger or any harm must be made a criminal offence to be tried under the Children Act [Art.33 CRC].

We are of the view that for proper administration of justice for children, until such time as Juvenile Courts are set up in each district, there must be a Court designated as being dedicated to hear cases involving children, otherwise the requirement of the law to have expeditious hearings will be frustrated. Reference may be made to Rule 3 which requires hearing of children's cases at least once a week. This is not possible since the Courts are otherwise busy hearing the regular criminal cases, which are given priority. Hence, one Court in each district must be designated as being a

Court dedicated to hear cases involving child offenders so that children's cases can be heard and disposed of on priority basis [Art.37 (d) CRC]. Legal Aid must be made available in all matters involving children so that no child remains unrepresented [Art.40 (2) (b) (ii) CRC]. Make Probation Officers available on call round the clock in all parts of the country to enable proper and effective implementation of section 50 of the Children Act. Similarly, places of safety must be set up, at least one in every district and local health clinics must be empowered for the purpose of medical examination of victims so that the need to detain victims in custody will be considerably reduced.

The Court also drew upon the comments of the UN CRC Committee on Bangladesh State Reports on the CRC of 1997 and 2003 respectively and quoted verbatim relevant portions from the Committee's observations and recommendations:

Incidentally, we may mention that various reports produced by the Bangladesh Government to the Committee of the UN CRC have come to our notice from browsing the internet. In their first available report in the year 1997 the Committee commented as follows:

The Committee is concerned about the unclear status of the Convention in the domestic legal framework and the insufficient steps taken to bring existing legislation into full conformity with the Convention, including in light of the general principles of non-discrimination (art.2), the best interests of the child (art.3), the right to life, survival and development (art.6) and respect for the views of the child (art.12). It is deeply concerned at the lack of conformity between existing legislative provisions and the Convention with respect to the various age limits set by law, the lack of a definition of the child, the age of criminal responsibility, which is set at too young an age, the possibility of imposing the death penalty, and/or imprisonment of children 16-18 in ordinary prisons. The Committee also notes that, as recognized in the State party's supplementary report, many laws are inadequately enforced and that most children's lives are governed by family customs and religious law rather than by State law.

The Committee recommended as follows:

The Committee recommends that the State party pursue its efforts to ensure full compatibility of its national legislation with the Convention, taking due account of the general principles as contained in articles 2, 3, 6 and 12 and the concerns expressed by the

Committee. Furthermore, the State party should develop a national policy on children and an integrated legal approach to child rights.

In response to the second periodic report of Bangladesh Government, the Committee in October, 2003 in its concluding observations dated 27th October, 2003 stated as follows:

The Committee regrets that some of the concerns it expressed and the recommendations it made (CRC/C/15/Add.74) after its consideration of the State party's initial report (CRC/C/3/Add.38), particularly those contained in paragraphs 28-47, regarding the withdrawal of the reservations (para.28), violence against children (para.39), the review of legislation (para.29), data collection (para.14), birth registration (para.37), child labour (para.44) and the juvenile justice system (para.46) have been insufficiently addressed (emphasis added). Those concerns and recommendation are reiterated in the present document.

The Committee recommended as follows:

The Committee recommends that the State party take all effective measures to harmonize its domestic legislation fully with the provisions and principles of the Convention, in particular with regard to existing minimum ages of criminal responsibility and of marriage, child labour and harmful traditional practices affecting children.

It appears that there have been assurances given by the Bangladesh Government that a Directorate of Children Affairs would be established, but in spite of recommendation to take all necessary measures to expedite the establishment of the Directorate no such Directorate has been established. The Committee further recommended that the State party take all appropriate measures to ensure that the principle of the best interests of the child is integrated into all legislation, as well as in judicial and administrative decisions and in projects, programmes and services which have an impact on children. The Committee also encouraged the State party to take all necessary measures to ensure that traditional practices and customary law do not impede the implementation of this general principle, notably through raising awareness among community leaders and within society at large.

The Committee further recommended as follows:

The Committee strongly recommends that the State party take immediate steps to ensure that the imposition of the death pen-

alty for crimes committed by persons while under 18 is explicitly prohibited by law.

The Committee made further recommendation as follows:

The Committee recommends that the State party:

- (a) Promote and facilitate respect for the views of children and their participation in all matters affecting them in all spheres of society, particularly at the local levels and in traditional communities, in accordance with article 12 of the Convention;
- (b) Provide educational information to, inter alia, parents, teachers, government and local administrative officials, the judiciary, traditional and religious leaders and society at large on children's right to participate and to have their views taken into account;
- (c) Amend national legislation so that the principle of respect for the views of the child is recognized and respected, inter alia, in custody disputes and other legal matters affecting children.

Recently in June 2009 the Committee in its concluding observations upon considering the 3rd and 4th periodic reports of the People's Republic of Bangladesh made, inter alia, the following comments and recommendations:

The Committee welcomes the establishment of the National Council for Women and Child Development in February 2009, headed by the Prime Minister. The Committee again urged the State party to take all necessary measures to address the previous recommendations that have not been fully implemented and to provide adequate follow-up to the recommendations contained in the present concluding observations on the combined third and fourth periodic report.

The Committee observed as follows:

However, the Committee remains concerned that some aspects of domestic legislation continue to be in conflict with the principles and provisions of the Convention and regrets that there is no comprehensive law to incorporate the Convention into domestic legislation. In particular, the Committee is also concerned that the 1974 Children's Act has not been revised in line with the Convention.

The Committee recommends that the State party continue to harmonize its legislation with the principles and provisions of the Convention and incorporate the Convention into domestic legislation, ensuring that the Convention can be invoked as a legal basis by individuals and judges at all levels of administrative and

judicial proceedings. The Committee also recommends that the 1974 Children's Act be revised to cover comprehensively the rights of the child. Finally, the Committee encourages the State party to carry out an impact assessment of how new laws affect children.

The Committee welcomes the strong political will to address children's issues and notes the information shared by the delegation on the newly established National Council for Women and Child Development (NCWCD) as an oversight mechanism. Nevertheless, the Committee remains concerned that effective coordination and monitoring have not been fully developed, in particular due to the relatively low empowerment of the coordinating body (Ministry of Women and Children's Affairs (MoWCA)) vis-à-vis other ministries, sectors, and levels of administration involved in the implementation of the rights of the child. Furthermore, the Committee notes with concern the risk of overlapping and duplication between the NCWCD, MoWCA and Department for Children, expected to be established under the MoWCA.”

The Court emphasised State obligation in ensuring the best interests of the child in all actions affecting them and expressed dissatisfaction at the ignorance of legal functionaries about the minimum standards for treatment of children in contact with the law. The Court observed:

The plight of children across the globe over the last 100 years had been considered in the decision of Roushan Mondal, cited above. Sadly, it appears that only lip service is paid by many countries, including the so-called developed countries, to 'the best interests of the child.' We note that when it comes to children committing more serious crimes, they are tried effectively as adults and the best interests of child takes back-stage as a mere slogan. This is in spite of the clear mandate in Article 3 of the CRC for State Parties to ensure that in all actions concerning children taken by institutions, including courts of law, the best interests of the child shall be a primary consideration. The age-old attitude of demonising children who commit serious crimes is to be deplored. Courts should at all times consider the reasons behind the deviant behaviour of the child and after taking into account all the attending facts and circumstances decide what treatment would be in the best interests of the child.

We are dismayed that till today Bangladesh is still lagging far behind in caring for its children. Because of our failure to implement the beneficial provisions of the CRC, the plight of our children has not improved to any measurable extent. The fact that we are lagging behind is only too apparent from the persistent recom-

mentation of the Committee of CRC for Bangladesh to incorporate and implement the provisions of the international instrument.

In the facts of the instant case, had the best interests of the child been considered then the learned Senior Judicial Magistrate, Sylhet should have realised that the best interests of a seven year old girl demands (emphasis added) that she be allowed to remain with her parents. The learned Magistrate, if he had any sense of common humanity in his dealings with a child and if he had applied a humane attitude, then he would have searched out the girl's parents in order to ascertain that they are fit and capable of retaining her custody. Moreover, had the learned Magistrate properly appreciated the law, then he could not have torn the girl away from her parents and sent her to safe custody in the safe home. Clearly the option that he had applied is a subservient provision of the law, the proviso being the dominant provision, that is to say, if the parent/guardian of a child is fit and capable of providing proper care, control and protection, then the custody of the child should have been given to the said parent or guardian. To say that the girl was sent to safe custody because there was no application by the parents for the custody of the girl is not proper interpretation of the law. ... Quite clearly, the learned Magistrate acted in total violation of the provisions of law. When it is apparent that the girl was crying to be with her mother, that clearly is an expression of the view of the child to be with her mother and in compliance with Article 12 of the CRC the learned Magistrate should have given effect to it. A crying child is itself a patent application before any right-thinking person that s/he wants to be with her/his mother. We feel that the learned Judge is bound to take into account the child's view. There is nothing on record to suggest that the learned Magistrate at all considered the views of the child which shows abject ignorance of the international provisions, which are meant to be for the welfare and wellbeing of children. Moreover, the tearing away of a seven year old female child from the bosom of her mother can be nothing other than cruel and inhuman treatment which is contrary to Article 27 of the CRC as well as Article 35(5) of our Constitution. The learned Magistrate has clearly acted in contravention of the provisions of law, the Constitution and the CRC, to which Bangladesh is a signatory. He has caused immeasurable human suffering to the victim girl and her parents. It is abundantly clear that the lower judiciary is not sensitised enough nor indeed sufficiently aware of relevant provisions of law to cope with a situation of this nature. It does not take a lot of intelligence to realize that a seven year old girl, who had been raped and severely traumatised, needs the company and

succour of her mother and yet the learned Magistrate caused even more trauma by wrenching the girl apart from her mother and putting her in a safe home totally isolated from her family at the time of her greatest need. Such a decision of the learned Magistrate clearly shows his lack of appreciation of the severity and gravity of the situation and the feelings of the victim girl. Moreover, his interpretation of the law shows his callous disregard for both our domestic law as well as international instruments. We would only remind all members of the judiciary that according to the decision in the case of *Hussain Muhammad Ershad v. Bangladesh and others*, 21 BLD (AD) 69, unless the provisions of the international instrument conflict with our domestic law, as signatories to those instruments, we are obliged to implement and apply the provisions of those instruments.

When we consider the repeated exhortation of the Committee of the CRC aimed at the Bangladesh Government to implement the provisions of the Convention, we find that the government has been very slow to react, particularly in the field of justice for children. As a result we find anomalous situations and decisions emanating from the sub-ordinate judiciary.

We can only reiterate the comment of the Committee of the CRC which welcomed “the strong political will to address the children issues”. We would suggest that for proper implementation of the provisions of the CRC as well as other international instruments, it is necessary to have sensitised personnel dealing with children at the various stages of the justice process. We, therefore, need dedicated and sensitised personnel in the various departments, ministries, judiciary, police, probation and other relevant agencies. Most of all, we need awareness in all those who deal with children as to their rights and needs and a benevolent attitude towards children and their plight.

The Court provided a number of directions and recommendations, which included:

1. All persons concerned with children, including the concerned Government officials of the relevant Ministries and officials of the concerned Government Departments, law enforcing agencies, the judiciary, personnel in the detention and penitentiary system, as well as community leaders and local government officials must be aware and sensitised to the needs of children in contact with the law.

2. Child-specific courts should be established in every district, which will be dedicated to cases relating to children. These courts will deal with cases involving children on a priority basis; other cases will be dealt with only if there is no outstanding case involving a child.
3. There is a patent need for a child-sensitive, specifically trained police force. Each police station shall have at least two officers, one of whom shall be a female, to deal with cases involving children in contact with the law.
4. Guidelines should be developed for members of the police and other law enforcing agencies with respect to the treatment of children in contact/conflict with the law, a summary of which should be displayed in prominent places of police stations.
5. In the police station, children shall be kept separately from adult accused persons.
6. A child shall not be separated from his/her parent or guardian save in exceptional cases. In the absence of a parent or guardian, a relative or other fit person may be entrusted to keep the child in safety. While separating the child from its parent or guardian, the police officer, the probation officer, or the Court must record the reasons thereof. When it is necessary to separate a child from its parent or guardian, in exceptional cases and where the situation demands, the guidelines under sections 55 and 58 of the Children Act should be strictly followed.
7. Informal atmosphere should be ensured in Juvenile Courts in order to protect child/youthful offenders, child victims, and witnesses. Presence of police should be avoided, unless it is felt necessary for the protection of the child offender, victim, or witness.
8. It is therefore imperative that the Government take immediate steps to amend the existing laws or formulate new laws in order to overcome the anomalies and procedural knots as highlighted above, as well as to enable implementation of the provisions of the international instruments, which will undoubtedly be beneficial to the children of this nation and will thus fulfill our obligations under international treaties and covenants.

**JUVENILE JUSTICE ADMINISTRATION - AGE OF CRIMINAL  
RESPONSIBILITY - DEPRIVATION OF THE LIBERTY OF THE CHILD -  
BEST INTERESTS OF THE CHILD - RIGHTS OF THE CHILD AS  
PROTECTED BY THE CONSTITUTION AND THE CHILDREN ACT  
1974 - IMPLEMENTATION OF THE CRC, ICCPR**

***Fahima Nasrin v. Bangladesh and Others*, 61 DLR (HCD) (2009), 232; 38 CLC (HCD) (2009). Supreme Court of Bangladesh, High Court Division (Special Original Jurisdiction)**

*Facts*

Md. Zahidul Hasan, alias Rony, was accused of taking gold jewellery from a young girl and thereafter killing her. He was charged under section 302 of the Penal Code and tried in a Sessions Case. Having been established that Rony was below the age of 16 years at the time of trial, the trial took place in the Court of Sessions Judge and Juvenile Court, Kushtia. At the conclusion of the trial, the learned Judge came to a finding that an offence under section 302 of the Penal Code was proved beyond doubt and, in view of his youth, by Judgement and order dated 14.08.2006, Rony was sentenced in accordance with the provisions of sections 51 and 52 of the Children Act, 1974 to imprisonment for 10 years. He was ordered to be detained in an institute for youthful offenders until he reached the age of 18 years. On 17.08.2006, Rony was sent from Kushtia District Jail to the Kishore Unnayan Kendra (KUK) (Youth Development Centre) at Jessore. His date of birth was recorded as 09.05.89 and, therefore, he would be 18 years of age on 09.05.2007. On 03.05.2007, the Assistant Director of the KUK, Social Welfare Department, Pulerhat, Jessore reported to the Secretary of the Ministry of Social Welfare that Rony was sufficiently rehabilitated and his behaviour was satisfactory. The Secretary was requested to order his final release under the provisions of section 67 of the Act. On 30.05.2007, Save the Children UK made representation to the Secretary of the Ministry of Social Welfare, reiterating the request from the KUK. However, it was decided by the Ministry of Social Welfare that, as Rony was sentenced to 10 years' imprisonment and there was no direction from the Court that he was to be released upon attaining the age of 18 years, he would be returned to the District Jail. The petitioner filed a PIL under 102(2)(a)(i) of the Constitution challenging the detention of Rony and calling upon

the respondents to show cause as to why the detenu shall not be released and discharged after attaining the age of 18 years in accordance with law.

### *Judgment*

We are of the view that the children who resort to offending or who deviate from the acceptable behaviour or norms, do so not through their own fault but through the neglect or fault of their parents and their immediate surroundings as well as the failure of society to provide for their basic needs. It is a fact that we are frequently finding children engaging in more and more serious offences. That is a sad reflection of the lack of provision which the State makes available to these children and their parents or guardians. We note more and more that the more notorious criminals are engaging children in criminal activities and that the children are becoming easy targets as potential accomplices due to their impoverished background. We have come across some cases where even the parents push their own children into criminal activity in order that they may earn and sustain the family members. That again is a sad reflection of our impoverished society and lack of facilities provided by the State. Nevertheless, we feel that the children may not be blamed and castigated for their wrongdoing and that it is our duty as part of the society to ensure that the children are protected from such criminal activities. It is very easy to say that a child has committed a serious offence and must be severely dealt with and sent to prison for the protection of the public, but under the laws of our country as well as international instruments covenants and norms, it is also our duty to ensure that we act with equanimity when dealing with cases of children. Efforts must be made to explore the root causes of the children's deviant behaviour and to remedy that. They are to be given all the benefit that our Constitution and the law of the land provide for them. We are also obliged to implement various beneficial provisions of international conventions, covenants and treaties, such as the UN Convention on the Rights of the Child (UNCRC) and International Covenant on Civil and Political Rights (ICCPR), of which Bangladesh is a signatory. We note also that our Constitution allows for special laws to be enacted in favour of children as well as other specified communities as detailed in Article 28(4) of the Constitution. Therefore, the rights of the child are not only protected by the Children Act, 1974, but are mandated by the UNCRC. Above all, the favourable provision of the law and of the covenants and conventions

are to be applied to the benefit of the child as provided by Article 28(4) of the Constitution. In this regard we take support from the observation of B.B. Roy Chowdhury, J. in the decision in *Hussain Mohammad Ershad v. Bangladesh & ors*, 21 BLD (AD) 69 and also *State v. Metropolitan Police Commissioner*, 60 DLR 660.

The development of the children's laws, international treaties, covenants and conventions has been considered in some detail in *State v. Md. Roushan Mondal Hashem*, 59 DLR 72. We can only reiterate that the laws have been developed over the years in a purposive way upon realisation of the need to protect children for their acts of indiscretion committed due to immaturity and impetuosity. To even consider any form of retributive or deterrent punishment in the guise of protection of society would be a regressive step shutting our eyes to our obligation to provide a congenial environment in which our children may grow and flourish into worthy citizens. At all times the welfare and the best interest of the child must be kept in the mind.

Yet again we express our views with the direction that the authorities concerned, including the Police, Judiciary and the Probation Service are to accord importance in interpreting and implementing the Act and the Rules in order to take appropriate action in respect of children who come before them in accordance with the laws of the land, keeping in mind the best interest of the child.

**SEXUAL HARASSMENT, CONSTITUTIONAL GUARANTEE OF GENDER  
EQUALITY AND NON-DISCRIMINATION, RIGHT TO EDUCATION  
AND WORK, WOMEN'S RIGHTS UNDER THE UDHR, ICCPR,  
ICESCR, APPLICABILITY OF INTERNATIONAL HUMAN RIGHTS  
INSTRUMENTS**

***Bangladesh National Women Lawyers Association (BNWLA) v. Government of Bangladesh and Others*, 14 BLC (HCD)(2009) 694; 29 BLD (HCD) (2009) 415; 38 CLC (HCD) (2009). Supreme Court of Bangladesh, High Court Division (Special Original Jurisdiction)**

***Facts***

As there are no legislative provisions to address sexual harassment of women and female children, human and women rights activists recognised the need for an effective and/or alternative mechanism to deal with the

issue. On 7 July 2008, the Social Resistance Committee, a platform of comprising 47 rights-based organisations, including the petitioner, held a press conference focusing on the acuteness of sexual harassment of women and girls in various organisations and institutions. The Committee presented at the press conference statistics that revealed 333 incidents of repressions on women from January to June 2008. The Committee also adopted seven resolutions, including the framing of guidelines to stop sexual harassment and implementation thereof at all educational institutions and universities.

A writ petition was filed under Article 102 of the Constitution calling upon the respondents to show cause as to why they failed to adopt guidelines or policies or to enact proper legislation to address the issue of sexual harassment and to protect and safeguard the rights of the women and female children in the workplace, educational institutions/universities, and other places, despite regular media coverage of sexual harassment incidents. The petitioner also drew the Court's attention to numerous incidents of sexual harassment in the media, academia, NGOs, etc.

### *Judgment*

The fundamental rights guaranteed in chapter III of the Constitution of Bangladesh are sufficient to embrace all the elements of gender equality including prevention of sexual harassment or abuse. Independence of judiciary is an integral part of our constitutional scheme. The international conventions and norms are to be read into the fundamental rights in the absence of any domestic law occupying the field when there is no inconsistency between them. It is now an accepted rule of judicial construction to interpret municipal law in conformity with international law and conventions when there is no inconsistency between them or there is a void in the domestic law.

Protection from sexual harassment and right to education and work with dignity is universally recognised as basic human rights. The common minimum requirement of these rights has received global acceptance. Therefore, the International Conventions and norms are of great significance in the formulation of the guidelines to achieve this purpose.

The Court referred to Articles 11 and 24 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in expounding on sexual harassment, its impact, and related state obligation. Specifically, the Court referenced General Recommendation No.

19 (11<sup>th</sup> Session, 1992) with respect to Article 11 of CEDAW, which states that “Equality in employment can be seriously impaired when women are subjected to gender-specific violence, such as sexual harassment in the workplace” and that

Sexual harassment includes such unwelcome sexually-determined behaviour as physical contacts and advances, sexually coloured remarks, showing pornography and sexual demands, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruiting or promotion, or when it creates a hostile working environment. Effective complaints procedures and remedies, including compensation should be provided.

The Court also referred to Specific Recommendation (24)(f), which states that “States Parties should include in their reports information about sexual harassment, and on measures to protect women from sexual harassment and other forms of violence of coercion in the workplace.”

The Court also referred to the fact that Bangladesh was a signatory to the “Declaration on the Elimination of Violence against Women (Resolution No. 48/104 of 20 December 1993),” which states in Article 1:

For the purposes of the Declaration, the term “violence against women” means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercions or arbitrary deprivation of liberty, whether occurring in public or in private life.

The Court further stated:

The framers of the Constitution were particularly impressed by the formulation of the basic rights in the Universal Declaration of Human Rights. If we make a comparison of Part III of the Constitution with the Universal Declaration of Human Rights (UDHR) we shall find that most of the rights enumerated in the Declaration have found place in some form or other in Part III and some have been recognised in Part II of the Constitution. The Declaration was followed by two Covenants- Covenant on Civil and Political Rights (ICCPR) and Covenant on Economic, Social and Cultural Rights (ICESCR) adopted by the United Nations General Assembly in December, 1966 making the rights contained in the UDHR

binding on all states that have signed the treaty, creating human rights law. Article 7 of UDHR states that all are equal before the law and are entitled without any discrimination to equal protection of the law and that all are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Our Courts will not enforce those Covenants as treaties and conventions, even if ratified by the State, are not part of the corpus juris of the State unless those are incorporated in the municipal legislation. However, the court can look into these conventions and covenants as an aid to interpretation of the provisions of Part III, particularly to determine the rights implicit in the rights like the right to life and the right to liberty, but not enumerated in the Constitution. In the case of *H.M. Ershad v. Bangladesh*, 2001 BLD (AD) 69, it is held: “The national courts should not ... straightway ignore the international obligations which a country undertakes. If the domestic laws are not clear enough or there is nothing therein the national courts should draw upon the principles incorporated in the international instruments.

The Court provided directives in the form of Guidelines to prevent and punish sexual harassment of women and girls. It stated:

In the backdrop of our discussion and observations made above, and in view of the inadequacy of safeguards against sexual abuse and harassment of women at work places and educational institutions whereby noble pledges of our Constitution made in so many articles to build up a society free from gender discrimination and characterized by gender equality are being undermined everyday in every sphere of life, we are inclined to issue certain directives in the form of guidelines as detailed below to be followed and observed at all work places and educational institutions till adequate and effective legislation is made in this field. These directives are aimed at filling up the legislative vacuum in the nature of law declared by the High Court Division under the mandate and within the meaning of article 111 of the Constitution.

These guidelines shall apply to all work places and educational institutions in both public and private sectors within the territory of Bangladesh.

The Court relied on case law from other jurisdictions in framing the Guidelines. They include *Apparel Export Promotion Council v. Chopra*, A.I.R. 1999 S.C. 625 (India), *Micari v. Mann*, 481 N.Y.S.2d 967 (N.Y. Sup. Ct. 1984), *Janzen and Govereau v. Platy Enterprise Ltd.* (Supreme Court of Canada),

*David Dotchin v. Saskatchewan (Worker's Compensation Board)*, Queen's Bench, Judicial Centre of Regina, Canada, 2002 SKQB 279, *Vishaka and Others v. State of Rajasthan*, A.I.R. 1997 S.C. 3011 (India), and *Hira Nath Misra v. Principal Rajendra Medical College*, A.I.R. 1973 S.C. 1260 (India).

**CHILDREN'S RIGHTS - RIGHT TO EDUCATION -  
CHILD LABOUR-HAZARDOUS WORK - IMPLEMENTATION OF  
THE LABOUR ACT 2006, THE CRC AND  
ILO CONVENTION NO.182 ON WORST FORMS OF CHILD LABOUR**

***Ain O Salish Kendra v. Bangladesh, represented by Secretary, Ministry of Labour and Manpower, Bangladesh Secretariat and others*, 31 BLD (HCD) (2011) 36; 39 CLC (HCD) (2010). Supreme Court of Bangladesh, High Court Division (Special Original Jurisdiction)**

***Facts***

An estimated 25,000 child workers between ages 4 and 14 were working in the "bidi" (hand-rolled cigarettes) factories at Haragacha, Rangpur in allegedly unhealthy and unhygienic conditions that posed a risk to their lives. This statistic was stated in a report published in the Daily Ittefaq on 05.10.2003. A similar report was published in the Daily Jugantar on 15.01.2004, reporting that 15,000 child workers between ages 8 and 16 were working in the 'bidi' factories of Haragacha, Rangpur in inhuman conditions. An editorial in the Daily Prothom Alo dated 04.10.2003 also spoke of how 10,000 children working in the "bidi" factories in Haragacha have lost their childhoods. In the wake of such stories, the petitioners, Ain O Salish Kendra (ASK) and Aparajeyo Bangladesh, both rights-based organisations, filed a writ petition seeking an order from the Court declaring the continuous failure of the respondents to ensure a healthy, hygienic, and safe work place for the workers within the 'bidi' factories of respondents Nos. 3 to 5 in accordance with the provisions of the Factories Act, 1965. The petitioners asserted that such activity should be declared as illegal and unconstitutional, as a violation of the fundamental rights guaranteed under Articles 27 and 31 of the Constitution, and the factories should be directed to discharge their legal duties to ensure compliance with the aforesaid provisions of law. The petitioners further prayed that the respondents Nos. 3, 4, and 5 be directed to provide cost of medical treatment to the workers

within those 'bidi' factories, including the children, who were suffering from diseases due to their work in those establishments.

### *Judgment*

It appears to us that the gravity of the problems of child labour spreads throughout the country and across multifarious industries and work types where children are engaged in earning for the family due to dire food insecurity. We, therefore, felt the urge to leave the confines of the facts of the instant case in order to deal with the wider problem of child labour. It indeed appears to be a national problem and deserves more than just a cursory glance from the State machinery.

From the statistics that are available, we find that according to data published by UNDP Human Report, 2007-2008 there are 5.05 million working children between the age of 5 to 14 years, the total number of children being 35.06 million in that age group. It is as well to mention here the provisions of International Labour Organisation (ILO) Convention No.182, which Bangladesh ratified on 12.03.2001. Article 3(d) of the said convention includes in the definition of hazardous child labour as "work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children. An ILO study on hazardous child labour in Bangladesh found that more than 40 types of economic activities carried out by children were hazardous to them. The survey also reveals that except for light work, child labour usually had harmful consequences on the mental and physical development of children.

The sum and substance of the reports which have been placed before us lead us to the conclusion that child labour is a phenomenon created by poverty. It is also noteworthy that poverty itself creates a vicious circle where poverty generates more poverty due to lack of education and properly managed resources.

Among factors contributing to child labour are rapid population growth, adult unemployment, bad working conditions, lack of minimum wages, exploitation of workers, low standard of living, low quality of education, lack of legal provisions and enforcement, low capacity of institutions, gender discrimination, conceptual thinking about childhood, etc. One or more of the above contribute to the large numbers of children working under exploitative or hazardous conditions.

The Court quoted verbatim Articles 18.1, 18.2, 27.1, 31.1, 32.1, and 36 of the Convention on the Rights of the Child (CRC) and Articles 1, 3, and 7 of the ILO Convention C182 Worst Forms of Child Labour Convention, 1999 in support of their observations. It also referred to the obligation of Bangladesh to conform to international instruments:

It is by now well established that the provisions of international instruments, of which Bangladesh is a signatory are to be implemented in our domestic laws. There is an obligation, which we should not ignore, as was held in *Hussain Mohammad Ershad v. Bangladesh & others*, 21 BLD (AD) 69 and *State v. Metropolitan Police Commissioner*, 60 DLR 660.

We are appalled by the revelation that in this day and age there is bonded labour or servitude practised in the coastal fishing areas of the country and young children are the victims. We have no hesitation in directing the Ministry of Labour to take all necessary steps to put an end to such practice immediately and with the help of the law enforcing agencies to bring the perpetrators of such practice to justice. At the same time there must be a concerted effort on the part of the relevant Ministries and government departments to ensure full time education and necessary financial assistance to the parents/guardians of these children to enable them to desist from such illegal and harmful practices and to encourage them to educate their children.

In the light of the matters raised by the instant writ petition, Respondent No.1 is hereby directed to ensure that all employers, particularly those engaging children as labourers, abide by the law and do not engage those under the legal age stipulated by statute, and provide all necessary facilities and equipment to ensure a healthy working atmosphere in their establishments for those who may be lawfully engaged in remunerated work. Needless to say prompt action must be taken against those who violate the provisions of law thereby creating unhygienic, cramped and unhealthy workplaces.

In all earnest we suggest that those parents who, due to their financial condition, are compelled to send their children to work must be targeted, identified and assisted as mandated by the Constitution and the CRC.

**CHILDREN'S RIGHTS - CHILD DOMESTIC WORKER –  
TORTURE - WORKING CONDITIONS - OBLIGATIONS UNDER  
THE CRC, ILO CONVENTION NO.182 ON WORST FORMS OF  
CHILD LABOUR, THE LABOUR ACT 2006**

***Bangladesh National Women Lawyers Association v. The Cabinet Division, Represented by Cabinet Secretary, Bangladesh Secretariat, Dhaka and others (HCD) (2011); 40 CLC (HCD.) Supreme Court of Bangladesh, High Court Division (Special Original Jurisdiction)***

*Facts*

BNWLA, an established and reputed organisation of women lawyers that deals with women's empowerment and children's rights, filed a writ petition under Article 102 of the Constitution of Bangladesh, drawing the Court's attention to an incident of physical violence against a child domestic worker reported in the daily national newspaper Amar Desh on 03.05.2010. The report stated that the lady of the house tied up the child housemaid, age 10, pushed her onto the floor, and inserted the handle of a hot cooking utensil (stirrer/paddle) into her anus for breaking a flower vase. The girl was in a critical condition and was receiving treatment at the Dhaka Medical College Hospital. The report also gave details of how the girl, sent by her poor father two years ago to work as a housemaid, was tortured on the slightest of pretexts. After the incident, she became ill, but was kept confined in the house. On the third day, seeing her critical condition, the lady of the house took her to the government hospital. The doctors informed the police, and the lady of the house was arrested.

A rule nisi was issued on 04.05.2010, calling on respondents Nos. 1 to 6 (relevant authorities) in connection with their failure to take appropriate steps against respondent No. 7 (the employer of the domestic child worker) in regards to the incident reported in the daily newspaper Amar Desh dated 03.05.2010 and to report to this Court within 24 hours with regard to their actions and measures taken in connection with the incident.

*Judgment*

It is patently clear that children of all ages, particularly from the poverty stricken rural areas, are being sent to the towns and cities for doing work in the household of their employers. Undoubtedly, there will be the lucky

ones who will work and help supplement their family's income without coming to any harm. However, we are most concerned at the large numbers of incidents where children of very tender age appear to have been sent out to work by their parents as domestic workers, who have been meted out horrendous treatment by their employers often leading to injury, death and sometimes suicide, not to mention the often invisible mental and psychological harm.

So far as the recent actions taken by the government in connection with children is concerned, we note with appreciation that the new Children Policy of 2011 defines a child as anyone up to the age of 18. At long last the definition of a child has come in line with the definition as recognised internationally.

It is as well to mention here the provisions of International Labour Organisation (ILO) Convention No.182, which Bangladesh ratified on 12.03.2001. Article 3(d) of the said convention includes in the definition of hazardous child labour as "work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.

In view of the circumstances of the case, the Court gave the Government a number of directions that included:

1. In order to make the provision and concept of compulsory primary education to be meaningful, we direct the government to take immediate steps to prohibit employment of children up to the age of 12 from any type of employment, including employment in the domestic sector, particularly with the view to ensuring that children up to the age of 12 attend school and obtain the basic education which is necessary as a foundation for their future life.
2. Education/training of domestic workers aged between 13 and 18 must be ensured by the employers either by allowing them to attend educational or vocational training institutes or by alternative domestic arrangements suitable to the concerned worker.
3. We urge the government to implement the provisions mentioned in the National Elimination of Child Labour Policy 2010 published in the gazette dated 08.04.2010. In particular, we strongly recommend the establishment of a focal Ministry/focal point, Child Labour Unit and National Child Labour Welfare Council in order to ensure implementation of the policies as mentioned in the 2010 Policy.

4. We direct the government to include domestic workers within the definition of “worker” in the Labour Act, 2006 and also to implement all the beneficial provisions of the draft of Domestic Worker Protection and Welfare Policy 2010 as announced by the government.
5. The cases relating to the violence upon the domestic workers must be monitored and prosecution of the perpetrators must be ensured by the government. We note with dismay the disinterested and sometimes motivated way in which the prosecution conducts the investigation and trial procedure resulting in the perpetrators being acquitted or discharged or even remaining untouched due to the high position, which they hold in the society. The government has a duty to protect all citizens of this country, be they rich or poor.
6. In order to prevent trafficking, in particular, and also to maintain a track on the movement of young children from the villages to the urban areas, parents must be required to register at the local Union Parishad the name and address of the person to whom the child is being sent for the purpose of employment. The Chairman of the Union Parishad must be required to maintain a register with the details of any children of his union who are sent away from the locality for the purpose of being engaged in any employment. If any middleman is involved, then his/her name and other details must be entered in the register.
7. The Government is directed to ensure mandatory registration of all domestic workers by all employers engaging in their household any child or other domestic worker and to maintain an effective system through the respective local government units such as Pourashava or Municipal Corporations in all towns and cities for tracking down each and every change of employment or transfer of all the registered domestic workers from one house-hold to another.
8. The Government should take steps to promulgate law making it mandatory for the employers to ensure health check up of domestic workers at least once in every two months.
9. The legal framework must be strengthened in order to ensure all the benefits of regulated working hours, rest, recreation, home-visits, salary etc. of all domestic workers.

10. Laws must also ensure proper medical treatment and compensation by the employers for all domestic-workers, who suffer any illness, injury or fatality during the course of their employment or as a result of it.

## NEPAL

### RESPONSIBILITY ARISING FROM THE INTERNATIONAL HUMAN RIGHTS CONVENTION - RIGHT TO FOOD - RIGHT TO LIFE.

*Advocate Prakash Mani Sharma and Others v. The Prime Minister of Nepal and Others.* Division Bench of the Supreme Court of Nepal, (Hon. Balaram K. C., & Hon. Bharat Raj Upreti, JJ.), decided on May 19, 2010.

#### *Facts*

There are certain parts of Nepal, especially the western region of Nepal, where the roads do not connect. Often, during the summer, especially in the rainy season, local people face food crises due to the lack of food supply in the western region. Each government allocates its national budget to supply necessary grain to address food crises in those areas. Despite the budget allocation, the government all too often fails to supply adequate grain. The problem is deeply rooted in the difficult topography and political problems that have persisted for a long time. The petitioners invoked the jurisdiction of the Supreme Court of Nepal to enforce the fundamental right to “food sovereignty” enshrined in Article 18(3)<sup>17</sup> of the Interim Constitution interpreted to characterize the right of those affected and the duty of the government towards those who are stricken with hunger, including those died as a result.

#### *Judgment*

In its decision, the Supreme Court of Nepal analyzed a number of international human rights conventions, declarations, and decisions. Among them, the International Covenant on Economic, Social, and Cultural Rights (ICESCR), Convention on the Elimination of Discrimination Against

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17 Article 18(3) of the Interim Constitution of Nepal (2007) provides that “Every citizen shall have the right to food sovereignty as provided for in the law.”

Women (CEDAW), Convention on the Rights of Child (CRC), Universal Declaration on Human Rights (UDHR), Universal Declaration on the Elimination of Hunger and Malnutrition, and regional human rights conventions including African Charter on Human and Peoples Rights (ACHPR) are some of the important international instruments referred to and analyzed by the Supreme Court.

The Supreme Court observed that Part III of the Interim Constitution, which provides for “fundamental rights,” does not specifically recognize the “right to food” as a fundamental right. Nevertheless, Article 12(1)<sup>18</sup> of the Interim Constitution guarantees every citizen the right to live with dignity. The “right to live with dignity” is a fundamental right that naturally incorporates the “right to food.” The Supreme Court reasoned that without the right to food, no one would be able to exercise the right to this freedom; thus, these two rights are mutually inclusive. The right to food also imposes a duty on the government to create an environment for jobs and employment by which people will have the opportunity to exercise their right to food and lead a dignified life.

The Supreme Court justified its proposition with reference to international human rights instruments. Among others, it referred to Article 6 of the ICESCR,<sup>19</sup> which requires the government to create jobs and employment. The Supreme Court specifically noted that the rights enshrined in the ICESCR are rights that create a duty for the government to realize progressively, but without any delay. While government does not have the obligation to provide free food to its citizens, it also should not stand idly

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18 Article 12(1) of the Interim Constitution of Nepal (2007) provides that “Every person shall have the right to live with dignity, and no law shall made which provides for capital punishment.”

19 Article 6 of the International Covenant on Economic, Social, and Cultural Rights (ICESCR) reads as follows:

1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.
2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programs, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

by when its citizens are dying of starvation. The government should be responsible to ensure the food supply. Especially in a region where there is no road access and food is not available on the market, the government should be accountable to supply necessary grain on time to address the problem of starvation. The government is also answerable to ensure that grain is available to needy people at a reasonable price. For people who cannot engage in employment due to age, disability, or disease, the government should protect their right to food through the mechanism of social security as directed by Article 9 of the ICESCR.<sup>20</sup>

**APPLICABILITY OF INTERNATIONAL COVENANT ON CIVIL AND  
POLITICAL RIGHTS - 1995 ELECTION ROLLS ACT - INTERIM  
CONSTITUTION - CITIZENSHIP AND THE RIGHT TO VOTE**

*Advocate Sarojnath Pyakurel v. The Prime Minister of Nepal and Others.* Special Bench of the Supreme Court of Nepal, (Hon. Balaram K. C., Hon. Bharat Raj Upreti, & Hon. Prof. Bharat Bahadur Karki JJ.), decided on February 7, 2011.

*Facts*

Section 8 of the 1995 Electoral Rolls Act of Nepal authorizes the Election Commission to prepare an electoral roll for the purpose of local and parliamentary elections. Article 65 of the Interim Constitution of Nepal,<sup>21</sup> the Citizenship Act, and other domestic laws of Nepal extend the right to vote and right to be a candidate for any political position only to Nepalese citizens. In contravention to constitutional and legal requirements, Section 8 of the Electoral Rolls Act<sup>22</sup> allows the Election Commission to include

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20 Article 9 of the ICESCR provides that “The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.”

21 Article 65 of the Interim Constitution of Nepal (2007) provides that “Any person should possess the following qualifications in order to become a member of the Constituent Assembly: (a) Nepali citizen; (b) attained at least twenty-five years of age; (c) not have been punished on any criminal charge of moral turpitude; (d) not holding an office of profit.”

22 The explanation of Section 8(5) of the 1995 Electoral Rolls Act provides that “For the purpose of this sub-section, the citizenship certificate, land ownership certificate, any identity card issued by the governmental office or government

a name of a person on the electoral rolls on the production of documents such as land ownership title, identification card issued by government office or academic institutions, or recommendation letter by the local government office (Village Development Committee or Municipality). The petitioner claimed that the impugned Section 8 would pose two dangers. First, the political right to be exclusively exercised by citizens could also be exercised by non-citizens in contravention to the Interim Constitution and International Covenant on Civil and Political Rights (ICCPR). Second, the requirement of documents in addition to citizenship would diminish the political value of citizenship. The petitioner thus urged the Supreme Court to declare the impugned provision to be ultra vires to the Interim Constitution and ICCPR.

### *Judgment*

The Supreme Court of Nepal determined that the right to vote and the right to be elected to a political position constituted political rights guaranteed only to citizens. This was provided for not only in the Interim Constitution (2007), but also Article 25 of the ICCPR<sup>23</sup> that recognizes the scope of political rights limited exclusively to the citizens. The Supreme Court also clearly maintained that the legislature is restrained to enact laws compatible with the Constitution. As constitutional supremacy is clearly established by Article 1 of the Interim Constitution, the legislative body cannot exercise its sovereign power beyond constitutional limits in the pretext of parliamentary supremacy. For any law enacted by the parliament in contravention to the Constitution, the Supreme Court retains the authority of declaring such law to be ultra vires to the Constitution. The

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owned organization, or by an educational institute, and the recommendation letter given by the Village Development Committee or Municipality may also be taken as the evidence.”

- 23 Article 25 of the International Covenant on Civil and Political Rights (ICCPR) provides that “Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;”

...

legislative body is also required to be vigilant to comply with international treaties to which Nepal is a party. In this context, the impugned law seems inconsistent with Article 65 of the Interim Constitution and Article 25 of the ICCPR that applies to Nepal as its domestic law. However, the Constituent Assembly is constituted only for the purpose of the promulgation of the Constitution. It is not a permanent body. The Interim Constitution did not envision periodic elections for the Constituent Assembly. The question raised by the petitioner is thus a moot question. The Supreme Court should not exercise its power of judicial review on an “assumed potential invasion of right.” To declare any law or provision to be *ultra vires*, there should be a condition of an “actual and threatened invasion of right.”

The Supreme Court declined to declare the impugned provision to be *ultra vires* to the Constitution. However, it issued important directives to the government and the Election Commission. The directives are as follows:

1. The process of the preparation of an electoral roll is a continuous process. The right to vote and to give candidacy for a political position are influenced by the electoral roll prepared by the Election Commission. Thus, the Election Commission is required to respect Article 25 of the ICCPR in the preparation of an electoral roll and not to require any other documents besides proof of citizenship; otherwise, that would allow the presence of grey areas in the exercise of political rights.
2. No other document can substitute the authenticity of the citizenship card. However, if the authenticity of a citizenship card is disputed, the Election Commission can use other documentary evidence to verify the authenticity of the citizenship card.
3. In preparation of the electoral roll, the Election Commission is required to respect the provisions of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and take necessary steps not to deprive any eligible woman from exercising her political rights.

**ARTICLE 2 OF THE INTERNATIONAL COVENANT ON CIVIL AND  
POLITICAL RIGHTS – WITHDRAWAL OF CRIMINAL CASES  
AGAINST MAOIST INSURGENTS**

***Advocate Madhav Kumar Basnet and Others v. The Prime Minister of Nepal and Others. Division Bench of the Supreme Court of Nepal, (Hon. Khil Raj Regmi, & Hon. Bharat Raj Upreti, JJ.), decided on February 16, 2011.***

***Facts***

Following the elections for the Constituent Assembly (CA) of Nepal in early 2009, the Maoist Party (formerly the insurgents' party) retained a majority of seats on the CA, formed the government as the largest party in parliament with a coalition of other parties. Former rebel leader Mr. Prachand (Pushpa Kamal Dahal) became Prime Minister. Among others, the Maoist government took a decision to withdraw 365 criminal cases lodged against Maoist rebels (insurgents). The government reasoned that all those cases were political and thus, could not be prosecuted as criminal cases. The petitioners challenged the blanket clemency decision of the government as a serious challenge to and violation of international human rights laws, the interim constitution of Nepal, and the rule of law. The petitioners asked the Supreme Court of Nepal to revoke the government's decision and allow a proper and efficient investigation, prosecution, and judicial decision against the crimes committed by anyone including the insurgents. The petitioners raised an important question for the interpretation by the Supreme Court of whether a crime could be exonerated on political and ideological grounds.

***Judgment***

With an extremely constrained perspective, the Supreme Court legitimized the decision of the Maoist government on the blanket withdrawal (clemency) of criminal cases lodged against the Maoist insurgents. The Supreme Court observed that the government, with prior approval of the concerned District Court where the cases were prosecuted, could withdraw cases. The authority of the government could not be questioned and invalidated on any grounds including Article 2 of the International Covenant on Civil and Political Rights.

The Supreme Court found unconvincing the contention of the petitioner that due to the clemency and withdrawal of criminal cases, the government was violating Article 2 of the ICCPR, promoting a state of impunity, protecting political criminalization, and weakening the rule of law. The Supreme Court also found that there was no need to develop standards by the judiciary in regards to clemency and withdrawal of criminal cases. The Supreme Court validated the government argument that the withdrawal of criminal cases was necessary to manage conflict and facilitate the peace process to its logical end.

The Supreme Court also observed that the discretionary power granted to the government by the law regarding the withdrawal of criminal cases should be exercised in a fair, reasonable, and just manner. The value of the rule of law would be defeated when if government kept exercising its discretionary power beyond any conceivable standards. All the same, the Supreme Court did not find any such misuse of power or violation of international human rights law by the government.

**TRANSITIONAL JUSTICE – CRIMES COMMITTED DURING  
INSURGENCY - ARTICLE 166(3) OF THE INTERIM CONSTITUTION -  
1992 PUBLIC PROSECUTION ACT**

***Sushil Pyakurel v. The Prime Minister. Division Bench of the Supreme Court of Nepal, (Hon. Ramkumar Prasad Shah, & Hon. Prakash Osti, JJ.), decided on June 21, 2011.***

*Facts*

Nepal experienced a violent conflict coupled with an insurgency during 1996-2005. During this period, over 15,000 people were killed, thousands were displaced with numerous people who are still missing. Among others, a group called the Maoists started the insurgency, defied law and order, and killed and kidnapped civilians. The government was also involved in arresting, committing extra-judicial killings, and causing the disappearance of Maoists as well as civilians. Finally, the Maoists and the Government of Nepal entered into an agreement called the Comprehensive Peace Agreement (CPA) on November 21, 2006. Article 5.1.5 of the CPA provides that a High-Level Truth and Reconciliation Commission would be established to investigate the truth about violations of human rights and crimes against

humanity. The CPA has also made commitments towards the Universal Declaration of Human Rights, international humanitarian law, and the basic principles and values of human rights. However, the Truth and Reconciliation Commission has not been established. It left the question open as to whether complaints lodged by victims against crimes committed by insurgents could be investigated, prosecuted, and penalized under the regular legal system of the country. This question is both politically and legally important. At the same time, the former Maoist insurgents have come into power and the police have not properly investigated complaints lodged against them. Amidst this complex situation, the petitioner, a prominent human rights activist in Nepal, asked the Supreme Court of Nepal to order the Prime Minister to carry out a proper investigation of the cases lodged against the insurgents and terminate from public office a Maoist leader who was appointed Minister.

### *Judgment*

Among other issues, the Supreme Court of Nepal examined two important issues. First, whether crimes committed during the insurgency could be investigated and prosecuted under the regular legal system. Second, whether a Minister charged under a murder case could continue in public office. When the government argued before the Court that acts perpetrated during the insurgency for a political purpose could not be brought before the regular jurisdiction of a law court, this demanded an analysis of the relationship between a transitional justice system and the regular legal system. In a nutshell, the Supreme Court opined that crimes committed during the insurgency could not be impugned purely on the basis of political reasons. No reasons, in fact could justify violations of human rights and legitimize the commission of a crime. Under no grounds could the rule of law be undermined.

Since the idea of transitional justice has been adopted under Article 166(3) of the Interim Constitution of Nepal by incorporating the Comprehensive Peace Agreement (CPA) as exhibited in its Annex 3, it would be natural to expect necessary legal action regarding human rights violations under the transitional justice mechanism. However, in a situation where the mechanism of transitional justice was not established, the Supreme Court found it necessary to apply the regular legal system to investigate, prosecute, and penalize criminal acts that took place during the insurgency.

The Supreme Court also ordered the carrying out of a proper investigation of the complaint registered against Mr. Agni Sapkota, the Maoist Minister. At the same time, the Supreme Court also found that though there was a registration of a complaint, one could not be considered an accused or a culprit. Unless one is sentenced for a morally degrading crime, the person could not be deprived of public office.

In light of the Universal Declaration of Human Rights and other international human rights instruments including the International Covenant on Civil and Political Rights to which Nepal is a party, a violation of human rights during the insurgency could not be exonerated. Further, the Supreme Court found that it was the duty of the Court to institutionalize the rule of law and implement international human rights instruments. The Supreme Court observed that it was unfortunate that the government, the parliament, and political parties did not give priority to the agenda of the establishment of a High-Level Truth and Reconciliation Commission envisioned under Article 33(s)<sup>24</sup> of the Interim Constitution. In the event of the establishment of a transitional justice system in the future, the investigation and prosecution of crimes that took place during the insurgency might be governed as provided for under the transitional system. Nevertheless, in a democratic society, the law and judicial system cannot be expected to be in a desultory state. The Supreme Court ordered that complaints lodged against crimes perpetrated during the insurgency should be investigated properly and the legal process should be taken under the 1992 Public Prosecution Act of Nepal.

#### APPLICATION OF 1994 IMMIGRATION LAWS – DISCRIMINATORY TREATMENT – VISA FEES

***Advocate Mira Dhungana and Others v. The Council of Ministers and Others. Special Bench of the Supreme Court of Nepal, (Hon. Kalyan Shrestha, Hon. Girish Chandra Lal, & Hon. Gyanendra Karki, JJ.), decided on November 24, 2011.***

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24 Article 33(s) of the Interim Constitution of Nepal (2007) provides that the State shall have the following responsibilities: “To constitute a High-Level Truth and Reconciliation Commission to investigate the facts regarding grave violation of human rights and crimes against humanity committed during the course of conflict, and create an atmosphere of reconciliation in the society.”

### *Facts*

Since a long time, the Immigration Laws of Nepal levied a visa fee to male foreign citizens married to female Nepalese citizens when entering Nepal and also on the renewal of visas. In regard to female foreign citizens married to male Nepali citizens, the Immigration Laws of Nepal waived the visa fee. The petitioners, against this backgrounds, asked the Supreme Court of Nepal to declare Rule 9 Schedule 5.4 of the 1994 Immigration Rules of Nepal unconstitutional claiming that the impugned provision violates the right to equality guaranteed under the Interim Constitution of Nepal and the international human rights conventions to which Nepal is a party. The petitioners also raised the question that the impugned provision was discriminatory in a number of ways, including giving less favorable treatment to foreigners who are married to the Nepalese citizen than foreigners who are born to Nepali parents.

### *Judgment*

The Supreme Court of Nepal declined to issue the writ petition and refused to declare the impugned provision to be ultra vires to Article 13.2<sup>25</sup> of the Interim Constitution, and Articles 2.1<sup>26</sup> and 3<sup>27</sup> of the International Covenant on Civil and Political Rights. The Supreme Court gratuitously reasoned that the immigration regulations were engendered by government policy to which the Court should give judicial deference rather than intervention. The act of formulating and implementing desired laws and policies to regulate and facilitate harmonious family relations belongs

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25 Article 13.2 of the Interim Constitution of Nepal, 2007 provides that “No discrimination shall be made against any citizen in the application of general laws on grounds of religion, race, caste, tribe, sex, origin, language or ideological conviction or any of these.”

26 Article 2.1 of the ICCPR, 1966 provides that “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

27 Article 3 of the ICCPR, 1966 provides that “The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.”

to the jurisdiction of the legislature and the executive body. Thus, the Supreme Court reasoned that was not appropriate for the Court to enter into an inquiry on legislative wisdom and intervene in the policy issues of the executive body.

The Supreme Court observed that the Immigration Rules did not maintain a discriminatory visa fee between male and female foreigners. Both male and female are required to pay an equal amount. Foreigners, except those whose visa fee was waived by law, are required to pay a visa fee to enter Nepal. The legal requirement for the payment of a visa fee is a globally accepted practice. Therefore, the Supreme Court established that in regard to the visa fee, no one should expect equal treatment between citizens and foreigners.

Further, the Supreme Court mentioned that the Foreigners Act, which was already withdrawn, had legalized the waiver of the visa fee for a female foreigner married to a male Nepalese citizen. However, a similar provision is carried over by the Immigration Rules. The Supreme Court, despite acknowledging the differences in treatment between male foreigners married to female Nepalese citizens and female foreigners married to male Nepalese citizens, refused to recognize the discriminatory treatment on the basis of sex and gender. The reason tendered by the Supreme Court is derived from a proposition that the legality of the carried over provision by the Immigration Rules cannot be tested under existing laws including the Constitution and international conventions.

## PHILIPPINES

### COUNTERFEIT DRUGS – RIGHT TO HEALTH AND “BASIC DECENCIES OF HUMANITY”

***Roma Drug and Romeo Rodriguez v. The Regional Trial Court of Guagua, Pampanga et al.* [GR No. 149907. 16 April 2009]**

A team composed of the National Bureau of Investigation and the Bureau of Food and Drugs conducted a raid on Roma Drug, a duly registered sole proprietorship operating a drug store. The raid was conducted pursuant to

a search warrant. Subsequently, a complaint was filed against the owner of Roma Drug for violation of the Special Law on Counterfeit Drugs (SLCD).<sup>28</sup>

The seized drugs are identical in content with their Philippine-registered counterparts. Their classification as “counterfeit” is based solely on the fact that they were imported from abroad and not purchased from the Philippine-registered owner of the patent or trademark of the drugs.

During preliminary investigation, the constitutionality of the SLCD was challenged for violating the equal protection clause of the Bill of Rights; Section 11, Article XIII, which mandates that the state make “essential goods, health and other social services available to all the people at affordable cost;” and Section 15, Article II, which states that it is the policy of the state “to protect and promote the right to health of the people and instill health consciousness among them.”

The Court held that the challenge is moot as the Universally Accessible Cheaper and Quality Medicines Act of 2008, which grants third persons the right to import or possess unregistered imported drugs, was passed and prevailed over SLCD. Besides, an implementation of the SLCD would have “implications that deny the basic decencies of humanity.” The law would make criminals of doctors from abroad on medical missions of international humanitarian organizations such as the International Red Cross, International Red Crescent and Medicin Sans Frontieres.

**RIGHT TO LIBERTY – CRIMINAL PROSECUTION AS  
VALID RESTRICTION – UNAVAILABILITY OF THE REMEDY OF  
AMPARO**

***Reverend Father Robert P. Reyes v. Court Of Appeals at al.* [GR No. 182161. 3 December 2009]**

A Hold Departure Order was issued against Fr. Robert Reyes by the Secretary of the Department of Justice Secretary Raul Gonzalez for Reyes’ alleged involvement in the Manila Peninsula Hotel siege on 30 November 30, 2007.

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28 According to the Court, the section said to be violated prohibits the sale of counterfeit drugs, which under Section 3(b)(3) of said law, includes “an unregistered imported drug product.” The term “unregistered” signifies the lack of registration of a trademark, tradename, or other identification mark of a drug in the name of a natural or juridical person, the process of which is governed under Part III of the Intellectual Property Code.

Fr. Reyes petitioned the court for the issuance of the writ of Amparo as his right to travel—part of the right to liberty—was violated.

The Supreme Court upheld the decision of the Court of Appeals which had denied the petition for the issuance of the writ. The Court cited precedents such as *Secretary of National Defense et al. v. Manalo et al.*,<sup>29</sup> which expounded on the right to life, liberty, and security as enshrined in the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR). The restriction on his right to travel was a consequence of the criminal case against him was not unlawful and that he failed to establish that his right to travel was impaired in the manner and to the extent that it amounted to a serious violation of his right to life, liberty, and security, for which there exists no readily available legal recourse or remedy.

**ENFORCED DISAPPEARANCE –  
AVAILABILITY OF THE REMEDY OF AMPARO**

***Gen. Avelino I. Razon, Jr. Chief, Philippine National Police (PNP), at al. v. Mary Jean B. Tagitis* [GR No. 182498. 3 December 2009]**

This case was one of first impression in the use and application of the Rule on the Writ of Amparo in an enforced disappearance situation in the Philippines. Morced Tagitis, a consultant for the World Bank and the Senior Honorary Counselor for the Islamic Development Bank (IDB) Scholarship Programme, together with Arsimin Kunnong, an IDB scholar, arrived in Jolo, Sulu from a seminar in Zamboanga City. They checked-in at a pension house. Tagitis asked Kunnong to buy a return boat ticket for him. When Kunnong returned from this errand, Tagitis was already missing.

The disappearance of Tagitis was reported to the Jolo Police Station. More than a month later, Mary Jean Tagitis filed a Petition for the Writ of Amparo directed against several officials of the Armed Forces of the Philippines. The writ was issued by the Court of Appeals (CA) and further hearing on the matter was conducted. The CA issued its decision confirming that the disappearance of Tagitis was a case of enforced disappearance and extended the privilege of the writ to Tagitis and his family, directing

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29 *Sec'y of Nat'l Def. v. Manalo*, G.R. No. 180906, (S.C., Oct. 7, 2008) (Phil.), available at <http://sc.judiciary.gov.ph/jurisprudence/2008/october2008/180906.htm>.

the officials to exert extraordinary diligence and efforts to protect the life, liberty, and security of Tagitis and obliging them to provide monthly reports of their actions to the CA.

The decision of the CA was questioned. In affirming the ruling, the Supreme Court held, among others, that the presentation of substantial evidence by the petitioner to prove her allegations was sufficient for the court to grant the privilege of the writ. Furthermore, the writ of Amparo does not determine the guilt nor pinpoint criminal culpability for the alleged enforced disappearance of the subject of the petition for the writ. It is rather a protective remedy against violations or threats of violation against the rights to life, liberty, and security.

In order to appreciate the application of the Amparo rule to an enforced disappearance situation, the Court looked at the historical context of the writ and enforced disappearances. The Court said that the phenomenon arising from state action first attracted notice in Adolf Hitler's *Nacht und Nebel* Erlass or Night and Fog Decree of 7 December 1941. In the mid-1970s, it resurfaced when individuals, numbering anywhere from 6,000 to 24,000, were reported to have "disappeared" during the military regime in Argentina, then in Latin America. Thus, victims of enforced disappearances began to be called the "desaparecidos" which literally means the "disappeared ones." The Court also recounted the numbers of persons who have disappeared in recent Philippine history.

With regard to enforced disappearance under Philippine law, the Court held that as the law now stands, extra-judicial killings and enforced disappearances in this jurisdiction are not crimes penalized separately from the component criminal acts undertaken to carry out these killings and enforced disappearances and are now penalized under the Revised Penal Code and special laws. The simple reason is that the Legislature has not spoken on the matter. However, even without the benefit of directly applicable substantive laws on extra-judicial killings and enforced disappearances, the Court said it is not powerless to act under its own constitutional mandate to promulgate "rules concerning the protection and enforcement of constitutional rights, pleading, practice and procedure in all courts"<sup>30</sup> since extrajudicial killings and enforced disappearances, by

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30 Const. (1987), art. VIII, sec. 5 (Phil.).

their nature and purpose, constitute state or private party violation of the constitutional rights of individuals to life, liberty, and security.

From the international law perspective, the Court proclaimed that involuntary or enforced disappearance is considered a flagrant violation of human rights. The UN General Assembly first considered the issue in December 1978 under Resolution 33/173. In 1992, the UN General Assembly adopted the Declaration on the Protection of All Persons from Enforced Disappearance. In 2006, it adopted the International Convention for the Protection of All Persons from Enforced Disappearance. This convention is the first universal human rights instrument to assert that there is a right not to be subject to enforced disappearance and that this right is non-derogable.

Juxtaposing domestic and international law, the Court however said that while the Philippines is not yet formally bound by the terms of the Convention on enforced disappearance (or by the specific terms of the Rome Statute) – as it is not a party to the Convention – and has not formally declared enforced disappearance as a specific crime, there are reasons that reveal that, “enforced disappearance as a state practice has been repudiated by the international community, so that the ban on it is now a generally accepted principle of international law,<sup>31</sup> which we should consider a part of the law of the land, and which we should act upon to the extent already allowed under our laws and the international conventions that bind us.” The main reason given by the Court to justify this conclusion is state practice with respect to enforced disappearance as evidenced, *inter alia*, by jurisprudence in other jurisdictions and in regional human rights bodies.

### **An Act Providing for the Magna Carta of Women, Republic Act No. 9710**

The President approved the passage into law of the Magna Carta of Women on August 14, 2009. This law affirms the role of women in nation building and ensures the substantive equality of women and men. Through it, the

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31 Art. II, Sec. 2 of the 1987 Philippine Constitution provides: “The Philippines renounces war as an instrument of national policy, adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations.”

state condemns discrimination against women in all its forms and pursues by all appropriate means and without delay the policy of eliminating discrimination against women in keeping with the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and other international instruments consistent with Philippine law. It also affirms women's rights as human rights and that the state shall intensify its efforts to fulfill its duties under international and domestic law to recognize, respect, protect, fulfill, and promote all human rights and fundamental freedoms of women.

The principles of the human rights of women are laid out and the magna carta declares the universality of human rights as encompassed in the words of Article 1 of the UDHR. Along with defining terms such as women empowerment and discrimination against women, it sets out the duties related to the human rights of women, rights and empowerment, and the rights and empowerment of marginalized sectors (e.g., food security and productive resources, housing, decent work).

The state is the primary duty-bearer in relation to the human rights of women and duties extend to all state agencies, offices, and instrumentalities. Importantly, it declares that all rights in the 1987 Philippine Constitution and those rights recognized under international instruments duly signed and ratified by the Philippines, in consonance with Philippine law, are rights of women under the Act that are to be enjoyed without discrimination. Specific provisions on human rights of women include protection from violence; rights of women affected by disasters, calamities, and other crisis situations; participation and representation; equal treatment before the law; equal access and elimination of discrimination in education, scholarships, and training; women in sports; women in the military; nondiscriminatory and non-derogatory portrayal of women in media and film; women's right to health; special leave benefits for women; and equal rights in all matters relating to marriage and family relations.

Gender mainstreaming is a strategy for implementing the magna carta. As such, gender focal points are established in government offices, including in embassies and consulates. The overall monitoring body and oversight to ensure the implementation of the Act is the National Commission on the Role of Filipino Women which was renamed as the Philippine Commission on Women. It is the primary policymaking and coordinating body of the women and gender equality concerns under the Office of the

President. The Commission on Human Rights (CHR) acts as the Gender and Development Ombud, consistent with its mandate.

Under the magna carta, upon finding of the CHR that a department, agency, or instrumentality of government, government-owned and -controlled corporation, or local government unit has violated any provision of this Act and its implementing rules and regulations, the sanctions under administrative law, civil service, or other appropriate laws shall be recommended to the Civil Service Commission and/or the Department of the Interior and Local Government. The person directly responsible for the violation as well as the head of the agency or local chief executive shall be held liable under the Act. If the violation is committed by a private entity or individual, the person directly responsible for the violation shall be liable to pay damages. If violence has been proven to be perpetrated by agents of the state, such shall be considered aggravating offenses with corresponding penalties depending on the severity of the offenses.

#### **TORTURE AND OTHER CRUEL, INHUMAN AND DEGRADING TREATMENT OR PUNISHMENT**

#### **An Act penalizing Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment and prescribing penalties therefor, Republic Act No. 9745**

Declaring as well the policy of the state to fully adhere to the principles and standards on the absolute condemnation and prohibition of torture as provided for in the 1987 Philippine Constitution; various international instruments to which the Philippines is a state party such as, but not limited to, the ICCPR, the Convention on the Rights of the Child (CRC), CEDAW, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); and all other relevant international human rights instruments to which the Philippines is a signatory, this Act was signed by the President on 10 November 2009. The Act defined torture as:

[A]n act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him/her or a third person information or a confession; punishing him/her for an act he/she or a third person has committed or is suspected of having committed; or intimidating or coercing him/her or a third person; or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a person in authority or agent of a person in authority. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.<sup>32</sup>

Meanwhile, “other cruel, inhuman and degrading treatment or punishment” is referred to as “a deliberate and aggravated treatment or punishment not enumerated under Section 4 of this Act, inflicted by a person in authority or agent of a person in authority against a person under his/her custody, which attains a level of severity causing suffering, gross humiliation or debasement to the latter.”<sup>33</sup> Order of battle means any document or determination made by a law enforcement agency of government, listing names of persons and organizations that it perceived as “enemies of the state and considers as legitimate targets as combatants that it could deal with, through the use of means allowed by domestic and international law.”<sup>34</sup>

Under the law, there are two general acts of torture: physical and mental/psychological torture. The former is a form of treatment or punishment that causes severe pain, exhaustion, disability, or dysfunction of one or more parts of the body of another in one’s custody. The latter is calculated to affect or confuse the mind and/or undermine a person’s dignity and morale. They have to be inflicted by a person in authority or agent of a person in authority. The assessment of the level of severity within the context of “other cruel, inhuman and degrading treatment or punishment” shall depend on all the circumstances of the case, including the duration of the treatment or punishment, its physical and mental effects and, in some cases, the sex, religion, age, and state of health of the victim.

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32 An Act Penalizing Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment and Prescribing Penalties Therefor, Rep. Act No. 9745, § 3(a) (Nov. 10, 2009) (Phil.).

33 *Id.* at § 3(b).

34 *Id.* at § 3(d).

It should be pointed out that the Act declares torture and other cruel, inhuman and degrading treatment or punishment as criminal acts in all circumstances. A state of war or a threat of war, internal political instability, or any other public emergency, or a document or any determination comprising an “order of battle” shall not and can never be invoked as a justification for torture and other cruel, inhuman and degrading treatment or punishment. Secret detention places, solitary confinement, incommunicado, or other similar forms of detention, where torture may be carried out with impunity are hereby prohibited.

The principle of non-refoulement is also expressly provided for in the Act. Accordingly:

No person shall be expelled, returned or extradited to another State where there are substantial grounds to believe that such person shall be in danger of being subjected to torture. For the purposes of determining whether such grounds exist, the Secretary of the Department of Foreign Affairs (DFA) and the Secretary of the DOJ, in coordination with the Chairperson of the CHR, shall take into account all relevant considerations including, where applicable and not limited to, the existence in the requesting State of a consistent pattern of gross, flagrant or mass violations of human rights.<sup>35</sup>

There are other provisions in the Act which deal with matters such as evidence obtained as a result of torture; disposition of writs of habeas corpus, Amparo and habeas data; torture as a separate and independent crime; and compensation to victims of torture.

#### **LESBIAN, GAY, BISEXUAL OR TRANSGENDER RIGHTS**

The Secretary of the Department of Justice was requested and has given opinions on matters relating to international law such as those on lesbian, gay, bisexual, and transgender rights in the Philippines, and the character of several agreements entered into by the Philippines with other states.

**Opinion no. 05, s. 2009, 16 January 2009, “Legal opinion or position on issues surrounding lesbian, gay, bisexual or transgender (LGBT) rights.”**

The opinion of Department of Justice Secretary Raul Gonzalez was sought by Representative Ana Theresa Hontiveros-Baraquel on the primary ques-

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35 Id. at §17.

tion of who should craft Philippine policies on LGBTs. Secretary Gonzalez said it is the responsibility of the CHR. Citing Articles 2(2) and 26 of the ICCPR, to which the Philippines is a signatory, among others, he said that the state has the obligation to ensure that LGBTs are entitled to equal protection before the law.

Policies concerning human rights and constitutional guarantees on civil liberties are the jurisdiction of the CHR and the Presidential Human Rights Committee. However, questions of legislation belong to Congress of the Philippines, composed of the House of Representatives and the Senate.

## SINGAPORE

### CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA AND RELATED INTOLERANCE – REPORT OF UN SPECIAL RAPPORTEUR – SINGAPORE

At the invitation of the Government, Githu Muigai, the UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance visited Singapore from 21 to 28 April 2010. At the end of his visit, the Special Rapporteur issued a press statement. Singapore's Ministry of Foreign Affairs responded to what it felt were hasty conclusions and errors in the Special Rapporteur's press statement. Below are the two press statements.

#### **Full text of the press statement delivered by the UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mr. Githu Muigai, in Singapore, 28 April 2010:**

Ladies and Gentlemen,

I visited Singapore from 21 to 28 April. During my mission, I held meetings with representatives of the Government, members of the legislative and judicial branches, as well as with representatives of civil society, including community members, academics, lawyers and private individuals.

I came to Singapore at the invitation of the Government and wish to express my sincere gratitude for its full cooperation and openness in the preparation and conduct of my visit, as well as for the organization of a very rich programme. Its readiness to organise a last minute visit to the Changi Prison was much appreciated. I

was truly impressed by the professionalism and dedication demonstrated by members of the civil service and I would like to convey my appreciation for the detailed information received during all official meetings. I am also extremely grateful to all those individuals, including numerous civil society partners, who granted me interviews and provided me with information and other assistance during my mission.

As UN Special Rapporteur, I would like to reaffirm that I undertook my visit with an open mind and without any preconceived ideas. I came here with the desire to obtain a deeper understanding of Singapore and its people, to engage in a constructive dialogue with the authorities and civil society, to identify best practices that could be shared with the international community at large and to prepare an objective report with clear recommendations.

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Singapore is rightly proud of its richly diverse society where individuals from a wide range of ethnic, religious and cultural backgrounds manage to cohabit and interact with each other on a small portion of territory. Considering that ethnic and religious riots occurred a few decades ago, the actual peaceful coexistence of the diverse communities is a remarkable achievement in itself.

The historical legacy of ethnic and religious tensions still casts a long shadow over the social and political life of Singapore today. To address this, the authorities have continuously and actively promoted social cohesion, religious tolerance and what they refer to as racial harmony, as fundamental pillars of the city-state. They have done so through a number of commendable policies and measures emphasizing tolerance, understanding and respect among the diverse ethnic and religious groups living in Singapore. The wide range of organisations seeking to and succeeding in offering common space for people to dialogue and learn about the cultural traditions and practices of the main ethnic groups in Singapore testify to the recognition that social harmony must not be taken for granted and that continuous efforts are needed to preserve it. In this regard, I was deeply impressed by the work achieved and activities undertaken by, inter alia, the National Integration Council, the National Steering Committee on Racial and Religious Harmony, the People's Association, OnePeople, as well as the Inter Racial and Religious Confidence Circles.

Social cohesion and political stability undoubtedly constitute essential elements of nation-building in a young country like Singapore. In this regard, the authorities have taken wide-ranging

measures to foster racial harmony and discourage intolerance. Most of these measures are widely appreciated by all sectors of the society. In addition, they demonstrate that the Government is committed to confronting these challenges in an open manner. On the other hand, various interlocutors pointed out that the legitimate goal of searching for racial harmony may have created blind spots in the policies and measures pursued by the Government.

There exist several legislative provisions which prohibit the promotion of feelings of “enmity”, “ill-will” or “hostility” between members of the different ethnic groups in Singapore. It appears that these restrictions aim to frame and limit any public debate or discourse on an issue considered as highly sensitive. Given Singapore’s historical legacy, the concerns of the authorities with regard to ethnic conflicts are understandable. However, it is absolutely necessary in a free society that restrictions on public debate or discourse and the protection of racial harmony are not implemented at the detriment of fundamental human rights such as freedom of expression and freedom of assembly. Many interlocutors assured me that Singaporean society had evolved substantially from the days of the violent confrontations 45 years ago, so as to have open public debate on a sensitive issue like ethnicity in a dispassionate and fruitful manner. I therefore believe that time is ripe for the authorities to review any legislative restrictions that may exist in the statute books in order to allow Singaporeans to share their views on matters of ethnicity, to identify potential issues of discomfort and above all, work together to find solutions.

Despite the existence of various policies and institutions seeking to provide all ethnic groups with equal opportunities, it would appear that the significance of ethnic identity has not diminished and indeed some would say has increased in one’s interactions with the State and with the Singaporean society at large. Consequently, individuals find themselves classified into distinct categories defined along ethnic lines. As an illustration, the ethnic background of Singaporeans is indicated on identification documents, although I was informed that the practice has now been made more flexible so as to enable individuals of mixed origins to display several ethnic backgrounds. Yet, individuals of mixed origins may find it difficult to relate to any of the self-help groups (CDAC, SINDA, Yayasan Mendaki, EA and AMP) established to assist members of their own communities. These self-help groups, which play a critical role in the provision of social services, are ethnically based. Consequently, it might be difficult for a non Tamil-speaking Indian Muslim to identify him- or herself with the Mendaki or the SINDA.

I was informed that the Group Representation Constituencies (GRC) were created for the purpose of ensuring minorities' political participation by requiring that a minority candidate be fielded in each of the GRC. Some interlocutors were of the view that this scheme had actually institutionalised and entrenched the status of minorities within Singaporean society.

In addition, concern was expressed that such schemes may tend to reinforce and perpetuate ethnic categorization. This in turn may lead to certain prejudices and negative stereotypes held against certain minority groups taking root. As an example, I was informed that people tend to think of "Little India" as an unsafe neighbourhood.

The benefits of a society which allows for more permeability between delimited ethnic categories and in which social interactions are not predetermined by ethnic identity cannot be overemphasised. I would therefore recommend as a starting point that the identification documents should not indicate the ethnic background of individuals in order to accord less significance thereto.

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In addition to the general issues raised above, I am of the view that the following specific issues require attention:

#### HOUSING

The 1989 Ethnic Integration Policy - whereby ethnic quotas are imposed in each State-subsidized building and each neighbourhood - put in place in order to prevent the formation of ethnic enclaves, has been generally successful in terms of social integration. I was indeed told by many interlocutors that this policy allows the great majority of Singaporeans from diverse ethnic backgrounds to mix together and regularly interact, for instance in the "void decks" situated on the ground floor of each State-subsidized building.

While the rationale and objectives of this policy may be laudable, there are those who think that its implementation has created new problems. For instance, it is felt that the existing public housing quotas may prevent members of ethnic minorities finding an accommodation close to their families or that ethnic minorities encounter greater difficulties in reselling their apartments to members of their groups, as sale to other ethnic groups is prohibited under this policy.

Although the implementation of the Ethnic Integration Policy may already be of a rather complex nature, I would nonetheless suggest that more flexibility be allowed and that the authorities

keep it under constant review, so as to take into account the evolving needs of Singaporeans.

#### EDUCATION

The Singaporean public educational system has been successful in allowing all children, regardless of their backgrounds, to learn and play together. Moreover, education programmes fostering tolerance, understanding and respect have very much contributed to the peaceful coexistence of the diverse communities in Singapore.

According to Government officials, the principle of meritocracy, which is at the core of the public educational system – and of Singaporean society – ensures that all children are offered equal opportunities. Meritocracy has its merits. However, where there are acknowledged historical inequalities, as is the case with Malay students, this principle may serve to entrench them. Indeed, this may very well be the reason why the Government had until a decade ago directly supported free national education programmes for Malay students.

Despite statistics showing that great progress has been made in the last decades, Malay students seem to have remained below the national average. For instance, I was informed that since independence, only two Malay students had been granted Presidential scholarships which award the best students in the country.

Moreover, I was informed that Special Assistance Plan (SAP) schools, which have been established in order to nurture the best talents that will form the next generation of leaders in the various fields, had restricted access to Mandarin speakers. This has led to some resentment among non-Mandarin speakers. Critics argue that these schools favouring Chinese culture and language are a visible symbol of the marginalisation of minority groups, and that they create the impression that there exists a hierarchy of cultures.

Education is undoubtedly one of the most efficient tools to create a cohesive and tolerant society, where all children may be taught how diverse ethnic and national groups can coexist peacefully. Consequently, I would like to suggest that specific measures be taken to ensure that the educational interests of Malay students are protected and promoted, in accordance with article 152 of the Constitution of Singapore and international human rights standards. While there can be no doubt that meritocracy guarantees equality of opportunities, special measures within clearly defined timelines may help to address historical inequalities.

#### EMPLOYMENT

During my official meetings, I was informed of the promotional approach taken to address problems of discrimination against job-seekers and workers from certain ethnic or religious backgrounds. In this regard, I welcome initiatives taken by the Ministry of Manpower and the Tripartite Alliance for Fair Employment Practices aimed at educating employers and employees about the principle of non-discrimination or at resolving labour issues related to discrimination through mediation.

While the results of this approach appear to be good, in particular when it comes to language discrimination affecting job-seekers, my attention has nonetheless been drawn to the difficulties and negative stereotypes faced by members of the Malay and Indian communities in the field of employment. For instance, I was told that Malay individuals continue to be underrepresented in senior positions of the armed forces, the police and intelligence services, as well as in the judiciary. These are critical institutions that ought to reflect the diversity of the nation. I would therefore recommend that the authorities urgently review all laws, regulations, guidelines, policies and practices, so as to ensure sufficient representation of the minority ethnic groups in all employment sectors. In addition, I would like to suggest that the authorities consider adopting legally binding provisions prohibiting discrimination of all kinds, including on the grounds of ethnic or national origin, in the field of employment.

#### RECENT MIGRANTS

The influx of foreigners which has been supported by the Government to satisfy the demands of a fast-growing economy and to counter a declining birth rate has contributed to the building and the prosperity of this young nation in a positive manner. Yet, it has also created significant challenges. I was for instance told both by Government officials and civil society actors that the recent wave of migrants coming mainly from the People's Republic of China and India had led to some resentment by the Singaporean population. Depending on the nationality of these recent migrants, they could in some instances be perceived as taking away jobs from Singaporean citizens, threatening Singaporean families or affecting the fragile national demographic balance. There was also a perception among some interlocutors that the Government seemed to favour migrants from certain countries.

The National Integration Council seeks to address some of these concerns. However, there is still a need to formulate a more open and transparent immigration policy.

#### MIGRANT WORKERS, INCLUDING DOMESTIC WORKERS

The Government has to a large extent determined the employment areas in which certain foreign communities can work. In this regard, I was informed that for each sector of employment, there exists a list of “approved source countries” from which employers may hire foreign workers. As a result, domestic workers may originate from Indonesia, Myanmar or the Philippines, but not from the People’s Republic of China. Similarly, the construction sector may only hire foreign workers from the People’s Republic of China, Malaysia, India, Sri Lanka, Thailand, Bangladesh, as well as few other Asian countries. This has raised concerns that the system may reinforce ethnic stereotypes and taint the rest of the employment system.

While my mandate does not specifically relate to migrant workers, it is nonetheless concerned with discrimination on the grounds of national or ethnic origin preventing individuals from enjoying, inter alia, just and favourable conditions of work, equal pay for equal work, as well as equality before the law. In this regard, the living and working conditions of migrant workers, in particular of the low-skilled ones commonly referred to as “transient workers”, were frequently raised during my meetings.

I was told by virtually all my interlocutors that the authorities had taken numerous and commendable initiatives to prevent and address the manifold human rights violations and sometimes physical abuse suffered by low-skilled migrant workers. These include education programmes both for employers and employees; the conduct of random interviews of domestic workers during their initial months of employment; assistance by the Ministry of Manpower in resolving labour disputes through mediation; the sanctioning of companies when workers’ wages are left unpaid or the enhancement of penalties for offences committed by employers against their domestic workers.

Yet low-skilled migrant workers continue to face a number of difficulties. These include the sponsorship system which places migrant workers in a highly dependent relationship to their employer and severely limits labour mobility; unilateral cancellations of work permits by their employers; poor and unhygienic living conditions or denial of medical insurance by their employers contrary to of-

ficial policy. Concerns relating to migrant workers being trafficked into the country were also raised.

Migrant domestic workers, who constitute about a quarter of the migrant workforce, also face a number of additional difficulties due to their exclusion from the Employment Act and to their isolated working environment. For instance, migrant domestic workers are not always accorded a day of rest per week; in practice they are not always granted annual or medical leave; they are automatically deported if found pregnant and are prohibited from marrying Singaporean men.

While I received assurances from relevant authorities that these issues are under review, I would strongly urge the Government to act swiftly to ensure the protection of migrant workers' human rights, as this is one area where the situation is quite dire. In this regard, I particularly welcome the fact that the enforcement of a standard contract offering enhanced protection to migrant domestic workers is currently under review by the Ministry of Manpower. I recommend that the Government extends and enhances the effective implementation of the Employment Act; that efforts be undertaken to ensure that labour disputes are resolved expeditiously through accessible and effective mechanisms; and that a minimum wage for migrant workers particularly vulnerable to exploitation, such as construction and domestic workers, be introduced.

#### LEGAL AND INSTITUTIONAL FRAMEWORK TO FIGHT RACISM AND XENOPHOBIA

The fight against racism, racial discrimination, xenophobia and related intolerance can only be achieved in the most effective manner with the help of a solid and robust institutional and legal framework. While I understand that the Government wishes to ensure that it is in a position to fully implement international obligations contained in an international treaty before ratifying it, I nonetheless urge it to accede to international human rights instruments which enshrine the fundamental principles of equality and non-discrimination. These include the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, as well as the International Convention on the Rights of All Migrant Workers and Members of Their Families.

In addition, the Durban Declaration and Programme of Action, as well as the Outcome Document of the Durban Review Conference, to which Singapore made a positive contribution, provide the

most comprehensive frameworks for the fight against racism, racial discrimination, xenophobia and related intolerance. I would like to encourage the Government to continue taking concrete measures to achieve the goals and objectives contained therein.

While acknowledging that the Constitution of Singapore contains non-discrimination provisions, I would like to recommend that a specific legislation prohibiting racial discrimination in all areas of life, including employment, education and health, be enacted. This would allow for the set up of relevant reporting, reviewing and enforcement mechanisms, as well as specific funding, which usually allows for more effective policies against racism.

Given its constitutional status, the Presidential Council for Minority Rights (PCMR) appears to be the highest organ within the Government mandated with the task of protecting the rights of members of minority groups. It is my understanding that the PCMR, which is chaired by the Chief Justice, may consider and report on legislative and policy matters affecting persons of ethnic and religious communities only if referred to by Parliament or the Government. I was surprised to learn that in 40 years of existence, the PCMR had never issued a statement or taken a position on any particular legislation or public policy that may have affected the rights of members of ethnic minority groups. Moreover, it seemed to me that there exists a potential conflict between the dual role of the Chief Justice as head of an independent judiciary (to which a case may be filed questioning the constitutionality of any law or policy) and as Chairperson of the PCMR.

I would therefore encourage the authorities to review the mandate conferred to the PCMR and its composition, so that it may consider any legislation or public policy on its own initiative and that its independence be ensured.

#### CONCLUDING REMARKS

At the end of my visit, I have come to the conclusion that the Government of Singapore is acutely aware of the threats posed by racism, racial discrimination, xenophobia and related intolerance, and that it has endeavoured to put in place laws, policies and institutions that seek to combat these scourges. And while there may be no institutionalised racial discrimination in Singapore, several policies have further marginalized of certain ethnic groups. This is a situation that must be acknowledged and acted upon in order to safeguard the stability, sustainability and prosperity of Singapore.

The country report, which I expect to present to the Human Rights Council in June 2011 will include a more detailed and ex-

haustive analysis of my preliminary findings. As I have said earlier, I will be drafting my report in the spirit of contributing positively towards the reforms already undertaken. I will of course remain available for further constructive interaction with the Government in order to facilitate the implementation of these recommendations.

Finally, I would like to stress that the task of enhancing the enjoyment of human rights in the Singaporean society must be borne by all. These include the Government, citizens, residents and civil society organisations. My mandate stands ready to provide any assistance as may be required in this regard.

I thank you for your attention.”

**Ministry of Foreign Affairs Press Statement: MFA’s Response to the Press Statement of Mr Githu Muigai, UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, 28 April 2010**

Mr Githu Muigai visited Singapore at the invitation of the Singapore Government. He had requested to come to Singapore to better understand our society, engage in dialogue, and identify best practices to be shared.

We told Mr Muigai that for Singapore, maintaining racial and religious harmony and treating minorities fairly is not just the morally correct thing to do. It is a political, economic and even foreign policy imperative for our continued survival and prosperity.

The principle of meritocracy is the basis of Singapore’s success and will continue to serve as the core value of our society.

Mr Muigai told us that he now better appreciates the complexity of Singapore society and how we deal with racial issues. He agreed with us that managing racial issues is a journey with no end and there will always be challenges. We told him that we will deal with them pragmatically as they arise; policies are continually reviewed and adjusted if changes are warranted.

The Singapore Government looks forward to reading Mr Muigai’s final report. We have an open mind because the maintenance of racial harmony is of such vital importance to us that we are prepared to consider any practical suggestion that advances this goal and is workable in our unique circumstances.

We do not expect Mr Muigai to agree with all our approaches; nor do we agree with all that he had shared with us. Such differences of opinion are natural when dealing with a subject as complex as race. We will respond fully as appropriate when we see his final report.

However, there are some comments in his press statement and from his press conference that require immediate clarification.

#### POSITION OF THE MALAYS

We are surprised that Mr Muigai had so quickly concluded that in the field of education, “special measures within clearly defined timelines” may be necessary to help address the historical inequalities faced by the Malay community.

As Mr Muigai himself has acknowledged, statistics show that “great progress has been made in the last decades” in terms of the Malay community’s performance in education and many other areas. These statistics are publicly available.

The approach that Mr Muigai appears to be advocating – popularly known as ‘affirmative action’ based on racially defined quotas – is one that has been tried by many countries without notable success. During our discussions with him, we found that Mr Muigai is well aware of failures of affirmative action and indeed shared with us an example of such a failure in another country.

During his meeting with MUIS, Mr Muigai directly asked the President of MUIS Haji Mohd Alami Musa whether he thought the Malay community wanted the government to create special provisions to help the Malay community. Haji Alami categorically told Mr Muigai that the Malays disapproved of any affirmative action policy because the Malay community had a deep sense of pride in its own ability to achieve steady progress under the national system of meritocracy.

#### RESTRICTIONS ON DISCUSSION OF SENSITIVE ISSUES

In the course of his press conference this afternoon Mr Muigai referred to restrictions in our laws such as the Penal Code and the Sedition Act and expressed the opinion that they may not as useful today as forty-five years ago. He called for greater openness in the public discussion of sensitive issues.

Here we must emphatically disagree with Mr Muigai. Race, language and religion will always be sensitive issues in Singapore. This does not mean that they cannot be discussed, but a balance must always be struck between free expression and preservation of racial and religious harmony.

This balance is only for the Singapore government to determine because only the Singapore government bears the responsibility should things go wrong. The UN bears no such responsibility and we see no reason to take risks for the sake of an abstract principle.

We believe most Singaporeans agree with the government's approach.

#### PRESIDENTIAL COUNCIL FOR MINORITY RIGHTS

Mr Muigai was of the opinion that there was a potential conflict between the role of the Chief Justice as head of an independent judiciary and as Chairman of the Presidential Council for Minority Rights (PCMR). Mr Muigai has not fully understood the Constitutional role of the PCMR. As the Chief Justice himself told Mr Muigai, if there was any conflict of interest in a case, the Chief Justice would recuse himself. Our judiciary is well respected internationally and the PCMR has worked well to preserve racial harmony in Singapore.

#### CATEGORISATION BY ETHNICITY

Mr Muigai has suggested that categorising individuals by ethnicity, for example on our National Registration Identity Cards and through our Group Representation Constituency system, may reinforce and perpetuate prejudices and negative stereotypes. However, during our discussions Mr Muigai acknowledged that there was no single correct approach to this issue and that there were good reasons not to pretend that ethnic differences did not exist.

#### ACCEDING TO INTERNATIONAL CONVENTIONS

Mr Muigai has also recommended that we accede to certain international human rights conventions. We have told Mr Muigai that we are in the process of studying some of these conventions and do not rule out acceding to them. But we do not value form for its own sake and will accede to these conventions if there is substantive value in doing so and we are prepared to implement all their provisions.

There are also factual errors in Mr Muigai's press release that need immediate correction.

#### EDUCATION FOR MALAY STUDENTS

Mr Muigai had noted that "the Government had until a decade ago supported free education programmes for Malay students". This implies that the Government has reduced the amount of money devoted to Malay education. This is not true. What has changed is that the money that used to be allocated to middle-class Malays who no longer need subsidies for education is now given to Mendaki for distribution to the most needy Malays. The total amount of money dedicated to Malay education has not changed.

## NON-TAMIL-SPEAKING INDIAN MUSLIMS

Mr Muigai claimed that non-Tamil-speaking Indian Muslims may find it difficult to identify with Mendaki or SINDA. This is not true and in fact they have been making full use of programmes in both community groups. No Indian Muslim in need of help is denied help.

## SPECIAL ASSISTANCE PLAN (SAP) SCHOOLS

Mr Muigai claimed that Special Assistance Plan (SAP) schools were established in order to nurture the best talents that will form the next generation of leaders in the various fields. This is a misunderstanding of the role that SAP schools play in Singapore. Then-DPM Lee Hsien Loong in his speech at the 300th Anniversary of the Birth of the Khalsa Sikh Vesakhi Celebrations in 1999 had explained fully the role of SAP schools. The speech is still relevant and Mr Muigai was given a copy of the speech today.

A report – A/HRC/17/40/Add.2 – was submitted to the UN General Assembly on 25 March 2011. Below are excerpts of Part IV of the Report dealing with “Main challenges in the fight against racism, racial discrimination, xenophobia and related intolerance” as well as the Rapporteur’s conclusions and recommendations.

**Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Githu Muigai. Addendum Mission to Singapore, 21–28 April 2010. A/HRC/17/40/Add.2 dated 25 March 2011**

**IV. Main Challenges in the Fight Against Racism, Racial Discrimination, Xenophobia and Related Intolerance**

23. Singapore is rightly proud of its richly diverse society, where individuals from a wide range of ethnic, religious and cultural backgrounds manage to cohabit and interact with each other on a small portion of territory. Considering that violent communal riots occurred just a few decades ago, the Special Rapporteur would like to emphasize that the peaceful coexistence of the diverse communities is a remarkable achievement in itself.

24. The historical legacy of ethnic and religious tensions still casts a long shadow over the social and political life of Singapore today. To address this, the authorities have continuously and actively promoted social cohesion, religious tolerance and what they refer

to as “racial harmony”, as fundamental pillars of the city State. They have done so through a number of commendable policies and measures emphasizing tolerance, understanding and respect among the diverse ethnic and religious groups living in Singapore. The wide range of organizations providing common space for people to dialogue and learn about the cultural traditions and practices of the main ethnic groups in Singapore testify to the recognition that social harmony must not be taken for granted and that continuous efforts are needed to preserve it. In this regard, the Special Rapporteur was deeply impressed by the work achieved by, inter alia, the National Steering Committee on Racial and Religious Harmony, the National Integration Council, the People’s Association, OnePeople.sg, as well as the Inter-Racial and Religious Confidence Circles. In this regard, the Special Rapporteur was very much impressed by the level of community engagement by the population in fostering understanding and maintaining social cohesion, which undoubtedly constitute essential elements of nation-building in a young country like Singapore.

25. The wide-ranging measures taken by the authorities to foster racial harmony, discourage intolerance and preserve political stability and prosperity are widely appreciated by all sectors of the society. They indeed demonstrate that the Government is committed to confronting these challenges in an open manner. Yet, various interlocutors pointed out that the legitimate goal of searching for racial harmony may have created some blind spots in the policies and measures pursued by the Government. The Special Rapporteur would like to highlight some of these concerns in the following sections.

#### **A. Restrictions on freedoms of expression and assembly**

26. During his mission, the Special Rapporteur was informed that there exist several legislative provisions which deal with the promotion of feelings of “enmity”, “ill-will” or “hostility” between members of the different ethnic groups in Singapore. These legislative provisions include sections 298 and 298A of Singapore’s Penal Code, sections 3 and 4 of the Sedition Act, section 4 of the Undesirable Publications Act and section 7 of the Public Order Act.

27. For instance, according to section 298A of the Penal Code, “whoever (a) by words, either spoken or written, or by signs or by visible representations or otherwise, knowingly promotes or attempts to promote, on grounds of religion or race, disharmony or feelings of enmity, hatred or ill-will between different religious or

racial groups; or (b) commits any act which he knows is prejudicial to the maintenance of harmony between different religious or racial groups and which disturbs or is likely to disturb the public tranquillity, shall be punished with imprisonment for a term which may extend to 3 years, or with fine, or with both". Section 4 of the Undesirable Publications Act states that "for the purposes of this Act, a publication is objectionable if, in the opinion of any controller, it ... describes, depicts, expresses or otherwise deals with ... (b) matters of race or religion in such a manner that the availability of the publication is likely to cause feelings of enmity, hatred, ill-will or hostility between different racial or religious groups". Section 7 of the Public Order Act provides that the police may refuse to grant a permit for a public assembly or public procession if it has reasonable ground for apprehending that the proposed assembly or procession may "cause feelings of enmity, hatred, ill-will or hostility between different groups in Singapore."

28. It appears that the above-mentioned restrictions are aimed at framing and limiting any public debate or discourse on issues that are regarded as highly sensitive. Given Singapore's historical legacy, the concerns of the authorities with regard to communal tensions are understandable. Yet, the Special Rapporteur takes the view that it is absolutely necessary in a free society that restrictions on public debate or discourse and the protection of racial harmony are not implemented at the detriment of human rights, such as freedom of expression and freedom of assembly. During his mission, many interlocutors assured the Special Rapporteur that the Singaporean society had evolved substantially from the days of the violent confrontations 45 years ago, and that it was now able to hold open public debate on a sensitive issue like ethnicity in a dispassionate and fruitful manner. The Special Rapporteur therefore believes that the time is ripe for the authorities to review any undue legislative restrictions that may exist in the statute books in order to allow all individuals living in Singapore to share their views on matters related to ethnicity, to identify potential issues of discomfort and above all, work together to find solutions.

### **B. Significance of ethnic identity**

29. Despite the existence of various policies and institutions seeking to provide all ethnic groups with equal opportunities, it would appear that the significance of ethnic identity has not diminished. Some of the Special Rapporteur's interlocutors said it has even increased in one's interactions with the State and within the Singaporean society at large. Consequently, he notes that individuals find

themselves classified into distinct categories defined along ethnic lines. As an illustration, the ethnic identity of all Singaporeans is indicated on their identification documents and is used in a variety of purposes, including the choice of mother tongue instruction in schools and the ethnic quotas in the field of public housing (see sections below on housing and education).

30. Another example of ethnic categorization relates to the existence of “self-help groups” funded by the Government along ethnic or religious lines. While the Special Rapporteur was informed by the Government that there were various national schemes and programmes providing help to communities, including financial assistance to the needy through, for example, the Community Care Endowment Fund, these self-help groups seem to play a critical role in the provision of complementary social services, in particular in the field of education. Thus, the Yayasan Mendaki is to assist members of the Malay community, the Chinese Development Assistance Council has been established for members of the Chinese community, the Singapore Indian Development Association for members of the Indian community, the Eurasian Association for members of the Eurasian community and the Association of Muslim Professionals for members of the Muslim community.

31. According to the Government, these self-help groups provide tailored responses to the needs of each community, because they draw on and mobilize deep-seated ethnic, linguistic and cultural loyalties. Yet, various interlocutors questioned the compatibility of these officially endorsed self-help groups with the multi-ethnic, multi-religious and multicultural ideals promoted by the Government. Besides fears about the emphasis put on ethnic differences, concerns have been expressed that the smaller organizations are actually unable to compete with the Chinese self-help group, owing to its substantially larger financial resource base. Hence, it is felt that a more effective strategy might be to have a national body, instead of ethnically-based ones, to co-ordinate efforts and provide assistance to all individuals living in Singapore in an equal manner.

32. While the Special Rapporteur acknowledges that the self-help groups have occasionally pooled their resources to launch joint initiatives and that organizations such as OnePeople.sg provide valuable common space to all self-help groups, he nonetheless supports the idea of having a national body. In this regard, he takes the view that a national body would lessen the significance of ethnic identity in one’s interactions with the State and within Singaporean society at large. Such a body would also help remedy the challenges

faced by individuals of mixed origins or those who do not belong to the main ethnic groups, who seem to have difficulty in relating to any of the existing self-help groups.

33. During his mission, the Special Rapporteur was informed about the system of group representation constituencies (GRCs),<sup>7</sup> which was introduced to “ensure the representation in Parliament of Members from the Malay, Indian and other minority communities”, according to article 39A of the Constitution. The official and laudable rationale behind the 1988 introduction of GRCs was to ensure that the needs, concerns and views of minority groups would not be ignored or neglected in an ethnically Chinese-dominant Singapore. Further, the authorities claimed that this measure would help counter the tendency of voters to vote along ethnic lines. Under the GRC scheme, voters therefore elect on a “one person, one vote” basis a team of Members of Parliament (rather than an individual Member of Parliament), of which there must be at least one minority candidate from a designated ethnic background. While the Special Rapporteur understands the well-intentioned rationale behind the GRC system, he was told that this scheme had actually institutionalized and entrenched the minority status of certain ethnic groups within Singaporean society. It was underlined that the system reinforced the views that members of minority groups were not electable on their own and that they needed to be part of a group of Members of Parliament to be able to get a seat in the Parliament of Singapore.

34. The Special Rapporteur would like to express his concerns vis-à-vis the abovementioned schemes. Indeed, he takes the view that they may tend to reinforce and perpetuate ethnic categorization, which in turn may lead to certain prejudices and negative stereotypes held against certain minority groups taking root. The Special Rapporteur believes that the benefits of a society that allows for more permeability between delimited

ethnic categories and in which social interactions are not predetermined by ethnic identity cannot be overemphasized. In this context, he would like to suggest, as a starting point, that the identification documents should not indicate the ethnic background of individuals. While he was informed during his mission that this practice had been made more flexible to enable individuals of mixed origins to display several ethnic backgrounds, the Special Rapporteur nonetheless would like to emphasize that removing the ethnic background of individuals from identification documents would represent an important step in order to accord less significance to

the ethnic identity in one's interactions with the State and within Singaporean society at large.

### **C. Housing**

35. In 1989, the Government introduced the Ethnic Integration Policy in order to prevent the formation of ethnic enclaves and, more generally, to promote racial harmony. Under this policy, each of the main ethnic groups, i.e. Chinese, Malays, Indians and Eurasians, has a maximum quota of homes that may be rented or purchased by them in each public housing block and neighbourhood. Once the maximum quota has been reached for a particular ethnic group, no further sale or rental of apartments to members of that group will be allowed, unless the transaction is between members of the same ethnic group. Flexibility may be exercised vis-à-vis mixed couples, so that they may choose if they want to be considered as pertaining to one ethnic group or the other. During his mission, the Special Rapporteur was informed that a quota for permanent residents had been introduced in March 2010.

36. The Special Rapporteur was told by almost all his interlocutors that this policy had been generally successful in terms of social integration. Indeed, it allows the great majority of Singaporeans<sup>8</sup> from diverse ethnic backgrounds to mix together. As a result, almost every neighbourhood may be seen as a thumbnail representation of Singapore as a whole. Each precinct contains flats of different sizes so that households of different income and social profiles live together. Common spaces and shared facilities such as playgrounds or fitness corners enable all communities to regularly interact and to gain entrance into each other's world of food, festivals or social customs. In particular, the Special Rapporteur's attention was drawn to the "void decks" situated on the ground floor of each public housing block. These shared open spaces, where weddings, funerals or group games frequently take place, were highlighted as representing an important element of multi-ethnic, multireligious and multicultural life in Singapore.

37. While the rationale and objectives of the Ethnic Integration Policy may be laudable, the Special Rapporteur was informed that its implementation had actually created new problems. For instance, it was alleged that the existing public housing quotas may prevent members of ethnic minorities from finding accommodation close to their families. Moreover, since this policy prevents individuals from selling their flats to members of other ethnic groups if the maximum quota for these ethnic groups is reached, ethnic minori-

ties seem to encounter greater difficulties in reselling their apartments in the secondary market to members of their minority group. In this regard, several civil society interlocutors stressed the fact that, for ethnic minorities, the pool of potential buyers was smaller and therefore the selling price would be lower than if they were allowed to sell their properties to members of the ethnic Chinese group, for instance. In addition, some civil society interlocutors expressed their concerns that this policy based on ethnic grounds may contravene article 12, paragraph 2, of the Constitution with regard to the acquisition, holding or disposition of property (see para. 13 above).

38. Although the implementation of the Ethnic Integration Policy may already be of a rather complex nature, the Special Rapporteur would therefore like to suggest that more flexibility be allowed in its implementation, so that members of ethnic minorities may be able to find accommodation close to their families, for instance. Moreover, while there seems to be general agreement that this policy has benefited Singapore society as a whole, the Special Rapporteur would like to encourage the authorities to keep it under constant review, so as to take into account the evolving needs of the population living in Singapore.

#### **D. Education**

39. The Singaporean public education system has been successful in allowing all children, regardless of their backgrounds, to learn and play together. It has also been successful in preserving the languages of the main ethnic groups by allowing pupils to be taught both in English and in their mother tongue, i.e. Mandarin, Malay or Tamil. During his mission, the Special Rapporteur was informed about various education policies and programmes fostering tolerance, understanding and respect among the youth. For instance, school curricula include topics on social cohesion and harmony; interschool partnerships are organized for schools that are rather homogenous so that pupils may experience the existing ethnic and religious diversity in Singapore; and classroom arrangements are monitored so as to avoid any ethnic congregation. In addition, the Racial Harmony Youth Ambassador Programme seeks to develop a dynamic generation of youths from different backgrounds who participate actively in the development of a cohesive community. To that effect, it appoints Racial Harmony Ambassadors, whose tasks are, inter alia, to spread the message of multi-ethnic harmony among their families and friends, and to organize multi-ethnic activities. Another initiative relates to the yearly celebration in

schools of the Racial Harmony Day on 21 July to mark the anniversary of the 1964 communal riots. According to the Ministry of Education, this day serves to remind Singaporean pupils that promoting social cohesion and racial harmony requires constant effort. It is a day for schools to reflect on and celebrate the success of Singapore as a harmonious nation and society built on a rich diversity of cultures and heritages.

40. The Special Rapporteur would like to commend the Government for these fruitful policies and programmes. He indeed takes the view that they have very much contributed to the peaceful coexistence of the diverse communities in Singapore and as such, constitute good practices that may be shared with other States.

41. According to Government officials, the principle of meritocracy, which is at the core of the public educational system and Singaporean society more generally, ensures that all children are offered equal opportunities. On the face of it, meritocracy appears to be a laudable and legitimate principle. However, the Special Rapporteur notes that where there are acknowledged historical inequalities, as is the case with Malay students, this principle may contribute to entrenching these inequalities, rather than to correcting them. Despite statistics showing that great progress has been made in the last decades, Malay students seem to always remain below national average. As an illustration, the Special Rapporteur was informed that since Singapore's independence, only two Malay students had been granted the President's Scholarship, which is awarded to the best students in the country. Moreover, although the proportion of Malay pupils with at least five O-level passes has increased from 46 per cent in 1998 to 59.4 per cent in 2007 and the proportion of a Malay Primary One cohort admitted to post-secondary education institutions has increased from 62.6 per cent in 1998 to 83.5 per cent in 2007, the performance of their Chinese counterparts has consistently remained better over the years.

42. The Special Rapporteur was told during his mission that all communities adhered to the principle of meritocracy and that none would support the introduction of ethnic quotas. Yet, he would like to stress that Malay students who are persistently left behind may find it difficult to continue to adhere to the principle of meritocracy in the future. Indeed, if this principle is not perceived as benefiting all individuals living in Singapore in an equitable manner, members of the Malay community may well start to feel some resentment in the years or decades to come.

43. In addition to the above, the Special Rapporteur was informed that Special Assistance Plan (SAP) schools had been established in 1979 to provide an enriched teaching and learning environment for academically gifted students, who are destined to form the cultural elite of the country. He was also informed by the Ministry of Education that there exist equivalent programmes to nurture gifted Malay and Tamil students, albeit not in a whole-school setting. While English is the primary language of instruction in SAP schools and the latter appear to be open to all students, these schools are de facto restricted to Mandarin speakers. Indeed, the Special Rapporteur was told by various interlocutors that SAP schools seek to promote Mandarin as a tool for cultural transmission, but also for its economic advantage in terms of trade and investment in mainland China. This has led to some resentment among non-Mandarin speakers. Critics argue that these schools favouring Chinese language and culture are a visible symbol of the marginalization of ethnic minorities, and that they create the impression that there is a hierarchy of cultures in Singapore. In this context, critiques have also been expressed vis-à-vis the fact that non-Chinese students were not allowed to study Mandarin in schools. They are compelled to take courses in their mother tongue and must ask for special permission from the Ministry of Education before they can study Mandarin. This policy has been perceived by some interlocutors as denying access to the Mandarin language, which is regarded as an economically useful language.

44. Education is undoubtedly one of the most efficient tools to create a cohesive and tolerant society, in which all children may be taught how diverse ethnic and national groups can coexist peacefully. Consequently, the Special Rapporteur would like to encourage the authorities to ensure that the educational interests of Malay students are protected and promoted, in accordance with article 152 of the Constitution and international human rights standards. While there can be no doubt that meritocracy guarantees equality of opportunities, special measures within clearly defined timelines may help to address historical inequalities. In this context, he would like to encourage the authorities to consider making small adjustments to the educational system, for instance with special temporary programmes allowing Malay students to catch up. He also would like to suggest that all special programmes subsidizing tuition fees for Malay students be supported directly by the Government, rather than through the Yayasan Mendaki self-help group. In this manner, the Government could reinforce the message that the persistent lagging behind of the Malay community

in the field of education is not an issue to be addressed in isolation by the Malay community, but rather an issue that should be dealt with at the national level.

45. In addition to the above, the Special Rapporteur takes the view that in a society based on meritocracy, special schools for the most deserving students should be open to all, so that students from all communities may develop their skills in a non-discriminatory manner. On the question of the mother tongue taught at school, the Special Rapporteur acknowledges that this is a complex issue and that there is therefore no ready-made solution to it. He appreciates the Government's willingness to preserve the cultural features, including language, of each main ethnic group. However, he takes the view that the Government may consider ways of implementing its educational policy in a more flexible manner, so as to allow children to choose what language other than English they would like to take at school.

#### **E. Employment**

46. During his official meetings, the Special Rapporteur was informed of the promotional approach taken to address problems of discrimination against job-seekers and workers from certain ethnic or religious backgrounds. In this regard, he welcomes the initiatives taken by the Ministry of Manpower and the Tripartite Alliance for Fair Employment Practices aimed at educating employers and employees about the principle of non-discrimination or at resolving labour issues related to discrimination through mediation. In particular, the Special Rapporteur would like to emphasize the Tripartite Guidelines on Fair Employment Practices, aimed at promoting merit-based employment practices and preventing discrimination at the workplace. These guidelines clearly state that "race should not be a criterion for the selection of job candidates as multiracialism is a fundamental principle in Singapore. Selection based on race is unacceptable and job advertisements should not feature statements like 'Chinese preferred' or 'Malay preferred'". These guidelines also touch upon the issue of language requirements; for instance, they provide that "if a job entails proficiency in a particular language, employers should justify the need for the requirement. This would reduce ambiguity and minimise incidence of misunderstanding between the job seekers and the recruiting party". Other fruitful initiatives include the organization of various workshops on how to, inter alia, handle grievances, create an inclusive workplace, manage diversity and understand assumptions.

47. According to information provided by the Tripartite Alliance, the promotional approach aimed at changing mindsets among employers, employees and the general public to adopt fair and equitable employment practices has had good results. For instance, whereas before 1999 the ethnic criterion was referred to in 34 per cent of job ads, there is almost no mention of it in job ads today. Likewise, the Tripartite Alliance argues that the language criteria used to be mentioned in 20 per cent of job ads before 2006 and that this percentage has now been reduced to 1 per cent.<sup>13</sup> In addition, the media allegedly also examines the content of job advertisements and may refuse to publish them if they are not compliant with the Tripartite Guidelines on Fair Employment Practices.

48. Notwithstanding these achievements, the Special Rapporteur's attention was drawn to the difficulties and negative stereotypes faced by members of the Indian and Malay communities in the field of employment. For instance, the Special Rapporteur received reports indicating that Indian individuals applying for professional positions had been dismissed because they were not regarded as being hard workers. He was also told that Malay individuals continue to be underrepresented in senior positions in critical institutions that should reflect the diversity of Singapore, such as the armed forces, the police and the judiciary. Perceived lack of loyalty from members of the Malay community would appear to explain why they remain unable to gain access to sensitive positions in these institutions. While guidelines, policies and practices leading to the underrepresentation of the Malay community in these institutions may have found some political legitimacy during the few years immediately following the independence of the country, the Special Rapporteur would like to encourage the authorities to urgently review all of them, so as not to perpetuate the views that Singaporean citizens of Malay background cannot be trusted. In a diverse society like Singapore, it is all the more important for the authorities to ensure sufficient representation of the ethnic minorities in all employment sectors. In addition, the Special Rapporteur would like to suggest that the authorities consider adopting legally binding provisions prohibiting discrimination of all kinds, including on the grounds of ethnic or national origin, in the field of employment.

## **F. Migrant workers**

### *1. Integrating recent migrants into Singaporean society*

49. In order to satisfy the demands of a fast-growing economy and counter a declining birth rate and ageing population, the Govern-

ment has supported a significant influx of foreign workers – both skilled and unskilled – over the last decades. These foreign workers, who represent today about one third of the workforce residing in Singapore, have undoubtedly contributed to the building and the prosperity of this young nation. Yet, their presence has also created challenges for the Singaporeans. The Special Rapporteur was told both by Government officials and civil society actors that the recent immigration of individuals coming mainly from China and India had led to some resentment in the Singaporean population. Indeed, these recent migrants had in some instances been perceived as taking away jobs from Singaporean citizens, threatening Singaporean families, affecting the fragile national demographic balance or raising security concerns when foreign workers' dormitories are built close to residential areas. In fact, whereas numerous interlocutors recognized that there were today fewer tensions between the so-called "old" communities (i.e., ethnic Chinese, ethnic Malays, ethnic Indians and others) residing in Singapore since independence, they also acknowledged that new challenges had surfaced in terms of interactions between the old and newly arrived communities.

50. There was also a perception among some civil society interlocutors that the Government seemed to favour migrant workers from certain countries, in particular from China. According to these interlocutors, the rationale behind this policy would be to maintain the ethnic Chinese population above the critical threshold of 75 per cent. In this context, the interlocutors would like the authorities to provide them with more information, so that the parameters used to design immigration policy, in particular when relating to employment, may be more open and transparent.

51. The Special Rapporteur believes that the concerns described above, if unaddressed in a timely and open manner by the Government, could alter the peaceful coexistence of the great variety of ethnic and national groups residing in the country. This could indeed lead to generalized resentment against foreigners in Singapore and thus to overt xenophobic attitudes. In this regard, the Special Rapporteur would like to support the work undertaken by the National Integration Council (NIC), set up in 2009, which seeks to promote and foster social integration among Singaporeans and new immigrants. To that effect, NIC encourages collaborative social integration efforts among the people, the public and the private sectors, through various initiatives at schools, workplaces, in the media and at the community level. According to some civil society

interlocutors, however, NIC would mainly focus its work on the social integration of skilled migrant workers and would therefore not pay sufficient attention to those who were unskilled or semi-skilled, who often live in isolation from the rest of the Singaporean society. The Special Rapporteur therefore would like to encourage NIC to include unskilled and semi-skilled migrant workers – who sometimes stay for several years – in their programmes, so that they may also enjoy the benefits of social integration into Singaporean society.

***2. Enhancing the living and working conditions of unskilled and semi-skilled migrant workers, including domestic workers***

52. While the mandate of the Special Rapporteur does not specifically relate to migrant workers, it is nonetheless concerned with discrimination on the grounds of national or ethnic origin preventing individuals from enjoying, inter alia, just and favourable conditions of work, equal pay for equal work, as well as equality before the law. In this regard, the living and working conditions of migrant workers, in particular of the unskilled and semiskilled ones commonly referred to as “transient workers”, were frequently raised during the mission.

53. The Special Rapporteur was told by virtually all his interlocutors that the authorities had taken numerous and commendable initiatives to prevent and address the manifold human rights violations and sometimes physical abuse suffered by unskilled and semiskilled migrant workers, including domestic workers. These include awareness-raising and education programmes both for employers and employees; the conduct of random interviews of domestic workers during their initial months of employment; the monitoring of employers who change domestic workers frequently; assistance from the Ministry of Manpower in resolving labour disputes through mediation; the imposing of sanctions on employers when workers’ wages are unpaid; and the enhancement of penalties by one and a half times for offences committed by employers against their domestic workers. 54. Yet unskilled and semi-skilled migrant workers continue to face a number of difficulties. These include the abuses by labour-recruitment agencies in Singapore and in the countries of origin; the sponsorship system, which places migrant workers in a highly dependent relationship with their employer and severely limits labour mobility; unpaid salaries; unilateral cancellations of work permits by their employers; poor and unhygienic living conditions; or denial of medical insurance by their employers contrary to official policy. Concerns relating to

migrant workers being trafficked into the country were also raised by some civil society representatives.

55. Migrant domestic workers, who constitute about one fifth of the migrant workforce, also face a number of additional difficulties due to their exclusion from the Employment Act and to their isolated working environment. For instance, migrant domestic workers are not always accorded a day of rest per week; in practice they are not always granted annual or medical leave; they are automatically deported if found pregnant and are prohibited from marrying Singaporean men. Migrant domestic workers may also be prevented from leaving the house, due to the employer's fear of losing the S\$ 5,000 compulsory security bond, which seeks to ensure that the employers repatriate their work permit holders once the term of employment ends.

56. While the Special Rapporteur received assurances from relevant authorities that these issues are under review, he would like to strongly urge the Government to act swiftly to ensure the protection of migrant workers' human rights, as this is one area where the situation is dire. In this regard, he particularly welcomes the fact that the enforcement of a standard contract offering enhanced protection to migrant domestic workers is currently under review by the Ministry of Manpower. The Special Rapporteur also would like to suggest that the Government extend and enhance the effective implementation of the Employment Act; that efforts be undertaken to ensure that labour disputes are resolved expeditiously through accessible and effective mechanisms; and that a minimum wage for unskilled and semi-skilled migrant workers particularly vulnerable to exploitation, such as construction and domestic workers, be introduced.

### *3. Countering ethnic stereotypes concerning migrant workers*

57. The Government has, to a large extent, determined the employment areas in which members of certain foreign communities can work. In this regard, the Special Rapporteur was informed that for each sector of employment, there exists a list of "approved source countries or territories" from which employers may hire foreign workers. For instance, domestic workers may originate from Indonesia, Myanmar or the Philippines, but not from China; the construction sector may hire migrant workers only from Bangladesh, China, India, Malaysia, Sri Lanka, Thailand, and a few other Asian countries; and service sector companies may recruit workers from China; Hong Kong, China; Macao, China; Malaysia; the Republic

of Korea; and Taiwan Province of China. This policy of approved source countries or territories implemented by the Ministry of Manpower has raised concerns among civil society actors. They argue that this policy may entrench ethnic stereotypes within Singaporean society by associating certain low-skilled professions with certain nationalities and that this may taint the rest of the employment system. For instance, women from Indonesia and the Philippines would in most cases be perceived as being domestic workers. The Special Rapporteur therefore would like to suggest that the authorities consider reviewing their policy concerning the list of approved source countries or territories, so as to prevent and address the negative stereotypes applied to certain ethnic or national groups which are associated with unskilled or low-skilled professions. 58. In addition, the Special Rapporteur received reports concerning ethnic or national bias in salaries. As such, it appears that the principle of meritocracy would not apply to domestic workers and that, as a consequence, a maid from the Philippines would earn more than a maid from Indonesia, for instance. While these economic differences between national or ethnic groups do not stem from a deliberate governmental policy, some civil society interlocutors were nonetheless of the view that this economic differentiation was backed up by a range of prejudices and stereotypes affecting particular ethnic or national groups among unskilled and semi-skilled migrant workers.

## V. CONCLUSIONS AND RECOMMENDATIONS

59. Singapore is rightly proud of its richly diverse society, in which individuals from a wide range of backgrounds manage to cohabit and interact with each other on a small territory. Considering that violent communal riots occurred just a few decades ago, the peaceful coexistence of the diverse communities in Singapore is a remarkable achievement in itself.

60. Due to the historical legacy of communal tensions, the Government of Singapore is acutely aware of the threats posed by racism, racial discrimination, xenophobia and related intolerance. In this regard, the authorities have endeavoured to establish laws, policies and institutions that seek to actively combat these scourges and to continuously promote social cohesion, religious tolerance and what they refer to as “racial harmony”. The numerous measures taken by the authorities to preserve political stability and foster understanding among the diverse ethnic and religious groups living in Singapore testify to the recognition that social harmony must not be taken for granted and that continuous efforts are needed

to preserve it. As such, these measures are widely appreciated by all sectors of the society.

61. Yet, the Special Rapporteur notes that the legitimate goal of searching for racial harmony may have created some blind spots in the measures pursued by the Government and may in fact, and to a certain extent, have further marginalized some ethnic minorities. Even if there is no institutionalized racial discrimination in Singapore, the Special Rapporteur emphasizes that the marginalization of ethnic minorities must be acknowledged and acted upon in order to safeguard the stability, sustainability and prosperity of Singapore. In this regard, he would like to make the following recommendations.

#### *On Restrictions to Freedom of Expression and Assembly*

62. The Special Rapporteur recommends that the Government review undue legislative restrictions on public debate or discourse related to matters of ethnicity. Given Singapore's historical legacy, the Special Rapporteur understands that matters related to ethnicity may be regarded as highly sensitive. Yet the protection of racial harmony should not be implemented at the detriment of human rights, such as freedom of expression and freedom of assembly. The Special Rapporteur therefore recommends that the Government remove legislative provisions preventing all individuals living in Singapore from holding open public debate on matters related to ethnicity, so that they may share their views, identify potential issues of discomfort and above all, work together to find solutions.

#### *On the Significance of Ethnic Identity*

63. Despite the existence of various policies and institutions seeking to provide all ethnic groups with equal opportunities, it appears that Singaporeans find themselves classified into distinct categories defined along ethnic lines. As such, strong emphasis is put on the significance of ethnic identity, which is indicated on Singaporeans' identification documents.

64. The establishment of officially endorsed self-help groups providing complementary social services to the main ethnic groups in Singapore also testifies to the significance of ethnic identity. While the Special Rapporteur acknowledges that these self-help groups may provide tailored and effective responses to the needs of each community, he nonetheless recommends that the Government consider setting up a national body, instead of ethnically-based ones, to coordinate efforts and provide people living in Singapore

with assistance in an equal manner. Such a national body would lessen the significance of ethnic identity in one's interactions with the State and within Singaporean society at large and also help remedy the challenges faced by individuals of mixed origins or those who do not belong to the main ethnic groups, who seem to have difficulty in relating to any of the existing self-help groups.

65. Although the Special Rapporteur understands the well-intentioned rationale behind the system of group representation constituencies, which aims to ensure that the needs of minorities are not neglected in an ethnically Chinese-dominant Singapore, he takes the view that this system has actually institutionalized and entrenched the minority status of certain ethnic groups within Singaporean society. Further, it reinforces the views that members of ethnic minorities may sit in Parliament only if they belong to a larger group of Members of Parliament.

66. The Special Rapporteur emphasizes that the self-help groups and group representation constituency schemes may tend to reinforce and perpetuate ethnic categorization, which in turn may lead to prejudices and negative stereotypes held against certain ethnic minorities taking root. Taking into account the fact that a society may only benefit from social interactions that are not predetermined by ethnic identity, the Special Rapporteur recommends as a starting point that ethnic identity be removed from Singaporeans' identification documents.

### **On Housing**

67. The Ethnic Integration Policy, aimed at preventing the formation of ethnic enclaves, has been generally successful in terms of social integration. However, the Special Rapporteur recommends that the Government implement it in a more flexible manner, to ensure that members of ethnic minorities are not disadvantaged vis-à-vis ethnic Chinese individuals when seeking an accommodation close to their families or when trying to sell their accommodation in the secondary housing market.

### **On Education**

68. The principle of meritocracy, which is at the core of the public educational system and of Singaporean society more generally, ensures that all children are offered equal opportunities. However, where there are acknowledged historical inequalities – as is the case with Malay students who consistently remain below their Chinese counterparts – meritocracy may contribute to entrench-

ing these inequalities, rather than to correcting them. The Special Rapporteur therefore recommends that the Government consider making small adjustments to the educational system, for instance with special temporary programmes allowing Malay students to catch up. He also recommends that the programmes subsidizing tuition fees for Malay students be supported directly at national level, rather than through the Yayasan Mendaki selfhelp group.

69. In addition, the Special Rapporteur recommends that Special Assistance Plan schools be open to all, including to non-Mandarin native speakers, so that academically gifted students from all communities may have the opportunity to develop their skills in an environment that seeks to nurture the best talents of the country.

### **On Employment**

70. The promotional approach taken by the Ministry of Manpower and the Tripartite Alliance for Fair Employment Practices to address problems of discrimination against job-seekers and workers from certain ethnic or religious backgrounds appears to have had good results. Nonetheless, the Special Rapporteur recommends that the authorities adopt a firmer approach through legally binding provisions prohibiting discrimination of all kinds, including on the grounds of ethnic or national origin, in the field of employment.

71. In a diverse society like Singapore, it is essential to ensure sufficient representation of the ethnic minorities in all employment sectors. The Special Rapporteur therefore recommends that the Government urgently review all guidelines, policies and practices which may prevent members of ethnic minorities to be employed in institutions that should reflect the diversity of Singapore, such as the armed forces, the police and the judiciary.

### **On Migrant Workers**

72. The significant influx of foreign workers supported by the Government to satisfy the demands of a fast-growing economy and counter a declining birth rate and ageing population has significantly contributed to the building of the country. Yet, it has also created some resentment by the population, which at times perceives these migrant workers as taking away jobs from Singaporean citizens, threatening Singaporean families, affecting the fragile national demographic balance or raising security concerns. The Special Rapporteur recommends that these concerns be addressed in a timely and open manner by the Government, so as to prevent generalized resentment against foreigners, which could

lead to overt xenophobic attitudes. In this regard, he recommends that the National Integration Council treat the social integration of unskilled and semi-skilled migrant workers – who often live in isolation from Singaporean society – as a priority.

73. While numerous and commendable initiatives have been taken to prevent and address the manifold human rights violations and sometimes physical abuse suffered by unskilled and semi-skilled migrant workers, their situation remains dire. Difficulties faced by these migrant workers include the sponsorship system, which places them in a highly dependent relationship with their employers; unpaid salaries; unilateral cancellations of work permits by their employers; poor and unhygienic living conditions; or denial of medical insurance by their employers. The Special Rapporteur strongly urges the Government to act swiftly to ensure the protection of migrant workers' human rights. In this regard, he recommends that the Government enhance the effective implementation of the Employment Act and extend it to cover domestic workers; that efforts be undertaken to ensure the expeditious resolution of labour disputes through accessible and effective mechanisms; and that a minimum wage for migrant workers particularly vulnerable to exploitation, such as construction and domestic workers, be introduced.

74. The Special Rapporteur also recommends that the authorities consider reviewing their policy concerning the list of “approved source countries or territories”, so as to prevent and address the negative stereotypes applied to certain ethnic or national groups, which can be associated with unskilled or low-skilled professions.

#### *On the Legal and Institutional Human Rights Framework*

75. While the Special Rapporteur understands that the Government wishes to be in a position to fully implement the obligations contained in an international treaty before ratifying it, he nonetheless urges it to accede to international human rights instruments that contain provisions reaffirming the fundamental human rights principles of non-discrimination and equality. These include the International Convention on the Elimination of All Forms of Racial Discrimination; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

76. In the light of general recommendation No. 30 (2004) on non-citizens of the Committee on the Elimination of Racial Discrimination, the Special Rapporteur recommends that the constitutional provisions restricting certain human rights to Singaporean citizens – including the right to non-discrimination on the ground of religion, race, descent or place of birth in any law or in the appointment to any employment under a public authority, the rights in respect to education and the freedom of speech, assembly and association – be revised to extend equal human rights protection to all individuals residing in Singapore, including non-citizens.

77. While taking into account that the principles of equality and nondiscrimination are included in various domestic legislative acts, the Special Rapporteur recommends that the Government adopt a stand-alone law dedicated to the prohibition of racism, racial discrimination, xenophobia and related intolerance. Such legislation would clearly demonstrate Singapore's political commitment in the fight against racism and allow for enhanced visibility and accessibility of the law for all individuals, thereby enabling them to resort to the relevant provisions more easily and more effectively.

78. In order to strengthen the existing institutional human rights framework, the Special Rapporteur recommends that the Government review the mandate of the Presidential Council for Minority Rights, so that the latter may act on its own initiative. This Council should be empowered to consider and report on matters affecting the rights of members of ethnic minorities, without having to wait for the Speaker of Parliament or an appropriate Minister to refer such matters to it. Moreover, the Special Rapporteur recommends that the authorities take all necessary measures to guarantee the independence of this Council, including by ensuring that its Chairperson may not be faced with potential conflicts of interest.

## SRI LANKA

### RIGHTS OF ELDERS - UN RESOLUTION OF 1991

#### **Protection of the Rights of Elders (Amendment) Act, No. 5 of 2011**

This Act is an amendment to the Protection of the Rights of Elders Act, No. 9 of 2000. The amending Act has inserted a Preamble to the original

Act immediately after the long title. Paragraph 3 of the Preamble refers to the UN Resolution of 1991 and states:

AND WHEREAS Sri Lanka has adopted and ratified the United Nations Resolution No. 46/91 of December 16, 1991, which appreciates the contribution made by elders to society and is mindful that the State must provide the necessary infrastructure to assist elders who are advancing in years to live a life which is socially, economically, physically and spiritually fulfilling.

**ARBITRARY DEPRIVATION OF LIFE – TORTURE AND ILL-TREATMENT – LACK OF PROPER INVESTIGATION – RIGHT NOT TO BE SUBJECTED TO ARBITRARY OR UNLAWFUL INTERFERENCE WITH ONE’S FAMILY – RIGHT TO THE FAMILY.**

***Annakkarage Suranjini Sandamali Pathmini Peiris v. Sri Lanka. Communication No. 1862/2009, Human Rights Committee, 103<sup>rd</sup> session, 17 October to 4 November 2011, CCPR/C/103/D/1862/2009, 22 December 2011.***

The author of the communication submitted it on behalf of herself, her deceased husband, and her two minor children. She claimed violations of the following paragraphs of the International Covenant on Civil and

Political Rights: namely, Article 6<sup>36</sup> read in conjunction with Article 2(3);<sup>37</sup> Article 7<sup>38</sup> read in conjunction with Article 2(3); Articles 17<sup>39</sup> and 23(1).<sup>40</sup>

According to the author, there was a dispute between her husband, Nishantha Fernando, and a police officer over the sale of a vehicle. Her husband had made a complaint regarding the police officer and a disciplinary inquiry was instituted against the latter. The officer and several of his colleagues had threatened Fernando, and although the officer subsequently died, the threats continued.

From 2003 to 2008 the author and her family were subject to continuous threats, intimidation, and assault by the police. These included fabricated complaints against Fernando, verbal abuse, and death threats. They were also arrested and charged in court on fabricated charges and attacked and assaulted in their own home. The author and Fernando responded to these attacks by complaining to the Human Rights Commission of Sri Lanka, the National Police Commission, the Deputy Inspector General of Police, and the Bribery Commission. They received no redress from any of these institutions, and their complaints merely provoked further attacks from the police. They also filed a fundamental rights action in the Supreme

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36 Article 6 relates to the right to life.

37 Article 2(3) - Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.

38 Article 7 - No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

39 Article 17 - (1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. (2) Everyone has the right to the protection of the law against such interference or attacks.

40 Article 23(1) - The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Court. In addition, the lawyer appearing on behalf of the family was also threatened. On 20 September 2008, Fernando was shot inside his lorry by two masked men. In November 2008, the author filed an affidavit in the Negombo Magistrate's Court "alleging that there were serious threats against her and her family in her pursuit of her complaints of bribery and torture instituted against police officers." At later points in time, the staff of the organisation "Right to Life" that was assisting the author were threatened, her lawyer was assaulted at the police station, and grenades were thrown into the house of the lawyer appearing in the fundamental rights application.

The author submitted that she and her family suffered public assaults and threats culminating in her husband's murder. Although they submitted continuous complaints to the relevant institutions, no action was taken by the State Party to protect them, resulting in a violation of Article 6 of the Covenant, read together with Article 2(3). The author also submitted that they were severely tortured on 12 November 2007, resulting in herself and her daughter being hospitalised. They had also been forced to live in hiding. She contended that though torture is a crime in Sri Lanka, nobody was punished in her case, and the fundamental rights application filed in the Supreme Court was still pending. This resulted in a violation of her rights under Article 7 of the Covenant, read together with Article 2(3). She also contended that the state breached her rights under Article 9 of the Covenant<sup>41</sup> by failing to take adequate action to protect her family.

In 2009 and 2011, the Committee requested the State Party to submit information on the admissibility and merits of the communication, but the information was not received. The Committee regretted this failure and noted that Article 4(2) of the Optional Protocol obliges State Parties to examine in good faith all allegations made against them and communicate the information to the Committee. The Committee noted that "[i]n the absence of a reply from the State Party, due weight must be given to the author's allegations, to the extent that they are substantiated."

The Committee also regretted that the State Party has failed to respond to its request to take measures to protect the author and her family while

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41 Article 9 relates to the right to liberty and security of person.

the case is under consideration. It noted, “flouting of the rule<sup>42</sup> undermines the protection of the Covenant’s rights through the Optional Protocol.”

The Committee considered the admissibility of the case, as well as the merits. In regard to admissibility, the Committee concluded that for purposes of Article 5(2)(a) of the Protocol, the same matter is not being examined under any other procedure of international investigation or settlement. It noted that the State Party had not made any submissions in regard to admissibility and the author has declared that domestic remedies had not been effective, and therefore declared the communication admissible.

In regard to the merits of the case, the Committee noted firstly that, in the absence of submissions by the State Party, due weight must be given to the author’s allegations as far as they are substantiated. Regarding Article 6 of the Covenant, the Committee stated that the right to life is supreme and no derogation from this right is permitted. It went on to state that State Parties must ensure the protection of an individual’s rights, which may be violated not only by its agents but also by private persons. In view of the facts of the case, the Committee determined that the death of the author’s husband must be attributable to the State Party, which is in breach of Article 6. It also determined that the facts showed that the rights of the author and her family under Article 7 of the Covenant had also been violated. Criminal investigation and consequent prosecutions are necessary remedies for violations of the rights under these two Articles, and failure to take necessary steps in this regard resulted in a violation of the author’s rights under Article 2(3), read with Articles 6 and 7. Finally with regard to Article 9(1), the Committee recalled its jurisprudence that the Covenant protects the right to security of persons outside the context of the formal deprivation of liberty. The fact that the State Party did not take necessary action to protect the author and her family resulted in a violation of her rights to security of person under Article 9(1). The privacy of the family was also violated under Article 17.

The Committee held that the State Party is under an obligation to provide the author with an effective remedy. This includes ensuring that the perpetrators are brought to justice, that the author and her two children can return to their home in safety, and that reparation is granted, including compensation and an apology to the family.

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42 Rule 92 of the Rules of Procedure.

The Committee requested information from the State Party about the measures taken to give effect to the Committee's views and further requested that the Committee's views be translated into the official languages of the State Party and widely distributed.

## International Humanitarian Law

### PHILIPPINES

#### CRIMES AGAINST INTERNATIONAL HUMANITARIAN LAW, GENOCIDE AND OTHER CRIMES AGAINST HUMANITY

#### **An Act defining and penalizing Crimes against International Humanitarian Law, Genocide and Other Crimes against Humanity, organizing Jurisdiction, designating Special Courts, and for related purposes, Republic Act No. 9851**

This Act, also known as the Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity, declares principles and state policies of the Philippines in relation to international humanitarian law.

- (a) The Philippines renounces war as an instrument of national policy, adopts the generally accepted principles of international law as part of the law of the land and adheres to a policy of peace, equality, justice, freedom, cooperation and amity with all nations.
- (b) The State values the dignity of every human person and guarantees full respect for human rights, including the rights of indigenous cultural communities and other vulnerable groups, such as women and children;
- (c) It shall be the responsibility of the State and all other sectors concerned to resolved armed conflict in order to promote the goal of "Children as Zones of Peace;"
- (d) The state adopts the generally accepted principles of international law, including the Hague Conventions of 1907, the Geneva Conventions on the protection of victims of war and international humanitarian law, as part of the law our nation;

- (e) The most serious crimes of concern to the international community as a whole must not go unpunished and their effective prosecution must be ensured by taking measures at the national level, in order to put an end to impunity for the perpetrators of these crimes and thus contribute to the prevention of such crimes, it being the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes;
- (f) The State shall guarantee persons suspected or accused of having committed grave crimes under international law all rights necessary to ensure that their trial will be fair and prompt in strict accordance with national and international law and standards for fair trial, It shall also protect victims, witnesses and their families, and provide appropriate redress to victims and their families, It shall ensure that the legal systems in place provide accessible and gender-sensitive avenues of redress for victims of armed conflict; and
- (g) The State recognizes that the application of the provisions of this Act shall not affect the legal status of the parties to a conflict, nor give an implied recognition of the status of belligerency.<sup>43</sup>

Singed into law on 11 December 2009, the law defines concepts that are important to international humanitarian law, such as apartheid, armed conflict, attack directed against any civilian population, effective command and control or effective authority and control, enslavement, extermination, hors de combat, military necessity, perfidy, persecution, and works and installations containing dangerous forces.

In the chapter on crimes against international humanitarian law, genocide and other crimes against humanity, “war crimes” or “crimes against International Humanitarian Law” are categorized to mean: (a) in case of an international armed conflict, grave breaches of the Geneva Conventions of 12 August 1949; (b) in case of a non-international armed conflict, serious violations of common Article 3 to the four Geneva Conventions of 12 August 1949; or (c) other serious violations of the laws and customs applicable in armed conflict, within the established framework

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43 An Act Defining and Penalizing Crimes against International Humanitarian Law, Genocide and Other Crimes against Humanity, Organizing Jurisdiction, Designating Special Courts, and for Related Purposes, Rep. Act No. 9851, § 2 (Dec. 11, 2009) (Phil.).

of international law.<sup>44</sup> Genocide and “other crimes against humanity” are defined and penalized.

In the chapter dealing with some principles of criminal liability, sections on individual criminal responsibilities, irrelevance of official capacity, non-prescription, and orders from superiors are found. In the chapter on protection of victims and witnesses, the Act states that in addition to existing provisions in Philippine law for protection of victims and witnesses, there are measures that have to be undertaken by the state for them. Reparations to victims may include restitution, compensation, and/or rehabilitation.

In the chapter on jurisdiction, the Act provides that the state shall exercise jurisdiction over persons, whether military or civilian, suspected or accused of a crime defined and penalized in the Act, regardless of where the crime is committed, provided, any one of the following conditions is met: (a) the accused is a Filipino citizen; (b) the accused, regardless of citizenship or residence, is present in the Philippines; or (c) the accused has committed the said crime against a Filipino citizen. However, in the interest of justice, Philippine authorities may dispense with the investigation or prosecution if another court or international tribunal is already conducting the same. Instead, they may surrender or extradite suspected or accused persons in the Philippines to the appropriate international court, if any, or to the other state pursuant to the applicable extradition laws and treaties. Foreign nationals may not be prosecuted if they have been tried by a competent court outside the Philippines in respect of the same offense and acquitted, or having been convicted, already served their sentence.<sup>45</sup>

The following sources are to guide Philippine courts in the application and interpretation of the Act:

- (a) The 1948 Genocide Convention;
- (b) The 1949 Geneva Conventions I-IV, their 1977 Additional Protocols I and II and their 2005 Additional Protocol III;
- (c) The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, its First Protocol and its 1999 Second Protocol;

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44 *Id.* at § 4.

45 *Id.* at § 17.

- (d) The 1989 Convention on the Rights of the Child and its 2000 Optional Protocol on the Involvement of Children in Armed Conflict;
- (e) The rules and principles of customary international law;
- (f) The judicial decisions of international courts and tribunals;
- (g) Relevant and applicable international human rights instruments;
- (h) Other relevant international treaties and conventions ratified or acceded to by the Republic of the Philippines; and
- (i) Teachings of the most highly qualified publicists and authoritative commentaries on the foregoing sources as subsidiary means for the determination of rules of international law.<sup>46</sup>

## International Organizations

### PHILIPPINES

#### CHARACTER OF THE PHILIPPINE NATIONAL RED CROSS AS A NATIONAL SOCIETY

#### *Liban v. Gordon* [GR No. 175352. 15 July 15, 2009]

Liban, together with other petitioners, petitioned in Court to declare Senator Richard Gordon as having forfeited his seat in the Senate as he was elected Chairman of the Philippine National Red Cross (PNRC) Board of Governors. They argued that by accepting the responsibility, Gordon ceased to be a member of the Senate as provided in Sec. 13, Article VI<sup>47</sup> of the 1987 Philippine Constitution.

In ruling that Senator Gordon did not relinquish his senatorial post despite his election to and acceptance of the PNRC post, the Supreme Court held that PNRC is a private organization merely performing public func-

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<sup>46</sup> *Id.* at §15.

<sup>47</sup> Art. VI, Sec. 13 of the 1987 Philippine Constitution provides: "No person shall be a Member of the House of Representatives unless he is a natural-born citizen of the Philippines and, on the day of the election, is at least twenty-five years of age, able to read and write, and, except the party-list representatives, a registered voter in the district in which he shall be elected, and a resident thereof for a period of not less than one year immediately preceding the day of the election."

tions and that the PNRC Chairman is not a government official or employee. The PNRC Charter<sup>48</sup> was signed into law on 22 March 1947. It is a non-profit, donor-funded, voluntary, humanitarian organization, whose mission is to bring timely, effective, and compassionate humanitarian assistance for the most vulnerable without consideration of nationality, race, religion, gender, social status, or political affiliation.

Furthermore, the Republic of the Philippines, adhering to the Geneva Conventions, established the PNRC as a voluntary organization for the purpose contemplated in the Geneva Convention of 27 July 1929 (Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field). It is a member of the National Society of the International Red Cross and Red Crescent Movement (Movement), which is composed of the International Committee of the Red Cross, the International Federation of Red Cross and Red Crescent Societies (International Federation), and the National Red Cross and Red Crescent Societies (National Societies). The Movement is united and guided by its seven Fundamental Principles that provide a universal standard of reference for all members of the Movement. As a member of the National Society of the Movement, it has the duty to uphold the Fundamental Principles and ideals of the Movement and has to be autonomous in accordance with Article 4 of the Statutes of the International Red Cross and Red Crescent Movement. The Court added:

The reason for this autonomy is fundamental. To be accepted by warring belligerents as neutral workers during international or internal armed conflicts, the PNRC volunteers must not be seen as belonging to any side of the armed conflict. In the Philippines where there is a communist insurgency and a Muslim separatist rebellion, the PNRC cannot be seen as government-owned or controlled, and neither can the PNRC volunteers be identified as government personnel or as instruments of government policy. Otherwise, the insurgents or separatists will treat PNRC volunteers as enemies when the volunteers tend to the wounded in the battlefield or the displaced civilians in conflict areas.

PNRC is and should be viewed as autonomous, neutral, and independent from the Philippine government. It does not have government assets and does not receive any appropriation from the Philippine Congress. An over-

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48 An Act to Incorporate the Philippine National Red Cross, Rep. Act No. 95, as amended by Pres. Dec. No. 1264 (Oct. 1, 1979) (Phil.).

whelming majority of the board is elected or chosen by the private sector members of the PNRC. For not being a government official or employee, the PNRC Chairman, as such, does not hold a government office or employment. Thus, Article VI, Section 13 of the Constitution does not apply.

However, the PNRC Charter is violative of the constitutional proscription against the creation of private corporations by special law. Some of its provisions were struck down as unconstitutional and other parts declared valid as they can be considered as recognition by the state that the unincorporated PNRC is the local National Society of the International Red Cross and Red Crescent Movement, and thus entitled to the benefits, exemptions and privileges set forth in the PNRC Charter. They implement the Philippine Government's treaty obligations under Article 4(5) of the Statutes of the International Red Cross and Red Crescent Movement, which provides that to be recognized as a National Society, the Society must be "duly recognized by the legal government of its country on the basis of the Geneva Conventions and of the national legislation as a voluntary aid society, auxiliary to the public authorities in the humanitarian field."

## International Law and Municipal Law

### PHILIPPINES

#### RATIFICATION OF A TREATY – VALIDITY OF THE VISITING FORCES AGREEMENT (BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF THE PHILIPPINES)

*Suzette Nicolas Y Sombilon v. Alberto Romulo et al.* [G.R. No. 175888. 11 February 2009]

*Jovito R. Salonga et al. v. Daniel Smith et al.* [G.R. No. 176051. 11 February 2009]

*Bagong Alyansang Makabayan (Bayan) at al. a. President Gloria Macapagal-Arroyo et al.* [G.R. No. 176222. 11 February 2009]

Lance Corporal Daniel Smith, a member of the United States Armed Forces, was charged with the crime of rape committed against a Filipina

sometime on 1 November 2005. Pursuant to the Visiting Forces Agreement (VFA) between the United States of America and the Republic of the Philippines,<sup>49</sup> the United States, at its request, was granted custody of defendant Smith pending the proceedings. The United States faithfully complied with its undertaking to bring defendant Smith to the trial court every time his presence was required. Smith was found guilty of rape by the Regional Trial Court of Makati and was briefly detained at the Makati jail, until he was transferred to the US Embassy as provided for under new agreements between the Philippines and the United States, referred to as the Romulo-Kenney Agreement of 19 December 2006 and the Romulo-Kenney Agreement of 22 December 2006.

Petitioners contended that the Philippines should have custody of Smith because, first of all, the VFA is void and unconstitutional as it was not ratified by the United States Senate. The Court upheld the validity of the VFA, entered into on 10 February 1998, but the Romulo-Kenney Agreements were declared as not in accordance with the VFA, and the Secretary of Foreign Affairs was ordered to negotiate with United States representatives for the appropriate agreement on detention facilities under Philippine authorities as provided in Art. V, Sec. 10<sup>50</sup> of the VFA.

The Court noted that Art. XVIII, Sec. 25<sup>51</sup> of the 1987 Philippine Constitution was designed to ensure that any agreement allowing the presence of foreign military bases, troops or facilities in Philippine territory shall be equally binding on the Philippines and the foreign sovereign state involved. Recalling historical antecedence, the idea was to prevent a

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49 Entered into on February 10, 1998.

50 Art. V, Sec. 10 of the 1987 Philippine Constitution provides: "The confinement or detention by Philippine authorities of United States personnel shall be carried out in facilities agreed on by appropriate Philippines and United States authorities. United States personnel serving sentences in the Philippines shall have the right to visits and material assistance."

51 Art. XVIII, Sec. 25 of the 1987 Philippine Constitution provides: "After the expiration in 1991 of the Agreement between the Philippines and the United States of America concerning Military Bases, foreign military bases, troops, or facilities shall not be allowed in the Philippines except under a treaty duly concurred in by the Senate and, when the Congress so requires, ratified by a majority of the votes cast by the people in a national referendum held for that purpose, and recognized as a treaty by the other contracting State."

recurrence of the situation in which the terms and conditions governing the presence of foreign armed forces in Philippine territory were binding upon the Philippines but not upon the foreign state.

The presence of US Armed Forces in Philippine territory pursuant to the VFA is allowed under a treaty duly concurred in by the Senate and recognized as a treaty by the other contracting state. The Court provided two reasons for this. First, as held in *Bayan v. Zamora*,<sup>52</sup> the VFA was duly concurred in by the Philippine Senate and has been recognized as a treaty by the United States as attested and certified by the duly authorized representative of the United States government. The fact that it was not submitted for advice and consent of the United States Senate does not detract from its status as a binding international agreement or treaty recognized by the United States for this is a matter of internal United States law. The Court took note of the internationally known practice by the United States of submitting to its Senate for advice and consent agreements that are policymaking in nature, whereas those that carry out or further implement these policymaking agreements are merely submitted to Congress, under the provisions of the so-called Case-Zablocki Act,<sup>53</sup> within 60 days from ratification.

Second, the VFA, which is the instrument agreed upon to provide for the joint military exercises, is simply an implementing agreement to the main Military Defense Treaty of 30 August 1951 between the United States and the Philippines. This treaty was signed and duly ratified with the concurrence of both the Philippine Senate and the United States Senate. As an implementing agreement of the Mutual Defense Treaty, it was not necessary to submit the VFA to the US Senate for advice and consent, but merely to the US Congress under the Case-Zablocki Act. This substantially complies with the requirements of Art. XVIII, Sec. 25 of the Philippine Constitution. Since the VFA is valid and binding, the Court said that the parties are required as a matter of international law to abide by its terms and provisions.

The Romulo-Kenney Agreements were declared invalid as they are not in accordance with the VFA. The detention should have been carried

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52 *Bayan v. Zamora*, G.R. No. 138570, (S.C., Oct. 10, 2000) (Phil.), available at <http://sc.judiciary.gov.ph/jurisprudence/2000/oct2000/138570.htm>.

53 Case-Zablocki Act, 1 U.S.C. §112b (a) (2012).

out in facilities agreed on by authorities of both parties, but also that the detention shall be “by Philippine authorities.” The Agreements are not in accord with the VFA itself because such detention was not “by Philippine authorities.”

There was also the contention that the VFA violates another provision of the Constitution, namely, that providing for the exclusive power of the Supreme Court to adopt rules of procedure for all courts in the Philippines.<sup>54</sup> They argued that to allow the transfer of custody of an accused to a foreign power is to provide for a different rule of procedure for that accused, which also violates the equal protection clause of the Constitution.<sup>55</sup>

The Court said there was a substantial basis for a different treatment of a member of foreign military armed forces allowed to enter our territory and all other accused. The rule in international law is that a foreign armed forces allowed to enter one’s territory is immune from local jurisdiction, except to the extent agreed upon due to the recognition of extraterritorial immunity given to such bodies. Nothing in the Constitution prohibits such agreements. It in fact states that the Philippines adopts the generally accepted principles of international law as part of the law of the land.<sup>56</sup>

Lastly, the Court addressed the recent decision of the United States Supreme Court in *Medellin v. Texas*<sup>57</sup> which held that treaties entered into by the United States are not automatically part of their domestic law unless these treaties are self-executing or there is an implementing legislation to make them enforceable. The Philippine Supreme Court held the following points: first, the VFA is a self-executing Agreement, as that term is defined in *Medellin* itself, because the parties intend its provisions to be enforceable, precisely because the Agreement is intended to carry out obligations and undertakings under the Mutual Defense Treaty; second, the VFA is covered by implementing legislation, namely, the Case-Zablocki Act because it is the very purpose and intent of the United States Congress that executive agreements registered under it be immediately implemented. As such, the DFA differs from the Vienna Convention on Consular Relations and the

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54 Const. (1987), art. VIII, sec. 5(5) (Phil.).

55 Const. (1987), art. III, sec. 1 (Phil.).

56 Const. (1987), art. II, sec. 2 (Phil.).

57 *Medellin v. Texas*, 552 U.S. 491 (2008).

Avena decision of the International Court of Justice, the subject matter of the Medellin decision.

### **Memorandum of Understanding**

Opinion no. 41, s. 2009, 1 September 2009, “Whether the proposed Memorandum of Understanding (MOU) entered into by and between the Government of the Philippines and the Government of the Socialist Republic of Vietnam, concerning the release and utilization of the earmarked emergency rice reserve for the East Asia Emergency Rice Reserve (EAERR) can be considered as an executive agreement and, as such may not be subject to the rules and regulations provided for under Republic Act (R.A.) No. 9184, or the “Government Procurement Reform Act.”

Department of Agriculture Secretary Arthur Yap sought the opinion of Justice Secretary Agnes Devanadera on whether the Memorandum of Understanding between the governments of the Philippines and Vietnam could be considered an executive agreement. Under the memorandum, the Vietnamese government committed to supply rice to the Philippines under the Tier 1 Project of the East Asia Emergency Rice Reserve (EAERR).

Since it is an executive agreement, Secretary Devanadera held that the move of Secretary Yap to purchase rice from Vietnam is not covered by the provisions of the Government Procurement Reform Act<sup>58</sup> that requires public bidding. The importation could be used to augment supply during calamities. It was of utmost importance that the agreement was considered temporary only as it covers the years 2008 to 2010.

## **DISASTER MANAGEMENT AND EMERGENCY RESPONSE**

### **ASEAN Agreement on Disaster Management and Emergency Response (AADMER). Philippine Senate Resolution No. 202, 14 September 2009**

The Philippine Senate concurred with the ASEAN Agreement on Disaster Management and Emergency Response (AADMER) which was signed on 26 July 2005 in Vientiane, Lao PDR. The concurrence with the AADMER is largely seen as an impetus for change in the legal framework in the

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58 An Act Providing for the Modernization, Standardization and Regulation of the Procurement Activities of the Government and for Other Purposes, Rep. Act No. 9184 (Jan. 10, 2004) (Phil.).

Philippines that deals with climate change and disaster risk reduction and management.

In the resolution concurring with AADMER, the Senate affirms that the AADMER aims to provide a comprehensive regional framework for substantial reduction of disaster losses in lives and in the social, economic and environmental assets of ASEAN states, and to jointly respond to disaster emergencies through national efforts and intensified regional and international cooperation. The AADMER establishes an ASEAN Coordinating Centre for Humanitarian Assistance on disaster management and an ASEAN Disaster Management and Emergency Relief Fund.

## SINGAPORE

### APPLICATION OF CUSTOMARY INTERNATIONAL LAW IN MUNICIPAL COURTS – APPLICABILITY OF INTERNATIONAL HUMAN RIGHTS NORMS TO INTERPRETATION OF CONSTITUTION

*Yong Vui Kong v Public Prosecutor and Another Matter. Criminal Appeal No 13 of 2008; Criminal Motion No 7 of 2010. Singapore Court of Appeal. [2010] 3 Singapore Law Reports 489; [2010] SGCA 20*

#### *Facts*

The appellant was convicted of trafficking in 47.27g of diamorphine, an offence that carried the mandatory death penalty under the Misuse of Drugs Act (Cap 185, 2001 Rev Ed). He argued that the mandatory death penalty (MDP) was unconstitutional as it violated Article 9(1) of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) (the ‘right to life’) and Article 12(1) (‘guarantee of equality’). One argument raised by the appellant was that word ‘law’ in both Article 9(1) and Article 12(1) of the Constitution incorporated rules of customary international law (CIL) and that the Misuse of Drugs Act violated the CIL rule that prohibits ‘inhuman punishment’.

#### *Judgment*

... We agree that domestic law, including the Singapore Constitution, should, as far as possible, be interpreted consistently with Singapore’s international legal obligations. There are, however, inherent limits on the

extent to which our courts may refer to international human rights norms for this purpose. For instance, reference to international human rights norms would not be appropriate where the express wording of the Singapore Constitution is not amenable to the incorporation of the international norms in question, or where Singapore's constitutional history is such as to militate against the incorporation of those international norms ... In such circumstances, in order for our courts to give full effect to international human rights norms, it would be necessary for Parliament to first enact new laws ... or even amend the Singapore Constitution to expressly provide for rights which have not already been incorporated therein.... In short, the point which we seek to make is this: where our courts have reached the limits on the extent to which they may properly have regard to international human rights norms in interpreting the Singapore Constitution, it would not be appropriate for them to legislate new rights into the Singapore Constitution under the guise of interpreting existing constitutional provisions.

Where the Singapore Constitution is concerned, we are of the view that it is not possible to incorporate a prohibition against inhuman punishment through the interpretation of existing constitutional provisions (in this case, Art 9(1)) for two reasons.

First, unlike the Constitutions of the Caribbean States, the Singapore Constitution does not contain any express prohibition against inhuman punishment. Our constitutional history is quite different from that of the Caribbean States. Belize and the other Caribbean States modelled their Constitutions after the ECHR [European Convention on Human Rights], whereas the Singapore Constitution – specifically, Pt IV thereof on fundamental liberties – was derived (albeit with significant modifications) from Pt II of the 1957 Constitution of the Federation of Malaya (“the 1957 Malayan Constitution”), which formed the basis of what we shall hereafter refer to as “the 1963 Malaysian Constitution” (viz, the Constitution of Malaysia that came into effect when Malaysia (comprising the Federation of Malaya, Singapore, Sabah and Sarawak) was formed on 16 September 1963). It is a little known legal fact that the ECHR was made applicable to Singapore and the Federation of Malaya in 1953 just as it was made applicable to Belize and several other British colonies by virtue of the UK's declaration under Art 63 of the ECHR (see Karel Vasak, *The European Convention of Human Rights Beyond the Frontiers of Europe* 12 ICLQ 1206, 1210). The ECHR ceased to apply in the respective British colonies upon their

independence (in the case of Singapore, the ECHR ceased to apply when we became a constituent State of Malaysia in 1963), but Belize and many other former British colonies (especially those in the Caribbean) modelled their Constitutions after the ECHR. As a result, the Constitutions of these countries included a prohibition against inhuman punishment. This was not the case for either Malaysia or Singapore.

When the 1957 Malayan Constitution was drafted (pursuant to advice from the Federation of Malaya Constitutional Commission chaired by Lord Reid (“the Reid Commission”)), no reference was made to a prohibition against inhuman punishment in any provision of the draft Constitution; ie, the Reid Commission did not recommend the incorporation of such a prohibition. Given that the Reid Commission’s report (*viz*, Report of the Federation of Malaya Constitutional Commission, 1957 (CO No. 330, Feb. 11, 1957) was published in 1957 when the prohibition against inhuman punishment already existed in the ECHR (which applied to the Federation of Malaya prior to its independence), the omission of a similar prohibition from the 1957 Malayan Constitution was clearly not due to ignorance or oversight on the part of the Reid Commission. The prohibition against inhuman punishment was likewise omitted from the 1963 Malaysian Constitution.

When Singapore separated from Malaysia and became an independent sovereign republic on 9 August 1965, we inherited a state Constitution (ie, the Constitution of the State of Singapore set out in Schedule 3 to the Sabah, Sarawak and Singapore (State Constitutions) Order in Council 1963 (GN No S1 of 1963)) and many provisions of the 1963 Malaysian Constitution, including (inter alia) the provisions on fundamental liberties that are now Arts 9-16 in Pt IV of the Singapore Constitution. As a result of the aforesaid developments in our constitutional history, the Singapore Constitution, unlike many other Commonwealth Constitutions, is not modelled after the ECHR and does not contain an express prohibition against inhuman punishment. This weakens Mr Ravi’s contention that the Singapore Constitution should be read as incorporating an implied prohibition to this effect.

The second and more important reason why it is not possible to interpret the Singapore Constitution as incorporating a prohibition against inhuman punishment is that a proposal to add an express constitutional provision to this effect was made to the Government in 1966 by the constitutional commission chaired by Wee Chong Jin CJ (“the Wee Commission”), but

that proposal was ultimately rejected by the Government. The Wee Commission was appointed to look into (among other things) the protection of minority rights in Singapore after we became an independent sovereign republic. To this end, the Wee Commission studied the constitutional texts of some 40 different British colonies and dominions and newly independent nations as well as non-Commonwealth Constitutions (see *EVOLUTION OF A REVOLUTION: FORTY YEARS OF THE SINGAPORE CONSTITUTION* (11-12 (Li-ann io & Kevin Y L Tan eds., Routledge Cavendish 2009), and, in its written report (viz, *REPORT OF THE CONSTITUTIONAL COMMISSION 1966* (Aug. 27, 1966) (“the 1966 Report”)), went out of its way to recommend, *inter alia*, the inclusion of a constitutional provision prohibiting torture or inhuman punishment.

The Wee Commission gave the following reasons for its recommendation (see the 1966 Report at ¶ 40):

In looking at other written Constitutions[,] we find a fundamental human right which is acknowledged and protected in all of them but which is not written into the Constitution of Malaysia [ie, the 1963 Malaysian Constitution, certain provisions of which continued in force in Singapore after 9 August 1965 by virtue of the Republic of Singapore Independence Act 1965 (Act 9 of 1965)]. This is the right of every individual not to be subjected to torture or inhuman treatment. We think it is beneficial if this right is written into the Constitution of Singapore as a fundamental right and accordingly we recommend a new Article as follows -

13.-(1) No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that the law in question authorises the infliction of any punishment or the administration of any treatment that was lawful immediately before the coming into force of this Article.

For convenience, we shall hereafter refer to the new Article proposed by the Wee Commission as “the proposed Art 13”, and to the two subsections of this proposed Article as, respectively, “the proposed Art 13(1)” and “the proposed Art 13(2)”.

Three things may be noted about the proposed Art 13. The first is that the proposed Art 13(1) is effectively word for word the same as both Art 3 of the ECHR and s 7 of the Belize Constitution (which was the subject

matter of the decision in *Reyes* ([2002] 2 A.C. 235). The second is that the proposed Art 13(1) and the proposed Art 13(2) are *in pari materia* with: (a) ss 15(1) and 15(2) respectively of the Constitution of Barbados (which provisions were commented on by the Privy Council in *Boyce* ([2005] 1 A.C. 400) at, *inter alia*, [28]); and (b) ss 17(1) and 17(2) respectively of the Constitution of Jamaica (which Constitution was construed in *Pratt* ([1994] 2 AC 1), a decision rejected by this court in *Jabar* ([1995] 1 SLR(R) 326). Third, the proposed Art 13(2), which is essentially a savings clause to preserve the validity of punishments existing before the coming into force of the proposed Art 13 (regardless of whether or not such punishments are inhuman), is also substantially the same as para 10 of Schedule 2 to the Saint Lucia Constitution Order 1978 (SI 1978/1901) (“the Saint Lucia savings clause”).

The Saint Lucia savings clause reads as follows:

Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of section 5 of the Constitution [of Saint Lucia] to the extent that the law in question authorises the infliction of any description of punishment that was lawful in Saint Lucia immediately before 1 March 1967 (being the date on which Saint Lucia became an associated state).

In *Hughes* ([2002] 2 A.C. 259), the Privy Council held that the above clause was inadequate to save the MDP imposed for murder under s 178 of the Criminal Code of Saint Lucia as revised in 1992 (“Saint Lucia’s Criminal Code”) from unconstitutionality (in terms of violating the constitutional prohibition against inhuman punishment set out in s 5 of the Constitution of Saint Lucia). The Privy Council, relying on the word “authorises” (which is also used in the proposed Art 13(2)), stated (at [47] of *Hughes*):

[T]here is a world of difference between a law that requires a judge to impose the death penalty in all cases of murder and a law that merely authorises him to do so. More particularly, it is because the law requires, rather than merely authorises, the judge to impose the death sentence that there is no room for mitigation and no room for the consideration of the individual circumstances of the defendant or of the murder. [emphasis added]

Proceeding on this basis, the Privy Council held that s 178 of Saint Lucia’s Criminal Code fell outside the scope of the Saint Lucia savings clause “to the extent that it ... require[d] the infliction of the death penalty in all cases

of murder” (at [48]). In other words, the Saint Lucia savings clause saved only the discretionary death penalty, but not the MDP.

Since the proposed Art 13 is not part of the Singapore Constitution, the Privy Council’s decision in *Hughes*, which turned on the interpretation of the word “authorises” in the Saint Lucia savings clause, is not relevant in the present appeal. Nevertheless, we wish to add that, whatever the legislative intent of the Saint Lucia savings clause was, we find it difficult to believe that when the Wee Commission raised the proposed Art 13(2) for the Government’s consideration, it intended to exclude from the protection of this provision all punishments “required” by law, such as the MDP for murder, mandatory caning for other offences as well as the various mandatory minimum punishments prescribed under the then existing criminal statutes (for example, the Vandalism Act 1966 (Act 38 of 1966), which came into force on 16 September 1966). It seems to us that the converse was more likely, ie, the Wee Commission intended the proposed Art 13(2) to prevent the raising of any argument that any pre-existing lawful punishment of whatever nature would be in violation of the proposed Art 13(1) upon the proposed Art 13 taking effect.

In this regard, we note that the word “requires” was not used in the proposed Art 13(2). The word used was, instead, “authorises”. It is an established principle of interpretation that the meaning of a word is derived from the context in which that word is used. The purpose of a savings clause in the nature of the proposed Art 13(2) is clearly to save from possible unconstitutionality all existing punishments that were lawful prior to the coming into effect of a new constitutional right (such as that set out in the proposed Art 13(1)). If the word “authorises” in such a savings clause is indeed intended to exclude existing punishments that are “required” to be imposed (ie, mandatory punishments such as the MDP), it would be far easier to simply abrogate all those punishments so as to conform to the new constitutional right in question, instead of leaving the constitutional validity of those punishments in doubt until a court decides, long after the event, which of the “required” punishments are saved and which are not. It seems to us rather surprising that a punishment which the court is “required” to impose for a particular offence (eg, the MDP) can be construed as falling outside the ambit of “authorised” punishments. This is because, if the court is “required” to inflict a particular punishment, it is a fortiori authorised to inflict that punishment.

Returning to the Wee Commission's recommendations as set out in the 1966 Report, the Government accepted many of those recommendations in their entirety. There were other recommendations which the Government agreed to in principle, but not with regard to the details; and there were yet other recommendations which the Government found to be unacceptable. In respect of the proposed Art 13, the Government accepted in principle that no individual should be subjected to torture, but it omitted any reference to protection from inhuman punishment (*see* SINGAPORE PARLIAMENTARY DEBATES, OFFICIAL REPORT (Dec. 21, 1966) vol 25 at cols 1052-1053) (Mr EW Barker, Minister for Law and National Development)). Ultimately, the Government did not include the proposed Art 13 in the amendments to the Singapore Constitution, and the Constitution (Amendment) Act 1969 (Act 19 of 1969), which was passed to give effect to provisions of the 1966 Report that the Government accepted, provided for only the establishment of what is now the Presidential Council for Minority Rights to, *inter alia*, serve as "an additional check on ... matters which might affect the minorities" (*see* the 1966 Report at para 16).

The Government's rejection of the proposed Art 13 was unambiguous, whatever the reasons for such rejection were. This development, in our view, forecloses Mr Ravi's argument that it is open to this court to interpret Art 9(1) of the Singapore Constitution as incorporating a prohibition against inhuman punishment. We may reasonably assume that the Wee Commission recommended the inclusion of the proposed Art 13 in the Singapore Constitution because Art 9(1) did not deal with the same subject matter as that of the proposed Art 13(1) (*viz*, prohibition of inhuman punishment); otherwise, Art 9(1) would have been redundant. The Government's rejection of the proposed Art 13(1) - the content of which forms the basis of the ruling in the Privy Council cases relating to Art 9(1) that the MDP is an inhuman punishment - makes it impossible for the Appellant to now challenge the constitutionality of the MDP by relying on these Privy Council cases. It is not legitimate for this court to read into Art 9(1) a constitutional right which was decisively rejected by the Government in 1969, especially given the historical context in which that right was rejected. We therefore conclude that Mr Ravi's proposed interpretation of Art 9(1) as incorporating a prohibition against inhuman punishment is an interpretation which our courts are barred from adopting.

In this connection, we wish to highlight Lord Bingham's observation in *Reyes* at [28] that States are not bound to give effect in their Constitutions to norms and standards accepted elsewhere, perhaps in very different societies. It is also pertinent to refer to the judgment of Lord Nicholls in *Matthew* ([2005] 1 A.C. 433), where his Lordship said:

... If the requisite legislative support for a change in the Constitution is forthcoming, a deliberate departure from fundamental human rights may be made, profoundly regrettable although this may be. That is the prerogative of the legislature.

If departure from fundamental human rights is desired, that is the way it should be done. The Constitution should be amended explicitly.

... Let us first consider the effect of the proposition that the expression "law" in Art 9(1) includes CIL. If this proposition were accepted, it would mean that any rule of CIL would be cloaked with constitutional status and would override any existing MDP legislation, such as s 302 of the Singapore Penal Code, which, as mentioned at [84] above, can be traced back to 1883 (see s 1 of the Penal Code Amendment Ordinance).

Ordinarily, in common law jurisdictions, CIL is incorporated into domestic law by the courts as part of the common law in so far as it is not inconsistent with domestic rules which have been enacted by statutes or finally declared by the courts. (A rule of CIL may, of course, also be incorporated by statute, but, in that situation, the rule in question will become part of domestic legislation and will be enforced as such; ie, it will no longer be treated as a rule of CIL.) The classic exposition of the principle delineating when a CIL rule becomes part of domestic common law is set out in the Privy Council case of *Chung Chi Cheung* ([1939] A.C. 160) (cited by this court in *Nguyen* ([2005] 1 SLR(R) 103), where Lord Atkin explained (at 167-168):

[S]o far, at any rate, as the Courts of this country are concerned, international law has no validity save in so far as its principles are accepted and adopted by our own domestic law. There is no external power that imposes its rules upon our own code of substantive law or procedure. The Courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals.

Other authorities which illustrate this principle include *Collco Dealings Ltd v Inland Revenue Commissioners* [1962] A.C. 1 (likewise referred to in *Nguyen* at [94]); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* (Oxford University Press, 7th ed, 2008) at p 44; OPPENHEIM'S *INTERNATIONAL LAW, VOL. 1: PEACE* (Jennings & Watts eds., Longman 9th ed. 1992) at p 56; and PETER MALANCZUK, *AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 69 (Routledge, 7th ed, 1997).

The principle enunciated by Lord Atkin in *Chung Chi Cheung* entails that, at common law, a CIL rule must first be accepted and adopted as part of our domestic law before it is valid in Singapore - ie, a Singapore court would need to determine that the CIL rule in question is consistent with "rules enacted by statutes or finally declared by [our] tribunals" (per Lord Atkin in *Chung Chi Cheung* at 168) and either declare that rule to be part of Singapore law or apply it as part of our law. Without such a declaration or such application, the CIL rule in question would merely be floating in the air. Once that CIL rule has been incorporated by our courts into our domestic law, it becomes part of the common law. The common law is, however, subordinate to statute law. Hence, ordinarily, CIL which is received via the common law is subordinate to statute law. If we accept Mr Ravi's submission that the expression "law" in Art 9(1) includes CIL, the hierarchy of legal rules would be reversed: any rule of CIL that is received via the common law would be cloaked with constitutional status and would nullify any statute or any binding judicial precedent which is inconsistent with it.

In our view, a rule of CIL is not self-executing in the sense that it cannot become part of domestic law until and unless it has been applied as or definitively declared to be part of domestic law by a domestic court. The expression "law" is defined in Art 2(1) to include the common law only "in so far as it is in operation in Singapore". It must therefore follow that until a Singapore court has applied the CIL rule prohibiting the MDP as an inhuman punishment (if such a rule exists) or has declared that rule as having legal effect locally, that rule will not be in operation in Singapore. In the present case, given the existence of the MDP in several of our statutes, our courts cannot treat the alleged CIL rule prohibiting inhuman punishment as having been incorporated into Singapore law, and, therefore, this alleged CIL rule would not be "law" for the purposes of Art 9(1). We might add that (as noted at [44] above), in *Nguyen*, this court held (at [94]) that

in the event of any conflict between a rule of CIL and a domestic statute, the latter would prevail.

There is an even stronger reason why, even if we accept that “law” in Art 9(1) includes CIL, the specific CIL rule prohibiting the MDP as an inhuman punishment (assuming there is such a rule) cannot be regarded as part of “law” for the purposes of this provision. As mentioned earlier (at [64]-[65] and [71] above), the Wee Commission had in 1966 recommended adding a prohibition against inhuman punishment (in the form of the proposed Art 13) to the Singapore Constitution, but that recommendation was rejected by the Government. Given that the Government deliberated on but consciously rejected this suggestion of incorporating into the Singapore Constitution an express prohibition against inhuman punishment generally, a CIL rule prohibiting such punishment - let alone a CIL rule prohibiting the MDP specifically as an inhuman punishment - cannot now be treated as “law” for the purposes of Art 9(1). In other words, given the historical development of the Singapore Constitution, it is not possible for us to accept Mr Ravi’s submission on the meaning of the expression “law” in Art 9(1) without acting as legislators in the guise of interpreters of the Singapore Constitution.

In any event, there is one other crucial threshold which Mr Ravi must cross before he can make out a case that “law” in Art 9(1) includes the CIL prohibition against the MDP (assuming this prohibition does indeed exist), namely, he must show that the content of the CIL rule prohibiting inhuman punishment is such as to prohibit the MDP specifically.

[Appeal dismissed]

## Jurisdiction

### SINGAPORE

#### EXTRA-TERRITORIAL JURISDICTION – PRESUMPTION AGAINST EXTRA-TERRITORIAL APPLICATION OF STATUTES – PRINCIPLES OF COMITY

***Huang Danmin v Traditional Chinese Medicine Practitioners Board, Originating Summons No 849 of 2008, 18 May 2010. [2010] 3 SLR 1108; [2010] SGHC 152. Tay Yong Kwang J.***

#### *Facts*

The appellant, Huang was a Singapore-registered traditional Chinese medicine (“TCM”) practitioner with a clinic in Singapore. In 2003, the family members of a patient who had been diagnosed with terminal rectal cancer approached Huang to treat him. Huang agreed and informed them that he also operated a clinic in the neighbouring Malaysian state of Johor, and that he had some special equipment in his Johor clinic that might be helpful to the patient. Accordingly, Huang treated the patient at his Johor clinic. One form of treatment deployed by Huang required the use of a “electro-thermal needle” machine which inserted a needle into the patient’s tumour area.

In 2008, Huang’s registration as a TCM practitioner was cancelled by the respondent Traditional Chinese Medicine Practitioners Board (“the Board”) after considering the findings and recommendations of the Investigation Committee in respect of three complaints that had been filed against the Appellant. One of these complaints concerned his questionable treatment of the patient in his Johor clinic. Huang argued that the Board erred in finding his Johor treatment procedure to be against TCM practice. Among other things, the appellant argued that the TCM Act did not apply to acts committed by him while outside Singapore as there was a well-known principle of statutory interpretation that a statute is not extra-territorial in its application unless it expressly so provides.

#### *Judgment*

... Before I proceed with the substantive analysis, I would just make some comments regarding the presumption against extra-territoriality.

My first comment relates to Ms Koh's [counsel for appellant's] submissions that the presumption against extra-territoriality applies only to "offence creating" statutes and that there is no such presumption when the statute in question is not an "offence creating" one. In support of this proposition, she cited the case of *PP v Pong Tek Yin* [1990] 1 SLR(R) 543, where the court held at [16] that:

The question is one of construction, and in construing that section it must be borne in mind that there is a well-established presumption that in the absence of clear and specific words to the effect a statute which creates an offence is not intended to make an act taking place outside the territorial jurisdiction of the country an offence triable in the courts here: *Air-India v Wiggins* [1980] 2 All ER 593.

While Ms Koh's argument is an attractive one, it may not be easy to determine whether a particular law is an offence creating statute or not. Virtually every law that purports to regulate behaviour provides for a penalty (either a fine or a jail sentence) in the event that it is breached. For example, in *Mackinnon v Donaldson, Lufkin & Jenrette Securities Corporation* [1986] Ch 482, Hoffman J invoked the presumption against extra-territoriality in refusing to interpret s 7 of the Bankers' Books Evidence Act 1879 (c 11) (UK), which allowed a court to order the inspection of entries in a banker's book, as having extra-territorial effect (at 493). Although the said s 7 did not explicitly make a party's refusal to comply with a court inspection order a criminal offence, such refusal would certainly have been regarded as contempt of court and would have attracted a fine or even a jail sentence. In this sense, every statutory instrument can be regarded as an "offence creating" statute by virtue of the state's exercise of its coercive power in enforcing it. In this case, s 19 of the TCM Act relies primarily on the Board's power to cancel a practitioner's registration to ensure compliance with its rules. At first glance, this may seem to be a "non offence" because the penalty of cancellation of registration is different from traditional criminal penalties like a fine or a jail sentence. However, s 19(2)(b) of the TCM Act also allows the Board to impose a penalty of up to \$10,000 in lieu of such deregistration. Although the TCM Act refers to it as a "penalty" and not a fine and s 19(4) provides that this penalty is recoverable "as a debt due

to the Board”, it is difficult to see how this penalty differs conceptually from a fine in its effect.

The definition of an “offence creating” statute may be narrowed by making references to traditional notions of what constitutes a crime. Yet even this path is fraught with difficulty. As many academics have pointed out, there is no clear definition of what constitutes a crime (e.g., G Williams, *The Definition of Crime*, CURRENT LEGAL PROBLEMS 107, at 130 (1955); A SIMESTER AND G SULLIVAN, CRIMINAL LAW: THEORY AND DOCTRINE 3–4 (Oxford University Press, 3 ed, 2007)). The concept of crime can be defined in many ways. One way is to define it to mean all activities that are prohibited by the state and which are enforced by penalties imposed directly by it. Another way to define it is by looking at factors such as the type of proceedings that are brought to enforce it, the type of evidence that can be adduced and the burden of proof that is required. In the absence of any consensus as to what exactly is an “offence creating” statute, I shall proceed on the basis that there is a presumption against extra-territoriality in the construction of all statutes.

Secondly, the cases dealing with the presumption against extra-territoriality tend to do so in a way that suggests that there is a strict dichotomy between laws with extra-territorial effect and laws that do not. Of course, reality is more complex than that and it is probably more accurate to speak of degrees of extra-territoriality than to think of extra-territoriality as a discrete category. For example, a law that affects the actions of foreigners in a foreign jurisdiction is clearly more “extra-territorial” than one which only seeks to control the actions of a country’s citizens in a foreign jurisdiction, although both can be regarded as having some form of extra-territorial effect. In so far as the presumption against extra-territoriality is based on a hypothetical legislative concern about the problems that extra-territorial effect may create, the strength of the presumption may vary depending on the extent to which extra-territorial effect is claimed, since a law with lesser extra-territorial effect can be expected to present lesser problems.

Thirdly, counsel for the Respondent and Ms Koh have cited many cases where the acts of professionals in foreign jurisdictions were taken into consideration in disciplinary proceedings. Strictly speaking, these cases are not of direct relevance to the question of whether s 19(1)(i) of the TCM Act should be construed as having extra-territorial effect since they were based on the interpretation of different statutory instruments.

However, in so far as the courts had, in these cases, identified the purpose which the statutes were meant to serve and determined that those purposes could only be fulfilled by interpreting the statutes to have some degree of extra-territorial effect, they provide helpful guidance as to the degree of extra-territorial effect that is required to achieve a certain purpose.

#### PURPOSE, ENFORCEABILITY AND COMITY

Section 9A of the Interpretation Act requires the court to interpret a written law in a way that would promote the purpose or object underlying the written law. One of the ways to determine the underlying purpose or object of a statute is by looking at the Parliamentary debates. During the second reading of the Traditional Chinese Medicine Practitioners Bill on 14 November 2000 (SINGAPORE PARLIAMENTARY DEBATES, OFFICIAL REPORT (14 November 2000), vol 72 at cols 1126, 1127 and 1130), the Parliamentary Secretary to the Minister for Health, Mr Chan Soo Sen, informed Parliament that:

In July 1994, the Ministry of Health appointed a Committee to look into the regulation of TCM. The Committee recommended a phased approach, (ie a step-by-step approach) to the regulation of TCM practitioners in order to *safeguard patients' interest and safety, as well as to enhance the standard of training and professionalism of TCM practitioners in Singapore.*

...

[S]tatutory regulation of TCM practice is necessary to safeguard patients' interest and safety. We have to ensure that TCM practitioners are properly trained and qualified before they are allowed to practise. There should also be a framework to raise the professional standard of TCM practitioners in Singapore. ...

[emphasis added]

It is clear from the above that the overriding purpose of the TCM Act is to ensure the safety and well being of patients by ensuring a minimum standard of professionalism among the TCM practitioners. The legislative intent of the TCM Act is reinforced by the Ethical Code and Ethical Guidelines for TCM Practitioners (January 2006) ("Ethical Code"), which provides at p 5 that:

This 'Ethical Code and Ethical Guidelines for TCM Practitioners' represents the fundamental tenets of conduct and behaviour expected of TCM practitioners practising in Singapore, and elaborates on their applications. They are intended as a guide to all TCM

practitioners as to what the Board regards as the minimum standards required of all TCM practitioners in the discharge of their professional duties and responsibilities in the practice of TCM in Singapore.

In fairness, the Ethical Code does mention “practising in Singapore” and “the practice of TCM in Singapore”, thus implying that it accepts the presumption against extra-territoriality.

Having determined the purpose of the TCM Act, the next step is to select an interpretation of s 19(1)(i) of the TCM Act that would best serve that purpose. In doing this, it is important to remember that the number of ways which a statute can be interpreted depends on the number of factors which the interpreter regards as being legally significant. Hence, if a court finds that a statute ought to be interpreted as having extra-territorial effect in a particular factual situation, it should also highlight the legally significant factors that form the basis for its decision.

25 A survey of the cases suggests that there are two main problems associated with interpreting a statute to have extra-territorial effect. The first is the problem of enforceability while the second is that of comity among nations. In *Parno v SC Marine Pte Ltd* [1999] 3 SLR(R) 377, the Court of Appeal held at [41] that Parliament could not have intended the provisions of the now defunct Factories Act (Cap 104, 1998 Rev Ed) to apply to factories abroad because:

... enforcement of the Act would be impossible without infringing on the sovereignty of another state, let alone the practical difficulties associated with such enforcement worldwide. The main object of the Act is clearly to protect and ensure the safety of the many workmen who work on industrial premises in Singapore. To hold that the Factories Act is applicable to the case at hand, when there is no doubt that the Sumpile 8 was at the material time within the territorial waters of Myanmar, would be to intrude into the jurisdiction of another state.

The Court in *R (on the application of Carson) v Secretary of State for Work and Pensions* [2002] 3 All ER 994 explained the rationale behind the presumption against extra-territoriality in terms of enforceability and comity thus:

The comity of nations is doubtless one basis for this presumption: one state should not be taken to interfere with the sovereignty of

another state by enacting legislation extending to its territory. Another is practicality: most legislation cannot practically be applied to those present in another state.

As mentioned ... above, there are different degrees of extra-territoriality and correspondingly varying degrees of problems with enforcement and comity issues. The question of enforcement is essentially a practical one and depends largely on whether the penalty that is sought to be imposed on the party who has infringed the statute can be done so effectively. Where the party against whom enforcement is sought has substantial links to the domestic jurisdiction (either because he is a citizen of that jurisdiction or has substantial property there), enforcement is more likely to be more successful. Finally, to use an example that is more relevant to the case at hand, where the penalty sought to be imposed involves the cancellation of a licence that allows the infringer to engage in some regulated activity in the domestic jurisdiction, there is certainty of successful enforcement for obvious reasons. This probably explains why many courts in different jurisdictions have been willing to find that disciplinary tribunals are entitled to consider the acts of their members that were committed overseas when determining if disciplinary action should be taken against them. (See, *Marinovich v General Medical Council* [2002] UKPC 36; *Re Legault and Law Society of Upper Canada* (1975), 58 D.L.R. 3d 641(Can.); *Ewachniuk v Law Society (British Columbia)* [1998] Carswell B.C. 358).

Comity is a more controversial concept. Unlike enforceability which is usually a pure question of fact, the idea of comity is affected both by customary international law and legal history. For example, the interpretation of a statute to cover acts committed by a country's nationals in a foreign jurisdiction is regarded as less harmful to comity than if that statute were interpreted to cover acts committed by foreigners in that foreign jurisdiction. This is so despite the fact that in both situations, the state is seeking to punish an individual for acts committed in a foreign jurisdiction. The reason is probably because historically, law was regarded as personal and it was only until the advent of the territorial state that it became more fixed to the territory over which the state had effective control (J.L. Brierly, "The 'Lotus' Case" 44 LAW QUARTERLY REVIEW 154 at 155-156 (1928)). Furthermore, states do claim some form of jurisdiction over acts committed by their citizens in foreign jurisdictions (see, e.g., s 8A of the Misuse of Drugs

Act (Cap 185, 2008 Rev Ed) and s 37 of the Prevention of Corruption Act (Cap 241, 1993 Rev Ed)).

Both Ms Koh and counsel for the Respondent have cited the case of *Re Wong Sin Yee* [2007] 4 SLR(R) 676 to show that a statute should be interpreted as having extra-territorial effect if doing so would serve its underlying purpose. In that case, the High Court had to determine whether s 30 of the Criminal Law (Temporary Provisions) Act (Cap 67, 2000 Rev Ed) (“the CLTPA”), which allows the Home Affairs Minister to detain individuals without trial for up to 12 months, could be used to authorise the detention of a person for criminal activities committed outside Singapore. The detainee relied on the presumption against extra-territoriality to support his case for a narrow interpretation of s 30 of the CLTPA.

The detainee’s argument was rejected by Tan Lee Meng J who held that s 30 of the CLTPA allowed the Minister to take into consideration activities committed outside Singapore in determining whether the detention order was required in the interests of public safety, peace and good order in Singapore. He stated, at [21]:

While the Minister must be satisfied that a detention order is required in the interests of public safety, peace and good order in Singapore, it does not follow that the threat to public safety, peace and good order must result from criminal activities in Singapore. Otherwise, a person who is believed to be a threat to public safety, peace and good order in Singapore because of his criminal activities abroad must be given some time to become involved in criminal activities in Singapore before he can be detained under s 30 of the CLTPA. The applicant’s first ground for challenging the Detention Order thus fails.

No doubt this decision was fully justified because of the obvious purpose of the CLTPA. However, it is worth mentioning that the detainee in that case was a Singaporean, hence the abovementioned problems of enforcement and comity did not feature there.

Accordingly, I find that the question of whether a statute should be interpreted as having any degree of extra-territorial effect depends on the extent to which its purpose would be served by such an interpretation and whether this interpretation would result in problems relating to enforcement and international comity.

## ANALYSIS

Having regard to the fact that the overriding purpose of the TCM Act is to ensure the safety and well being of patients by ensuring a minimum standard of professionalism among TCM practitioners, I must now choose an interpretation of s 19(1)(i) that will best achieve this purpose.

I accept the Board's submission that to hold that section 19(1)(i) of the TCM Act does not apply in the present case would undermine its underlying purpose. Registered TCM practitioners who wish to perform unauthorised and possibly unsafe treatments on their patients will have a ready mechanism: they can simply cross the Causeway and perform those treatments there with seeming impunity. This is a loophole that cannot be accepted. Accordingly, an interpretation of s 19(1)(i) of the TCM Act that covers the facts of the present case would better serve its underlying purpose.

What are the legally significant factors that form the basis of this decision? In this respect, the case of *Re Linus Joseph* [1990] 2 SLR(R) 12 ("*Re Linus Joseph*") provides useful guidance. In that case, the defendant was an advocate and solicitor of both the Singapore bar and the Brunei bar. The defendant had allegedly dishonestly withheld professional fees from his employers, a Brunei firm of advocates and solicitors, whilst in the employment of that firm in Brunei. The issue in that case was whether the Disciplinary Committee could take this alleged misconduct into consideration when determining whether the defendant was guilty of grossly improper conduct under s 80(2)(b) of the Legal Profession Act (Cap 161, 1985 Rev Ed).

The court held that the words "guilty of fraudulent or grossly improper misconduct in the discharge of his professional duty" under s 80(2)(b) of the Legal Profession Act referred to the discharge of a solicitor's duty in his capacity as an advocate or solicitor of the Supreme Court of Singapore. Since it was clear that the defendant's acts had been committed in his capacity as a Brunei solicitor, they did not fall within s 80(2)(b) of the Legal Profession Act. More significantly, the court considered that if a solicitor had acted improperly in his capacity as a Singapore solicitor, such conduct would fall under s 80(2)(b) of the Legal Profession Act notwithstanding that it took place in a foreign jurisdiction.

The court in *Re Linus Joseph* chose the capacity in which the defendant solicitor acted as the legally significant factor for determining the jurisdictional ambit of s 80(2)(b) of the Legal Profession Act. In my opinion, an

interpretation of s 19(1)(i) of the TCM Act to cover all sorts of professional misconduct committed by a registered practitioner in his capacity as such, regardless of where those acts were committed, best serves the underlying purpose of the TCM Act and does not result in an overreaching effect.

This interpretation will not create any substantial problem with enforcement or comity. As mentioned above at [27], there is unlikely to be any problem with the enforcement of statutes relating to professional disciplinary bodies regardless of the extent of extra-territorial effect that is claimed because the mode of enforcement (ie, the cancellation of registration) is one that can be effected easily.

Neither will there be comity problems if the basis of the jurisdiction under s 19(1)(i) of the TCM Act is linked to the TCM practitioner acting in his capacity as a Singapore registered practitioner. After all, the cancellation of the practitioner's registered status only prevents him from practising TCM in Singapore. He is still free to practise TCM in other jurisdictions. Hence, the foreign jurisdictions' power to regulate the type of treatments that may be performed within their territory is unaffected. Furthermore, jurisdiction that is linked to the capacity in which the TCM practitioner acts is quite similar to the type of nationality-based jurisdiction mentioned in [28] above. Just as nationality-based jurisdiction is justified on the ground that a citizen who enjoys the protection of his state should accept the restrictions imposed on him, the jurisdiction of s 19(1)(i) of the TCM Act extends to a TCM practitioner whenever he conducts himself as a Singapore registered TCM practitioner.

Accordingly, I find that s 19(1)(i) of the TCM Act extends to a TCM practitioner whenever and wherever he conducts himself as a Singapore registered TCM practitioner.

## Territory

### JAPAN

#### **SENKAKU ISLANDS - SHIP COLLISION - EAST CHINA SEA**

On 7 September 2010, while on patrol close to the Senkaku Islands, the Japanese Coast Guard vessel, Yonakuni, found a Chinese trawling vessel

fishing inside the territorial waters of the Senkaku Islands. Yonakuni issued a warning against the fishing vessel to leave the Japanese territorial waters. The fishing vessel, after hauling a net onto the boat, started to sail. The fishing boat, at 10:15, 12 km north-northwest of Kuba Island, deliberately collided with Yonakuni. The fishing boat, after the collision, continued to sail while Japanese patrol ships, Mizuki and Hateruma, ordered it to stop and started to pursue the vessel. At 10:56, 15 km within Japanese territorial waters north-northwest of Kuba island, the fishing boat steered quickly to the left and intentionally collided with Mizuki during pursuit. Although Mizuki and Hateruma tried to stop the ship by intercepting its course and by using water cannons, the vessel refused orders to stop. At 27 km north-northwest of Kuba island outside of Japanese territorial waters, Mizuki forced the ship and the vessel was boarded.

On 8 September, 02:03, 8.7 km from the western edge of Uotsuri Island within Japanese territorial waters, the Chinese fishing boat captain was arrested for violating laws against interfering with a government official in the act of duty. On 9 September, 10:41, the captain was referred to the Ishigaki Branch of Naha District Public Prosecutors' Office and the case was sent for violation of the Act on Regulation of Fishing Operation by Foreign Nationals and of laws against interfering with the crew of Yonakuni in their acts of duty. The captain of the fishing boat was released on 25 September, and on 21 January, the charge against the captain was dropped.

#### **MARINE SCIENTIFIC RESEARCH - EXCLUSIVE ECONOMIC ZONE - EAST CHINA SEA**

On 31 July 2011 at 7:25 in the morning inside the Japanese Exclusive Economic Zone in the East China Sea, a Japanese Coast Guard reconnaissance plane spotted a Chinese marine research vessel that was suspected of conducting a marine survey by towing a wire from its stern without prior notification as required by international rules. A Japanese Coast Guard vessel and plane warned that it was not permitted to conduct a survey without the prior consent of Japanese government and urged an immediate halt to the survey. The Chinese research vessel sailed out from the Japanese Exclusive Economic Zone at 4:27 in the afternoon on the same day.

From September to December in the same year, there were a total six incidents in which Chinese marine research vessel conducted research

within Japanese Exclusive Economic Zone in the East China Sea. In each case, the Japanese Coast Guard issued a warning against those vessels.

**Act concerning Conservation of Low-Water Mark and Improvement of Important Facilities for Promoting Conservation and Utilization of Exclusive Economic Zone and Continental Shelf (Act No. 41 of June 2, 2010)**

Japan enacted a law concerning the preservation of the low-water mark and improvement of important facilities for promoting the conservation and utilization of the exclusive economic zone and continental shelf. The Act was enacted in regard to the maintenance of low-water mark for the delineation and preservation of the Exclusive Economic Zone and other areas and to the improvement of important facilities on strategically important isolated islands as the bases of operation for the preservation and utilization of exclusive economic zones and other areas. The purpose of the Act is to stipulate the basic plan; to regulate underwater drilling in the low-water mark preservation zone; to construct port facilities on designated remote islands; and to take other measures, as well as to promote the preservation and utilization of Exclusive Economic Zone and other areas; and finally to contribute to the sound development of the economy and society of Japan and to improve the stability of the lives of the citizenry. There is a recognition that Japan's exclusive economic zones and continental shelf are important sites for exploitation and exploration of the natural resources and for the conservation of the marine environment and other activities. The Act consists of 20 articles and supplementary provisions. Minamitorishima and Okinotorishima have been designated as designated isolated islands by Cabinet Order No.157 of 2010.

The Act includes penal provisions (Articles 17 to 20) and in accordance with article 17, if a person conducts drilling in specific areas without prior authorization by the Minister of Land, Infrastructure and Transportation, the person shall be sentenced to imprisonment for not more than one year or be liable to a fine not exceeding 500,000 yen.

## PHILIPPINES

### NATIONAL TERRITORY OF THE PHILIPPINES

#### **An Act to amend certain provisions of Republic Act No. 3046, as amended by Republic Act No. 5446, to define the Archipelagic Baselines of the Philippines, and for other purposes, Republic Act No. 9522**

Signed into law by the President of the Philippines on 10 March 2009, this Act further amended Republic Act No. 3046, defining and describing the baselines of the Philippine archipelago using, among others, the parameters of the World Geodetic System of 1984. Moreover, it states that the baseline in the Kalayaan Island Group (as constituted under Presidential Decree No. 1596) and Bajo de Masinloc (also known as Scarborough Shoal)—areas over which the Philippines likewise exercises sovereignty and jurisdiction—shall be determined as “Regime of Islands” under the Republic of the Philippines, consistent with Article 121 of the United Nations Convention on the Law of the Sea.

The law affirmed that the Republic of the Philippines has dominion, sovereignty, and jurisdiction over all portions of the national territory as defined in the Constitution and by provisions of applicable laws including, without limitation, the Local Government Code of 1991,<sup>59</sup> as amended. It ordered the deposit and registration of this Act, together with the geographic coordinates and the chart and maps indicating the defined baselines, with the Secretary General of the United Nations. The National Mapping and Resource Information Authority (NAMRIA) was tasked to produce and publish charts and maps of the appropriate scale clearly representing the delineation of basepoints and baselines as set forth in the Act.

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59 Local Government Code of 1991, Rep. Act 7160 (Phil.).

## SINGAPORE

## MALAYSIAN RAILWAY LAND IN SINGAPORE

**Joint Statement For The Meeting Between Prime Minister Lee Hsien Loong And Prime Minister Dato' Sri Mohd Najib Tun Abdul Razak On The Implementation Of The Points Of Agreement On Malayan Railway Land In Singapore (POA), 20 September 2010, Singapore**

1. Prime Minister Lee Hsien Loong and Prime Minister Dato' Sri Mohd Najib Tun Abdul Razak met in Singapore on 20 September 2010 to follow up on their earlier meetings of 24 May 2010 and 22 June 2010.

2. At the Singapore-Malaysia Leaders' Retreat on 24 May 2010, the two leaders issued a Joint Statement that they had agreed on the steps to move the Points of Agreement (POA) forward, and that both countries would embark on new bilateral co-operation, including the development of a rapid transit system link and an iconic project in Iskandar Malaysia.

3. On 22 June 2010, Prime Minister Lee visited Malaysia to discuss the land swap issue with Prime Minister Najib and conveyed Singapore's offer on the land swap. Following the same meeting, Prime Minister Lee sent a revised land swap offer to Prime Minister Najib on 28 June 2010. Prime Minister Najib accepted the offer on 17 September 2010 and Prime Minister Lee replied on 19 September 2010 confirming his agreement. Both Leaders have agreed as follows:

- The Singapore Government shall vest four land parcels in Marina South (TS30-361T, TS30-362A, TS30-363K and TS30-364N) and two land parcels in Ophir-Rochor (TS13-1115N and TS13-1116X) in M-S Pte Ltd, in lieu of the three parcels of POA land in Tanjong Pagar, Kranji and Woodlands and three pieces of land in Bukit Timah (Lot 76-2 Mk 16, Lot 249pt Mk 4 and Lot 32-10 Mk 16).
- The four Marina South parcels are located at the heart of the financial and business cluster in Singapore's Marina Bay, while the two Ophir-Rochor parcels are located next to the Kampong Glam Historic District, in a new growth corridor that is being developed as an extension of Singapore's Central Business District.

- The Marina South and Ophir-Rochor land parcels shall be vested in M-S Pte Ltd for joint development when Keretapi Tanah Melayu Berhad (KTMB) vacates the Tanjong Pagar Railway Station (TPRS). The KTMB station will be relocated from Tanjong Pagar to the Woodlands Train Checkpoint (“WTCP”) by 1 July 2011 whereby Malaysia would co-locate its railway Custom, Immigration and Quarantine (“CIQ”) facilities at WTCP.
  - Both countries have different views relating to the development charges payable on the three parcels of POA land in Tanjong Pagar, Kranji and Woodlands. Both Leaders have agreed to settle this issue amicably through arbitration under the auspices of the Permanent Court of Arbitration. They have further agreed to accept the arbitration award as final and binding.
  - Both Leaders also agreed that the arbitration will proceed on its own track, and shall not affect the implementation of the POA and the other bilateral initiatives agreed in the Joint Statement of 24 May 2010, which shall continue to be implemented.
  - The Joint Implementation Team shall conclude by 31 December 2010 their discussion on the details of the implementation of the POA.
4. Both Leaders reiterated their commitment to the matters set out in the Joint Statement of 24 May 2010, including:
- The 50-50 joint venture company between Khazanah Nasional Berhad and Temasek Holdings Limited to undertake the development of the iconic wellness township project in Iskandar Malaysia.
  - The joint development of a rapid transit system link between Johor Bahru and Singapore with a single co-located CIQ facility in Singapore aimed at enhancing connectivity between the two countries.
5. Both Leaders noted with satisfaction the progress on a number of bilateral initiatives, including:
- The increase in cross-border bus services between Singapore and Johor;

- The reduction of tolls at both the Singapore and Malaysian sides of the Second Link since 1 August 2010; and
- Joint co-operation on the environment and tourism, including the joint study on a cross-border eco-tourism project twinning Sungei Buloh Wetland Reserve on Singapore side with the three Ramsar sites of Sungai Pulai, Pulau Kukup and Tanjung Piai at Johor under a "One Experience, Two Destinations" concept.

6. Prime Minister Najib expressed Malaysia's appreciation on Singapore's decision to hand over the waterworks under the 1961 Water Agreement to the Johor water authorities free of charge and in good working order upon the expiry of the 1961 Water Agreement on 31 August 2011.

7. Both Leaders encouraged the Joint Implementation Team, led by the Secretary General of the Ministry of Foreign Affairs, Malaysia and the Permanent Secretary of the Ministry of Foreign Affairs, Singapore to maintain the momentum of its work on the implementation details.

**DELIMITATION OF TERRITORIAL SEA – WESTERN PART OF STRAIT OF SINGAPORE – TREATY BETWEEN SINGAPORE AND INDONESIA**

**Treaty between the Republic of Indonesia and the Republic of Singapore Relating to the Delimitation of the Territorial Seas of the Two Countries in the Western Part of the Strait Of Singapore. Done 10 March 2009; Ratified 30 August 2010**

THE REPUBLIC OF INDONESIA AND  
THE REPUBLIC OF SINGAPORE

NOTING that the coasts of the two countries are opposite to each other in the Strait of Singapore

HAVING partially settled their territorial sea boundary in the Strait of Singapore in the Treaty between the Republic of Indonesia and the Republic of Singapore relating to the Delimitation of the Territorial Sea of the Two Countries in the Strait of Singapore signed on 25 May 1973 (hereinafter referred to as "1973 Treaty")

CONSIDERING further that the territorial sea boundary in the western part of the Strait of Singapore shall continue the boundary line under the 1973 treaty.

DESIRING to further strengthen the bonds of friendship between the two countries,

PURSUANT THERETO, desiring to establish the boundaries of the territorial seas of the two countries in the western part of the Strait of Singapore.

HAVE AGREED AS FOLLOWS:

#### ARTICLE 1

1. The boundary line of the territorial seas of the Republic of Indonesia and the Republic of Singapore in the Strait of Singapore in the area west of Point 1 of the boundary line agreed in the 1973 Treaty located at 1° 10' 46.0" North and 103° 40' 14.6" East shall be a line, consisting of straight lines drawn between points, the co-ordinates of which are as follows:

POINTS	NORTH LATITUDE	EAST LONGITUDE
1	1° 10' 46.0"	103° 40' 14.6"
1A	1° 11' 17.4"	103° 39' 38.5"
1B	1° 11' 55.5"	103° 34' 20.4"
1C	1° 11' 43.8"	103° 34' 00.0"

2. The co-ordinates of the points 1A, 1B and 1C specified in paragraph 1 are geographical co-ordinates based on the World Geodetic System 1984 and the boundary line connecting points 1 to 1C is indicated in Annexure "A" to this Treaty.

3. The actual location of the above mentioned points at sea shall be determined by a method to be mutually agreed upon by the competent authorities of the two countries.

4. For the purpose of paragraph 3, "competent authorities" in relation to the Republic of Indonesia means the National Coordinating Agency for Survey and Mapping and the Indonesian Hydro-Oceanographic Office and in relation to the Republic of Singapore means any entity so designated by the Government of the Republic of Singapore

**ARTICLE 2**

The boundary line of the 1973 Treaty as well as the boundary line depicted in Article 1 paragraph 1 are shown in Annexure “B” of this Treaty, purely for illustration purposes.

**ARTICLE 3**

Any disputes between the two countries arising in relation to the interpretation of implementation of this Treaty shall be settled peacefully by consultation or negotiation.

**ARTICLE 4**

This Treaty shall be ratified in accordance with the constitutional requirements of the two countries.

**ARTICLE 5**

This Treaty shall enter into force on the date of the exchange of the Instruments of Ratification.

DONE IN DUPLICATE AT Jakarta on 10 March 2009 in the English and Indonesian languages. In case of any conflict between the texts or any divergence in interpretation, the English text shall prevail.

## Treaties

### INDIA

**Statement by India on Agenda Item 79 - Report of the International Law Commission, Chapter X: Treaties over Time at the Sixth Committee of the 65th Session of the United Nations General Assembly on November 01, 2010.**

India welcomed the establishment of a Study Group on the topic “Treaties over Time,” which considered the question of the scope of the work and agreed on a course of action to begin the consideration of the topic.



# LITERATURE

## BOOK REVIEWS

**Javaid Rehman, International Human Rights Law, 2nd Edition • London: Longman Publishing Group, 2010 • ISBN 978-1405811811 • 947 + lxvi pp**

International human rights law is one of the fastest growing areas of international law. The book titled International Human rights law is the second edition of Professor Javaid Rehman and was released in 2010. This volume expands on his previous work of the first edition which was published in 2005 and reflects the contemporary conventional legal developments in this field. The author with his experience and expertise in this field has produced an excellent treatise in order to demonstrate the progress and development along the line of the judgements of national and international judiciaries and thereby emerging as one of the leading academics and commentator in this filed.

A glance of the contents, surprises the readers due to the range of development of international instruments as well as the classification of the sections of area of law. This endeavour is confined to five parts of 24 chapters in total. The entire contents represent systematic and methodological analysis. It gives readers general and depth information and guides them on how to explore more details whenever required of this ever growing area of law. The footnotes are immense and very useful for further research and exploring the jurisprudence.

Part one contains three chapters. The first chapter introduces and outlines the scope of the book, themes of international human rights law and structure of the analyses. It assures the readers in general and students, academics, legal and foreign policy practitioners in particular with confidence that this book can be considered as their text book for references and to perform their professional duty. The second chapter deals with definitions, sources of primary and secondary nature and explains how the concept and idea of international human rights have become *jus cogens* of international law, and therefore emphasising that state and non state actors have no option other than recognising them. The third chapter is inevitably very comprehensive and introduces the growth and expansion of international human rights law and outlines the sequences

of emergences of institutions of the UNO and their role in promotion and protection of human rights. Functions and procedures of institutions are given for anyone using this book to direct them how to seek remedy from these institutions.

Part two, under the title of the international bill of rights contains three chapters and deals with the contemporary developments of international human rights instruments. The chapters systematically analyse the sequence of adoption of the instruments namely, the Universal Declaration of Human Rights [1948] International Covenant on Civil and Political Rights, and The International Covenant on Economic, Social and Cultural Rights [1966]. In these chapters, the author examines the international legal nature of these instruments and their entire aspects of procedure and mechanism which are created for the promotion and protection of international human rights. The contents of these chapters reflect the scrutiny and depth of the analyses of these legal instruments and demonstrate how the legal order of the international human rights has become an integral part of international law.

Part three of the book is allocated to dealing with the regional protection of human rights. History reflects that the atrocities were committed against humanity and humankind in different times, in different forms and in different parts of the world. Naturally, jurists, statesmen and victims have reacted by confronting the perpetrators and laid foundations for protection and to prevent repetition at least at regional level. Professor Rehman identifies the historical evolution of regional institutional arrangements for protection of human rights and focuses on them in five chapters. In this section, two chapters are allocated to cover the European Human Rights law and system. Comparatively, European human rights instruments and institutions have long history and could be considered as an advanced and well developed legal order for the protection of human rights at the regional level. It is therefore, more appropriate to cover the European system in two chapters which trace all relevant conventions, instruments and the legal mechanism established therein. The following two chapters deal with the inter-American system and the African system for the protection of human rights and their role in protecting human rights at the respective regional levels. The final chapter of this part explores the roots of human rights law in Islam and the role of the League of the Arab states in the promotion and protection of human rights, while commenting on human rights is-

sues in the South Asian region. The chapters of this section demonstrate the striking feature of the absence of regional arrangements for Asia, thus raising questions in the search for the existence of this vacuum. Although for convenience “Asian solidarity” is advocated, formation of Asian human rights instrument and mechanism continue to remain a challenging target.

Part four contains eight chapters to deal with group rights which are generally referred as collective rights. Equality and non-discrimination which are the fundamental principles of international law have been analysed in the first chapter of this part and as the twelfth chapter in chronological order in the contents. In this chapter, the author traces the international attempts under the auspicious of the UNO to enforce and implement the principles of equality and non-discrimination. The author makes observations on the formation of the International Convention on the Elimination of All Forms of Racial Discrimination and its mechanism for international supervision on the implementation of the provisions of the Convention. The next chapter of this section is devoted for the rights of minorities on which the author could be regarded an accomplished expert. In another of his treatise, the author has commented that “*minorities are extremely capable and successful in informing their sufferings to their sympathisers internationally.*” Along the line of his familiarity and acquaintances to the problems and continued suffering of minorities all over the world, he comprehensively outlines their international status and applicable international human rights law. In other chapters of this part, rights of peoples and indigenous peoples, rights of women, rights of the child, rights of persons with disabilities, rights of refugees and migrant workers and their families are analysed in an academic and professional manner.

The final part of the book is allocated to concentrate on the contemporary legal issues of international human rights. The author identifies international criminal court, the question of terrorism, international humanitarian law and enforced disappearances as the emerging international issues within the context of human rights law and treats them in each chapter respectively. The question of terrorism continues to be a controversial issue at national as well as international levels. The UNO has been unable to find a suitable definition for terrorism to date, while observing in one of its early days instruments the Universal Declaration of Human Rights that

It is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that all human rights should be protected by the rule of law.

The author handles the issues of terrorism in balanced academic approach in the chapter and emphasises the need for utmost important to human security and respect for humanity.

The entire volume and its treatise demonstrate how international human rights have become an integral part of international law by way of law making procedures of the UNO and imposing onuses on state and non-state actors to ratify those instruments. The international human rights regimes which are considered by the author, should remind the rulers of intolerant democracies that they cannot by pass the rights regimes of the UNO and they have no liberty to do so. Further, it is evidenced in the book that the author has endeavoured a substantial length of time to work on this project while demonstrating his sound knowledge in this area of law. It is not an exaggeration to mention that if this book is to be treated as a hand book for human rights handlers (officials) at national level and foreign policy practitioners, many human rights issues could be resolved amicably at national level.

Finally, the author sends a strong message [to leaders of states, academics human rights lawyers and diplomats] that state which is primary subject of international law, no longer entitled to govern its peoples and citizens as they please or at their discretion. Contrarily, they are obliged and duty bound to recognise and implement the rights regimes at national level and subjected to international scrutiny. Any systematic and serious violations of human rights cannot be sheltered under the pretext of sovereignty and territorial integrity. In short, the author relying on customary and conventional rights regimes concludes that state sovereignty is conditional and entitlement to sovereign power is upon fulfilling certain criterion including human rights norms. The era of absolute sovereignty has demised. Sovereignty is not a defence for violation of human rights and denial of justice.

SANDRASEGARAM PARAMALINGAM

**Shirley V Scott, *International Law in World Politics: An Introduction* • Boulder Colorado: Lynne Rienner, 2010 • ISBN 978-1-58826-745-0 • 324 + x pp**

**Conway W Henderson, *Understanding International Law* • West Sussex: Wiley-Blackwell, 2010 • ISBN 978-1-4051-9765-6 • 468 + xviii pp**

I must confess to a weakness in being attracted to introductory texts on international law. This weakness can probably be traced back my undergraduate days when I was desperately cramming for my international law examinations. Desperate for a simple yet rigorous text on the subject, I bought a copy of the 5th edition of the late Michael Akehurst's *MODERN INTRODUCTION TO INTERNATIONAL LAW* (1984). I could not have chosen better for as we all know, that book – or at least its 6th edition – has become a classic, to be spoken of in the same breath as James Brierly's *LAW OF NATIONS: AN INTRODUCTION TO THE LAW OF PEACE*. Ah ... if only all scholars could write like Akehurst!

Since then, I have made it a habit to pick up every new introductory text on the subject for two related reasons: First to see how much better we can simplify an inherently difficult subject; and second, to see how the complexities of international law can be conveyed to both a legal and non-legal audience. The second object is a matter of professional self-interest since I have to teach international law to non-law students and I have always found it a big challenge to prescribe an appropriate text or set of readings. In this respect, these two new books are to be welcomed.

Both books are written by political scientists with an interest in international law for a non-legal audience. However, this is the extent of any similarity between the two volumes. Shirley V Scott is an Associate Professor of International Relations at the School of Social Sciences and International Studies, Faculty of Arts and Social Sciences, University of New South Wales. She wrote this book 'to introduce international law to those who have no prior training in law' and 'to provide the reader with a framework within which to understand international legal developments in their political context.' The first edition of the book appeared in 2004 and contained 12 chapters. This new version adds a 13th chapter on the use of force in international law.

Scott's *INTERNATIONAL LAW IN WORLD POLITICS: AN INTRODUCTION* starts off by situating international law in the world of politics or in world politics, and then describing and briefly discussing the key institutions in international law: the state, international organizations, and non-state actors in three successive chapters. Although Scott does not divide her book up into parts, the first four chapters – “International Law and World Politics Entwined”, “States in International Law”, “Intergovernmental Organizations in International Law” and “Nonstate Actors in International Law” – logically come together as one part. In Chapter 5, which is entitled ‘The Logical Structure of International Law’ deals with the theoretical and structural questions in international law. To do this, Scott presents us with her pyramidal structure of international law logic. At the base of the pyramid (Level 1) is the “underlying philosophy” or theory of the system. Level 2 contains the “rules about the operation of the legal system itself” (akin to Hart’s rules of recognition) while the substantive rules of international law are dealt with at Level 3. So far so good. Anyone reading the first five chapters of the book at one quick go will very quickly gain a pithy but clear understanding of the nature of international law and its operations.

The newly-included Chapter 6 “International law and the Use of Force” rudely interrupts the flow of Scott’s scheme of argument. No one can deny the importance of the topic given the increased use of armed force all over the world, but this chapter must surely have been slotted into the wrong part of the book. Chapter 7, which deals with “Legal Argument as Political Maneuvering” flows much more naturally from the discussion in Chapter 5. Here Scott discusses the various approaches to international law and the politics behind the rules and the gap between law in the “rule book” and law in action.

Chapters 8 and 9 deal with treaties – in particular multilateral treaties – with one chapter on “Reading a Multilateral Treaty” and another on “The Evolution of a Multilateral Treaty Regime”. These are well-written and coherent chapters giving the reader an excellent idea of the treaty-making process and the politics behind the creation of international law through multilateral treaties. Scott would have done well to have kept the original flow of chapter 1 through to 9 and bring in the chapter on the use of force right at the end of the book with comprises the other discrete and substantive areas of international law: “International Law and Arms Control” (Chapter 10); “International Human Rights Law” (Chapter 11);

“International Humanitarian Law (Chapter 12); and “International Law and the Environment” (Chapter 13). The chapter on the use of force should have been added to the end of this list of substantive topics.

Scott ends her book with a chapter on “The Future Role of International Law in World Politics” in which she offers five themes concerning the operation of the international legal system: (a) law as a system of interrelated ideas; (b) international law as a state-based system of law; (c) international law is entwined with world politics; (d) law is an autonomous system of interrelated rules, principles and concepts; and (e) international law’s rapid expansion in the post-1945 era. She concludes by posing several questions to reader and offering some observations: (a) Will the rapid growth of international law led to its fragmentation? (b) How useful is constitutional language in analyzing developments in international law; (c) Can international law save the world from catastrophic climate change? (d) What the rise of China and India will mean for international law; and (e) Whether international law can provide for peaceful change in the international order?

As an introductory text, I found Scott’s book a enjoyable read. She covers a remarkable amount of detail and issues in a very tight space although I was left wondering if the book might not have benefitted from better organization and greater coverage on important topics like state responsibility and customary international law. Scott’s use of tables and “box stories” is helpful providing a lot of useful information in easily-digestible bits, but the reading list (comprising mostly general works) at the back of the book is not terribly helpful. It would have been better for selected further readings to be embedded within each chapter so the reader can instantly relate them to the topic at hand. The index is poorly organized and does not offer the reader a quick way to navigate the book.

Although Conway Henderson’s *UNDERSTANDING INTERNATIONAL LAW* is pitched as an introductory text, it is fairly hefty and detailed. Henderson is clear about his objectives: “to write the book that students need but will enjoy reading.” And although Henderson is an Emeritus Professor of Political Science, his textbook “aims to give proper coverage to the scope of international law with appropriate length, but also to better balance political and legal perspectives.” The book’s 13 chapters are divided into four distinct parts.

Part I, “Making the World More Lawful” has five chapters covering “The Rise of International Law”; “A World of Actors: A Question of Legal Standing”; “The Sources of International Law: Creating Law Without Government”; “The Efficacy of International Law” and “Jurisdiction: Domain Over Places and Persons.” Part II is entitled “Making the World Safer” and its four chapters cover “Diplomacy in Pursuit of Peace”; “Arms Limitations for a Less Violent World”; “Law to Constrain Force”; and “Core International Crimes: Atrocities that Shock the Conscience of Humankind”. There are only three chapters in Part III “Making the World Better” and they cover “Human Rights: Freedom and Protection for Humankind”; “The Global Environment in Jeopardy”; and “Rules for Sharing the World’s Wealth”. Part IV “Making the Future” has only one chapter dealing with “The Problems and Prospects of International Law”.

I must say I was most intrigued by Henderson’s approach and organization of topics. A number of his chapters read like typical chapters from international law books written by and for lawyers, but he organizes them in a functional and issue-driven fashion. Legal rules are important, but they are contextualized and the reader quickly gets a clear idea of what these rules can be used for.

Henderson’s text is lucid and easy to read, and each chapter is excellently organised. He offers a chapter summary at the end of each chapter poses a number of discussion questions, and references and lists for further reading, including useful weblinks. Scattered throughout the text are text and diagram boxes that provide the reader with a quick look at key concepts, cases or institutions – for example “The Special Case of Kosovo” when discussing statehood and recognition; or “The Career of Hugo Grotius” when explaining the development of international law.

Conway Henderson has written an excellent introductory textbook on international law that will appeal both to non-lawyers trying understanding the subject, and to lawyers who want to understand how the international system works and the place of law within that system. The text is organised and written in exemplary fashion and the reader never tires of the little nuggets Henderson throws out in every chapter. Anyone reading this book will not only understand international law, but learn a lot more besides. An excellent volume all round.

## GENERAL INFORMATION

### Editorial Addresses:

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- Translated versions of articles originally written in a language other than English.
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- Information on literature and documents concerning international law in Asia or concerning international law in general and published or issued in Asia.

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