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INTERNATIONAL LAW IN ASIA

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2011

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VOLUME 17
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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.

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

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

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

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

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Land Rights in Countries in Transition: A Case Study of Human Rights Impact of Economic Land Concessions in Cambodia

Surya P. Subedi¹

1. INTRODUCTION

Disputes relating to land or land rights is not new in law. In many countries land law is one of the oldest areas of law. Various wars have been fought throughout human history for land, whether between states or between communities or between individuals within the same community. Land ownership has been regarded as evidence of wealth, prestige and power in most countries. The right to property in both national and international law has its origins in land ownership and land rights.

However, with the introduction of collective farming or commune or state ownership of land in countries with socialist political systems, a fundamental change took place in the nature and scope of land rights in such countries. After the demise of communism in Europe, the collapse of the Soviet Union, and China's decision to embark on the road to economic liberalization, land rights and land disputes returned to occupy center stage in domestic policy making in countries with socialist tendencies. This is because some form of individual right to property or land came into existence with the opening up of the economy in these countries. With this recognition of the right to property, including land, the tendency on the part of the rich and powerful, whether politically or militarily, to grab land for speculative purposes has been a major problem in many countries with a socialist political system or a socialist past.

What is more, land acquisition by the government or local councils for various social and economic purposes under schemes such as economic

1 LL.B (Tribhuvan); LL.M with Distinction (Hull); D.Phil. (Oxford); Barrister of the Middle Temple; Professor of International Law, University of Leeds; United Nations Special Rapporteur for Human Rights in Cambodia.

land concessions that lack in transparency, accountability, due process, and adequate compensation, and involve forcible eviction of especially the poor, the indigenous and traditional communities, and those on the margins of the society, has posed its own challenges to countries in economic and political transition. The situation in Cambodia is particularly illustrative of the challenges for a number of historical, political and social reasons.

It is in this context that this article² aims to provide an assessment of the human rights impact of economic land concessions (ELCs) and other land concessions in Cambodia (generally referred to as “land concessions” throughout the article unless otherwise specified). It includes not only an analysis pertaining to agro-industry (for example, rubber, sugar, acacia, and cassava plantations), but also to concessions for mining, oil and gas, forestry, and concessions for the purposes of tourism, property development, and large scale development projects, such as hydropower dams.

The situation in Cambodia is a particularly interesting one. At the outset, it should be noted that historical circumstances, including policies of the Khmer Rouge regime, have led to the proliferation of land disputes that the government is trying to manage. It should also be noted that Cambodia as a developing country may wish to utilize its land and natural resources in order for the country to develop and become more prosperous.

2 This article is based on an earlier report submitted to the United Nations Human Rights Council in September 2012 by the present author in his capacity as the United Nations Special Rapporteur on the situation of human rights in the Kingdom of Cambodia. A Human Rights Analysis of Economic and other Land Concessions in Cambodia, U.N. Doc. A/HRC/21/63/Add.1 (Sep. 24, 2012). Upon reading this report and realising its significance for the broader intellectual and academic community, the Editor-in-Chief of the *Asian Yearbook of International Law*, Professor Kevin Tan of the National University of Singapore Law School, invited the present author to convert it into a scholarly article for publication in the *YEARBOOK*. The present author would like to thank Professor Kevin Tan for this invitation. He also wishes to thank several members of staff in the Cambodia Office of the United Nations Office of the High Commissioner for Human Rights and particularly Ms Taryn Lesser, Ms Bophal Keat, Mr James Heenan and Mr Karona Ean for their valuable assistance in collecting data and information for this study. The views expressed in this article should be treated as the personal and academic views of the author and not necessarily the views of the U.N. or the views of the present author in his capacity as the United Nations Special Rapporteur for Cambodia.

Nevertheless, this article argues that land concessions should be granted and managed within a sound legal and policy framework, with due consideration for and consultation with those who will be affected, and with the sustainable use of natural resources in mind. Cambodia, as an emerging market, is vulnerable to an international reputation for insecure investment in the land sector. The current climate of development – characterized by uneven transparency, inadequate consultation, and participation which is not inclusive – is unsustainable and likely to hamper future national economic growth.

This article concludes that the human cost of many such concessions has been high and the poorest of the poor have suffered the most. Therefore, human rights should be at the heart of land concessions for positive impact. It is not clear how much the people of Cambodia have benefitted from ELCs and many such concessions often have a dimension of corruption because they operate behind a veil of secrecy. There are far too many land disputes associated with economic concessions that remain unresolved and they are having a negative impact on the lives and livelihood of the rural and urban poor, the indigenous people, and other traditional communities. The Cambodian government should be transparent in dealing with economic concessions and protect the lives and livelihood of such people when negotiating such concessions with companies, both foreign and national, and hold them accountable over land disputes. The present author is of the view that the development of Cambodia's land and natural resources could have a positive impact on the lives of all Cambodians if done in a sustainable and equitable manner and within the framework of the human rights obligations of Cambodia.

2. LAND CONCESSIONS IN CAMBODIA

A land concession is a contract between the government and a state or private actor that gives that actor specific rights (for example, exclusive rights to manage and harvest the land) normally for a long period of time, but not ownership.³ Concerns about the impact of land concessions in

3 See generally L Cotula et al., *Land Grab or Development Opportunity? Agricultural Investment And International Land Deals In Africa*, IIED/FAO/IFAD (2009); K Barney, *A Note on Forest Land Concessions, Social Conflicts, and Poverty in*

Cambodia began in the 1990s when human rights organizations started to receive complaints about human rights violations on concession land.⁴ The human rights impacts of land concessions have been the subject of research by OHCHR and of reports by several successive Special Representatives of the Secretary-General (hereafter SRSGs) for human rights in Cambodia.⁵ The first SRSG, Michael Kirby, visited a plantation concession in January 1996 in Rattanakiri province and expressed concern about the impact of ELCs on the human rights and livelihoods of rural communities. In his subsequent report to the then Commission on Human Rights, he recommended that “the complaints of villages concerning non-consultation, the use of armed guards, the presentation for signature of an unexplained contract, the shooting of cows which wander onto concession areas and the feared endangerment of village survival and security of traditional

the Mekong Region proceedings: International Conference on Poverty Reduction and Forests, Proceedings.: International Conference on Poverty Reduction and Forests, Bangkok (2007); S.M. Borras et al., *Towards a better understanding of global land grabbing: an editorial introduction*, 38 THE JOURNAL OF PEASANT STUDIES 209 (2011); O. De Schutter, *How Not to Think of Land-Grabbing: Three Critiques of Large-Scale Investments in Farmland*, 38 THE JOURNAL OF PEASANT STUDIES 249 (2011); Ruth Hall, *Land Grabbing in Southern Africa: The Many Faces of the Investor Rush*, 38 Review of African Political Economy 193 (2011); FOOD AND AGRIC. ORG. ON U.N., VOLUNTARY GUIDELINES ON THE RESPONSIBLE GOVERNANCE OF TENURE OF LAND, FISHERIES AND FORESTS IN THE CONTEXT OF NATIONAL FOOD SECURITY FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS (2012); A. Zoomers, *Globalisation and the Foreignisation of Space: Seven Processes Driving the Current Global Land Grab*, 37 THE JOURNAL OF PEASANT STUDIES 429 (2010).

4 For example, see the archived reports of Global Witness, including *Going Places*, March 1998, and Sara Colm, *The effects of oil palm plantation development on indigenous communities, Rattanakiri province, Cambodia*, Natural Resource Management Project, 1996.

5 For a historical overview of land concessions, see the 2004 SRSG Report, 10-14.

sites of grave, pasture and farming land be resolved without delay, justly and according to the law.”⁶

Michael Kirby’s successor, Thomas Hammarberg, continued to examine the human rights impact on indigenous peoples caused by land and logging concessions, and he urged the government, among other things, to officially recognize their use of land, forests and other natural resources, and their distinct and unique identity, culture and way of living, as well as the role of indigenous peoples in managing and preserving forests and biological diversity. He recommended that “villages, lands and forests used by the Highland Peoples be clearly mapped and preserved from any current and future commercial concession or similar use. Local commune forestry projects should be recognized and supported. Public and private projects should only take place after due consultation with the peoples affected, and social, environmental and cultural impact assessment studies have been carried out.”⁷

By the 2000s, Thomas Hammarberg’s successor, Peter Leuprecht, studied in-depth the impact of the land concession system from a human rights perspective, which was the subject of a 2004 report. The report explained the history and current practice of land concessions, including the early development of the concession system, and focused on the impacts on the human rights and livelihoods of local communities. The aim of the report was to contribute to public understanding of the issues and to help bring about changes in policy and practice to assist Cambodia’s rural poor and future generations. Leuprecht, expressing shock at the situation he witnessed, assessed that the “policies are wrong....companies have been given rights over land that are very similar to ownership, and yet they have little or no regard for the welfare of the people; and they contribute little to state revenue....They are not reducing poverty in Cambodia, and they are allowing the continued plundering of its natural resources.”⁸ He called

6 UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMITTEE ON HUMAN RIGHTS, *Advisory Services in the Field of Human Rights Situation of Human Rights in Cambodia*, at ¶ 84, U.N. Doc., E/CN.4/1996/93 (Feb. 26, 1996).

7 UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMITTEE ON HUMAN RIGHTS, *Report of the Special Representative of the Secretary-General for Human Rights in Cambodia*, at ¶ 153, U.N. Doc. E/CN.4/1998/95 (Feb. 20, 1998).

8 2004 SRSR Report, foreword.

for full disclosure of information concerning all concessions in Cambodia, including economic concessions.

Subsequently, as the impact of land concessions and corresponding human right violations continued to affect more communities, Peter Leuprecht's successor, Yash Ghai, further examined the problem with a focus on human rights violations committed by land concession companies on rural communities, especially indigenous peoples. The result of this work, the 2007 SRSG Report, provided an update on key developments since the 2004 SRSG Report, including the revised legal and regulatory framework for the granting and management of ELCs, and implementation of this framework. In the report's introduction, SRSG Ghai noted that the impact of ELCs continued to mirror patterns documented in the 2004 SRSG Report, insofar as concessions had been detrimental to the livelihoods of rural communities. On the contrary, communities had drawn little benefit from land concessions and had no effective remedy when their rights were violated. SRSG Ghai also underscored the recommendations of the 2004 SRSG Report, including a recommendation that the entire concession system be reconsidered, and that alternatives for agricultural development be pursued for the benefit of Cambodia's rural population.

Despite these and many other calls for re-examination and reform, the government has continued to grant economic and other land concessions at an alarming rate. Over the last few years, increasing numbers of land concessions have been granted to private companies, both foreign and national, for large-scale agriculture, mining, infrastructure development, eco-tourism, and special economic zones.⁹ Many of these concessions are granted on land inhabited by indigenous communities, including protected areas and forests.

The lack of a public assessment by the government on the impact of the concession system on local communities' human rights and livelihoods, and the environment, as well as other human and economic costs of the concession system, together with a general lack of transparency surrounding concession activity, have been the subject of increasing discontent and protest. The result has been a general lack of trust by communities towards the authorities responsible for granting concession contracts, the local

9 Licadho & Cambodia Daily, *Carving Up Cambodia: One concession at a time*, THE CAMBODIA DAILY WEEKEND, Mar. 10-11, 2012, available at <http://licadho-cambodia.org/land2012>.

authorities and armed forces tasked with implementing the concessions, and the business enterprises who are viewed as exploitative and exclusive.

3. NATIONAL FRAMEWORK: LAWS AND PROCEDURES

There have been a number of legislative and policy developments since the 2007 SRSG Report, which build on the relatively well-developed existing national legal framework for land management. Under the Land Law of 2001, there are two categories of state land: state public land and state private land. According to Article 15 of the Land Law and the Sub-Decree on State Land Management, state public land should be used in the public interest, and includes natural resources such as forests, rivers, natural lakes, nature reserves protected by the law, and archeological, cultural and historical patrimonies. State public land is not for sale, and cannot be the subject of a land concession. When state public land loses its public interest value, it may become state private land, which can be used for other purposes. However state public land can only become state private land through declassification by a law passed by the National Assembly.¹⁰

In 2006, a Royal Decree was issued by the King to allow the government to make decisions on changing the status of state public land through a sub-decree.¹¹ The Royal Decree requires certain conditions to be observed when changing the status of state public land, for example, the land no longer serves the public interest, has lost its originally intended function, or is no longer used directly by the public.¹² This decree was followed by a sub-decree on rules and procedures for reclassification.¹³ The Sub-Decree on State Land Management sets out the framework for state land identi-

10 Land Law, 2001, arts. 16, 17.

11 Royal Decree, Aug. 8, 2006, on Provisional Guidelines and Provisions regarding the Expropriation of State Public Properties and of Public Entities.

12 Royal Decree No. NorSor/RoKorTor/0806/339, dated Aug. 3, 2006, on Provisional Guidelines and Provisions regarding the Expropriation of State Public Properties and of Public Entities, art. 3.

13 Sub-Decree No. 129, dated Nov. 27, 2006, on the Rules and Procedures Reclassification of State Public Properties and Public Entities.

fication, mapping, registration and classification, including the creation and maintenance of a state land database.¹⁴

The Land Law of 2001 authorizes the granting of land concessions for either social or economic purposes. The Land Law also envisages “other kinds of concessions,” including mining, fishing, industrial development and port concessions (also referred to as use, development or exploitation concessions), which do not fall within its scope. Land concessions can never be based on a *de facto* occupation of the land, but rather must be based on a specific legal document, issued by the competent authority prior to the occupation of the land, and must be registered with the Ministry of Land Management.¹⁵ As described above, land concessions can only be granted on private state lands.¹⁶

Social land concessions can be used to grant state private land to poor landless families for residential or farming purposes and to provide housing for army veterans. They are regulated by the Sub-Decree on Social Land Concessions.¹⁷ Other kinds of concessions, which include mining, ports, airports, industrial development, and fishing concessions, are regulated by other laws such as the 2007 Law on Use, Development or Exploitation Concessions, not the 2001 Land Law.

Economic land concession beneficiaries can clear land for industrial or commercial agricultural exploitation. The Sub-Decree on Economic Land Concessions adopted in December 2005 regulates the procedures for the granting of concessions and provides an important advance in establishing the legal and regulatory framework for the granting and management of concessions, including requirements to conduct public consultations

14 Sub-Decree No. 118 HNK/BK, dated Oct. 7, 2005, on State Land Management.

15 Land Law, 2001, art. 53; Sub-Decree No. 114, dated Aug. 29, 2007, on the Mortgage and Transfer of the Rights over a Long-Term Lease or an Economic Land Concession, art. 6.

16 Land Law, 2001, art. 58; Sub-Decree No. 19 ANK/BK, dated Mar. 19, 2003, on Social Land Concessions, arts. 2, 3.

17 Sub-Decree No. 19 ANK/BK, dated Mar. 19, 2003, on Social Land Concessions, arts. 2, 3.

as well as environmental and social impact assessments (two of five fundamental criteria).¹⁸

Land concessions for economic purposes include tree plantations (such as rubber, palm oil, teak, eucalyptus, and coconuts) and “agro-industry” (the large-scale production of food such as cassava, rice, corn, and soybeans). Under the 2001 Land Law, land concessions for economic purposes provide investors with exclusive rights to manage and harvest land, but may only create rights for use of the land during a fixed period of time, per the concession contract. They are granted in exchange for certain investments and fees.

Land concessions areas are limited by law to a maximum area of 10,000 hectares (ostensibly to avoid monopolization of natural resources), and a maximum duration of 99 years. Previously, provincial and municipal governments had the power to grant concessions of 1,000 hectares or less (per the 2005 sub-decree), however in 2008 this power was withdrawn by the central government. ELCs may now be granted only by national institutions.¹⁹ The government may revoke land concessions if the concessionaire does not comply with the terms of the concession contract.²⁰ Concessions are also subject to the Civil Code provisions relating to perpetual leases except where otherwise provided by special law.²¹

A sub-decree²² was issued in 2007 to determine the principles, terms, and conditions for security and transfer rights granted to investors on a long-term lease or an economic land concession. Only immovable property registered in the Master Land Register can be subject to a concession and a concessionaire cannot become the owner of the land.²³ The certificates

18 Sub-Decree No. 146 ANK/BK, arts. 4(3), 4(5).

19 Sub-Decree No. 131 ANKr.BK, dated Sept. 15, 2008.

20 Land Law, 2001, art. 55.

21 Civil Code, art. 307.

22 Sub-Decree No. 114, dated Aug. 29, 2007, on the Mortgage and Transfer of the Rights over a Long-Term Lease or an Economic Land Concession.

23 See Sub-Decree No. 114, arts. 5, 7, 9. The concessionaire has the right to mortgage or transfer his/her right over the land concession as well as the buildings and/or other immovable properties that he/she has constructed on the land, except as otherwise specified in the economic land concession agreement or as restricted by law. In all cases, the creditor cannot become the owner of the land and has

of ELCs must clearly specify the category of immovable property, its size, location, the identity of the owner of the land, and the identity of the concessionaire, as well as the duration of the concession.²⁴

The Sub-Decree on Economic Land Concessions of 2005 determines the criteria, procedures, mechanisms, and institutional arrangements for granting and monitoring the performance of ELCs. The Ministry of Agriculture, Forestry and Fisheries (MAFF) is authorized to grant ELCs. According to the Sub-Decree on Economic Land Concessions, the procedure for the granting of ELCs may be initiated through solicited proposals, where the government seeks expressions of interest in a project, or unsolicited proposals, where an investor proposes a project. However, competitive solicited proposals are the prioritized method for granting concessions, and unsolicited proposals may only be considered in exceptional cases where an investor promises to provide outstanding advantages through the introduction of new technology, contribute to social land concessions, or provide access to processing or export markets.²⁵ ELCs should be granted when only all the following criteria have been met:²⁶

- a. the land has been registered and classified as state private land;
- b. a land use plan has been adopted by the provincial or municipal state land management committee, and the proposed land use is consistent with the plan;
- c. environmental and social impact assessments have been completed with respect to the land use and development plan; and
- d. there are solutions for resettlement issues, in accordance with the existing legal framework and procedures. There shall be no

no right to claim ownership of the immovable property rented by or conceded to his debtor who has used his right over the concession as security. Moreover, the creditor shall not have the rights to claim the right to dispose of the immovable property possessed through a concession by his/her debtor.

24 Sub-Decree No. 114, art. 10.

25 Sub-Decree No. 146 ANK/BK, on Economic Land Concessions, art. 18.

26 Sub-Decree No. 146 ANK/BK, on Economic Land Concessions, art. 4.

involuntary resettlement by lawful land holders and access to private land shall be respected; and

- e. public consultations have been conducted with territorial authorities and local residents relating to the concession proposal.

The Sub-Decree on Economic Land Concessions also created a Technical Secretariat located at the MAFF with a mandate to support the authorities in reviewing existing ELCs, including: contractual compliance, land use fees and other revenue from contracts; a public consultation to solicit comments on concession activities within communes where concessions are located; a request for land regularization;²⁷ and a request for the voluntary reduction of ELCs exceeding 10,000 hectares.

The Ministry of Environment (MoE) is mandated to manage Cambodia's protected areas and is tasked, among other things, with reviewing and advising the government on the environmental impact of investment projects.²⁸ As the MAFF is authorized to grant all ELCs under Cambodian law, it remains unclear upon what legal basis the MoE is authorized to grant ELCs or other land concessions within protected areas. However, a sub-decree issued by the government in 2007 allows ministries and authorities other than MAFF to sign economic land concession or long-term leases, in particular in the case where the lease is made with the royal government

27 This is the responsibility of the Ministry of Land Management, Urban Planning and Construction (MLMUPC) and includes land parcel adjustments, adjudication of land rights of the occupants of land parcels under review, and demarcation and registration of land through existing procedures.

28 Protected Area Law, 2008, arts. 2, 4. The MoE is responsible for the management of the protected areas as defined by the provisions of the Law on Environmental Protection and Natural Resources Management (promulgated by Royal Decree No NS/RKM/1296/36 of Dec. 24, 1996); Royal Decree on the Establishment and Designation of Protected Areas of Nov. 1, 1993; Royal Decree on the Establishment and Management of Boeng Tonle Sap Biosphere reserve (No. NS/RKT/0401/070 of Apr. 10, 2001).

on untitled land and signed together with the Ministry of Economy and Finance.²⁹

The Protected Area Law³⁰ mandates the Ministry to set up a National Committee for Conflict Resolution on Protected Area Management (NCRPAM) and the Minister is to chair the inter-ministerial committee to resolve disputes arising from investment projects in protected areas. The Ministry is also responsible for evaluating and reviewing Environmental Impact Assessments (EIAs), and ensuring their implementation. This includes ensuring adequate follow up, monitoring, and taking appropriate measures to ensure the relevant investor will comply with a proposed Environmental Management Plan (EMP) during a project's construction, implementation, and closure, as has been described in the relevant EIA report.³¹

The Ministry of Industry, Mines and Energy (MIME) is tasked, among other things, with issuing mining licenses. According to the 2001 Law on Management and Exploitation of Mineral Resources, MIME is responsible for managing and inspecting all mining operations for compliance with the law.³² There are four general types of mining licenses: Artisanal Mining Licenses,³³ Pit and Quarry Licenses and Gem Mining Licenses, and Exploration and Exploitation Licenses for Industrial Scale Mining. For the Industrial Mining Licenses, the company must show that it is technically and financially able to implement the project, and the license applicant

29 Sub Decree No. 114 ANKr.BK, dated Aug. 29, 2007, on the Mortgage and Transfer of the Rights Over a Long-term Lease or an Economic Land Concession, art. 5 stated that "Only immovable property registered in the Master Land Register can be subject of a concession or long-term lease. In case the lease is made with the royal government and the land is not titled, the lease shall be signed by the Minister of the Ministry of Economy and Finance together with relevant ministers or heads of institutions, or provincial-municipal governors who are the trustee authorities of the said land."

30 Protected Area Law, 2008, art. 20.

31 Sub-Decree No. 72, dated Aug. 11, 1999, on the Environmental Impact Assessment Process.

32 Law on Management and Exploitation of Mineral Resources, 2001, article 15.

33 Applications for artisanal mining licenses are processed through the local department of MIME in the area where the mining operation is located (article 14 of the Mining Law).

must also do the following: conduct a feasibility study and complete an EIA; create a plan for protecting the health and safety of workers; create a plan for the education, training and employment of Cambodian citizens; and prepare a plan for decommissioning (or closing down) the mine and restoring the surrounding affected environment after the mine closes.³⁴

The 1994 Law on Foreign Investment in the Kingdom of Cambodia established the Council for the Development of Cambodia (CDC).³⁵ According to this law, the CDC is the highest authority on private and public sector investment in Cambodia. It is chaired by the Prime Minister and composed of senior ministers from the relevant government agencies.³⁶ The Cambodian Investment Board and the Cambodian Special Economic Zone Board are the CDC's operational arms for private sector investment, dealing with investment projects within and outside of special economic zones respectively. Both boards review investment applications, including land concessions, and grant incentives to investment projects meeting the requirements laid out in the 1994 Investment Law. As such, the CDC plays an important role in investment in land concessions.

**a. Ministry of Land Management,
Urban Planning and Construction (MLMUPC)**

The Land Law 2001 designated the MLMUPC as the entity responsible for issuing titles relating to immovable property (land) and managing the cadastral administration of land belonging to the state, which includes state private land over which land concessions may be granted. MLMUPC is responsible for land regularization when there is a request from the ELC Technical Secretariat. This includes land parcel adjustments, adjudication of land rights of occupants of land parcels under review, and demarcation and registration of land through existing procedures. This Ministry also has the duty to register land concessions for economic and other purposes.

34 Law on Management and Exploitation of Mineral Resources, 2001, arts. 11(6), 21.

35 Law on Investment in 1994, art. 3, and Law on the Amendment to the Law on Investment in 1994, dated Mar. 24, 2003.

36 Sub-Decree No. 149, dated Oct. 3, 2008, on the Organization and Functioning of the CDC, art. 1.

The existence of land concessions or long-term leases must be recorded on land title certificates managed by the MLMUPC.³⁷

b. Law on Protected Areas

The Protected Area Law came into force in January 2008. It defines the framework for the management, conservation and development of protected areas (national parks, wildlife sanctuaries, protected landscapes, multiple use areas, Ramsar sites, biosphere reserves, natural heritage sites, and marine parks),³⁸ which had been defined by previous regulations on national resource management and environmental protection.³⁹ The law aims to ensure the management and sustainable use of natural resources, and conservation of biodiversity, in protected areas.

The 1993 Royal Decree on the Protection of Natural Areas recognized 23 protected areas. Subsequent sub-decrees have added additional sites to Cambodia's protected areas list and altered the size of the original 23 areas. At present there is no publicly available list of all protected areas and their boundaries. The 1993 Royal Decree divides the protected areas into four distinct categories: natural Parks, wildlife reserves, protected landscapes, and multi-purpose areas. These categories were expanded by the 2008 Protected Area Law to include Ramsar sites, the Tonle Sap Biosphere Reserve, natural heritage sites, and marine parks.

The 2008 Protected Areas Law also introduced a new zoning management system in order to effectively manage the conservation and development of protected areas. Zones include the core zone, the conservation zone, the sustainable use zone, and the community zone. No clearance or building is allowed in the core or conservation zones, and any development within the sustainable use or community zones can only take place with the approval of the government at the request of the Ministry of Environment

37 Sub-Decree No. 114, art. 6. The MLMUPC shall issue "Certificates of Long-Term Lease" and "Certificates of Economic Land Concession."

38 Protected Area Law, 2008, art. 7.

39 The protected areas are those defined by the provisions of the 1996 Law on Environmental Protection and Natural Resources Management, the Royal Decree on the Establishment and Designation of Protected Areas of Nov. 1, 1993, and the Royal Decree on the Establishment and Management of Boeng Tonle Sap Biosphere reserve of Apr. 10, 2001, among others.

(MoE).⁴⁰ As with any areas protected under the Protected Areas Law, any development in these areas or in areas adjacent to protected areas must first be subject to an environmental and social impact assessment.⁴¹

Modification of the boundaries of each zone can only be carried out on the basis of clear scientific information on the ecosystems which are subject to change or are under threat, in compliance with the policies and strategies of the government.⁴² The MoE is charged with mapping protected areas with the participation of the MLMUPC, local authorities, local communities, and relevant agencies.⁴³ The Protected Area Law also set conditions for the establishment or modification of any protected area by a sub-decree.⁴⁴

Chapter VI of the law determines the involvement and access rights of local communities and indigenous communities, and declares that the state recognizes and secures access to traditional uses, local customs, beliefs and religions of the local communities, and indigenous ethnic minority groups residing within or adjacent to the protected areas. The law tasked the MoE with the authority to allocate part or parts of sustainable use zones to communities residing within or adjacent to a protected area as

40 Protected Area Law, 2008, art. 36.

41 Protected Area Law, 2008, art. 44, states that “To minimize adverse impacts on the environment and to ensure that management objectives of protected areas are satisfied, an Environmental and Social Impact Assessment shall be required on all proposals and investment for development within or adjacent to protected area boundary by the Ministry of Environment with the collaboration from relevant ministries and institutions. The procedures for Environmental and Social Impact Assessment for any projects or activities shall comply with provisions pertaining to the process of Environmental and Social Impact Assessment.”

42 Protected Area Law, 2008, art. 13.

43 Protected Area Law, 2008, art. 14. The Nature Protection and Conservation Administration of the Ministry of Environment shall conduct research and management zoning with the Ministry of Environment’s guidelines and demarcate the boundary markers for each protected area based on an appropriate location on the map determined by sub-decree.

44 Protected Area Law, 2008, art. 8.

community protected areas. As at the end of 2011, the MoE had set up 102 community protected areas, among them 23 indigenous communities.⁴⁵

c. Forestry Law

The Forestry Law authorizes the granting of forest concessions. However, since January 2002, a moratorium on logging in forest concessions has been in place,⁴⁶ and the Prime Minister indicated in June 2012 that this will be continued.⁴⁷ The Sub-Decree on the Management of Forest Concessions states that cancelled or revoked forest concessions must revert to natural forest protected areas, and cannot be converted into ELCs or awarded to other companies. Article 29 of the Forestry Law prohibits the harvesting of trees that yield high-value resin or those that local communities tap to extract resin for customary use. Chapter 9 of the law recognizes and ensures the traditional user rights of local communities to collect and use forest by-products. Traditional user rights include grazing for livestock and the sale of forest by-products, and do not require a permit. Chapter 9 also enables the allocation of any part of a permanent forest reserve as a community forest, granting a community living inside or near the forest the rights to manage and utilize the forest resources in a sustainable manner.

d. Laws on Environment

The 1996 Law on Environmental Protection and Natural Resource Management requires environmental impact assessments to be carried out on all private and public projects and activities. Concerned Ministries should consult with the MoE before issuing a decision or undertaking activities related to the preservation, development or management of natural re-

45 Information received during a meeting in May 2012 with the Minister of Environment. According to the Minister, of the 102 community protected areas, there are 197 villages with participation from 24,887 families. Out of the 102 communities, 23 communities or 4,449 families are of indigenous people.

46 In January 2002 the Prime Minister announced a moratorium on logging, in line with the Statement of the Royal Government on the National Forestry Sector Policy from July 26, 2002, *available at* <http://www.forestry.gov.kh/Law/ForestPolicy.html>.

47 A speech given by the Prime Minister, June 14, 2012, at the launch of the 2011 mid-term review report on the implementation of the national strategic development plan update 2009-2013.

sources. The MoE, in collaboration with the concerned ministries, must carry out a study to assess the environmental impacts on natural resources, and give recommendations to concerned ministries to ensure that the natural resources are preserved, developed, and managed in a rational and sustainable manner.

The 1999 Sub-Decree on Environmental Impact Assessment Process further specifies the procedures for an assessment which is to be done on every project or activity of any type or size, public or private, and should involve public consultations.⁴⁸ It empowers the MoE to evaluate and review assessments and ensure their implementation through monitoring and surveillance.⁴⁹ Article 4 of the Sub-Decree specifies that projects can only be approved by national institutions following a review of findings and recommendations provided by the MoE based on the impact assessments. At the time of writing this article, the MoE was in the process of drafting the law on environmental impact assessments, the contents of which were not made available to the public, but which were reportedly slated for a consultation process in the future.

e. Law on Investment

The Cambodian Law on Investment governs all investments made by Cambodian and foreign investors, whether individuals or legal private holdings,⁵⁰ and all investment applications go through the Council for the Development of Cambodia (CDC). The Law streamlined the foreign investment regime and provided the framework for incentives (including a corporate tax exemption) for direct private sector investment, including agro-industry, infrastructure development, environmental protection, and tourism.⁵¹ Chapter six specifies that the use of land is permitted to all investors (whereas land ownership is restricted to nationals), including long-term leases of up to a period of 70 years, renewable upon request. Chapter eight notes that any dispute relating to investment should first be settled amicably through consultation between the parties, and should

48 Sub-Decree No. 72 ANRK.BK, article 1.

49 *Id.* at article 3.

50 Cambodian Law on Investment, Aug. 4, 1994, articles 1, 2.

51 *Id.* at arts. 12, 13.

this not be possible within two months, the dispute should be brought by either party for Conciliation before the Council or referral to the court.

f. Laws Pertaining to Mining

The 2001 Law on Management and Exploitation of Mineral Resources governs the prospecting, exploring, and exploiting of mineral resources, save petroleum and gas, which is prohibited on “national cultural, historical and heritage sites.” In addition, any mining activities in “protected, reserved or restricted” areas can only be carried out with written permission of the authority responsible for managing that area. The Law also specifies requirements for addressing environmental impact and providing fair and just compensation. The 2002 Law on Forestry allows mining within Permanent Forest Estates, however, any proposed mining operation, in addition to following other relevant laws, must be the subject of a “prior study-evaluation” by the MAFF.⁵²

As of the writing of this article there is no specific law covering oil and gas in Cambodia, and the sector is currently governed by the amended Petroleum Regulations from 1991. Under the Petroleum Regulations of 1991, MIME was the administrative authority responsible for the management of petroleum resources. However, in 1998 this authority was transferred to the Cambodian National Petroleum Authority (CNPA). The CNPA is now responsible for evaluating bids and making recommendations to the government that Petroleum Agreements be granted to specific companies.

The Petroleum Regulations set out the terms for invitations to bid and the criteria for evaluating, negotiating, and approving subsequent bids. Exploration periods are granted for up to 4 years, after which they may be renewed twice for a period of two years each time. If exploration shows that resources can be commercially exploited, the company should apply for a production permit, including a detailed work plan and budget for the proposed exploitation. No further development of operations should commence until a production permit is issued. According to the Regulations, the production period lasts for 30 years, after which it may be extended for a further 5 years if the field is still commercially productive. A full Environmental Impact Assessment (EIA) is also required for all oil and gas operations, and project implementers are required to abide by all

52 Law on Forestry, 2002, art. 35.

relevant legal frameworks, including the environment laws and associated regulations. Operators are also required to submit a safety management plan, emergency response plan, and an oil spill contingency plan.⁵³

g. Laws Related to Hydro-Power

There is currently no separate law on hydropower in Cambodia, although there are a number of laws with relevance to the development and running of such projects, including the laws related to investment, electricity, land, forests, water resources, and the environment. As Cambodia does not yet have the financial or technical capacities to design, construct, and operate large-scale hydropower projects, all large-scale projects currently under development are under Build Operate Transfer (BOT) agreements of 25 years and upwards, and the existing hydro-power projects currently underway are all Chinese funded and operated.⁵⁴

The first step in developing a hydropower project is to seek a Memorandum of Understanding with MIME in order to conduct and prepare a feasibility study, followed by steps to develop the project, which must be approved by the Council for the Development of Cambodia. In addition, under the 2007 Law on Water Resource Management, all hydropower projects require a water use license.⁵⁵ As with all large-scale development projects, all hydropower projects must be subject to an Environmental Impact Assessment (EIA) prior to approval and EIAs should be conducted according to the procedures set out by the MoE.⁵⁶

h. Land Title and Possession Rights

The dissolution of private property during the Khmer Rouge regime from 1975-1979, resulted in a lack of documentation and land titles in the primarily agrarian sector and in informal urban settlements. In recognition of the absence of widespread land registration and titling in Cambodia,

53 Reference Amendment to Petroleum Regulations, 1998.

54 Open Development Cambodia, Briefing on Hydropower, Oct. 2011, *available at* <http://www.opendevdevelopmentcambodia.net/briefings/hydropower>.

55 Law on Water Resource Management, 2007, article 12.

56 Law on Environmental Protection and Natural Resource Management, 1996, art. 6; Sub-Decree on Environmental Impact Assessments Process, 1999.

Chapter Four of the Land Law recognises possession rights for peaceful, uncontested possession commencing at least five years before 2001, which can be converted into full ownership rights through the issuance of title.

The Ministry of Land Management with the support of development partners and other authorities has made significant progress in systematic and sporadic land registration and titling programmes, and has slowly made efforts to try and address the situation of informal settlers through new policies and regulations.⁵⁷ The government has accelerated the land titling programme, resulting in many people obtaining ownership documents or deeds to their land. Having said this, there have been criticisms about the systematic and sporadic titling programme, Land Management and Administration Programme (LMAP), which is funded by the World Bank, GTZ (Germany), the government of Finland, and the Canadian International Development Agency (CIDA). Civil society organizations monitoring the titling scheme claim that despite significant successes in some areas, LMAP did not improve tenure security for segments of the population that are most vulnerable to displacement, as many areas of sought-after land, including that of indigenous peoples, have been systematically excluded from the programme.⁵⁸ They point out that a key factor in the design of LMAP is that areas “likely to be disputed” and areas of “unclear status” would not be targeted by the titling system— in practice this has resulted in a lack of access to the titling system for households and communities that lie in the path of planned developments or concessions, or whose lands have been targeted by well connected individuals or companies.⁵⁹ Consequently, they contend that “[v]ulnerable groups that have legitimate claims to land are routinely and arbitrarily denied access to land

57 *E.g.*, note the adoption of the Circular on resolution of temporary settlements on illegally occupied land in the capital, municipal and urban areas (Circular 03) in May 2010.

58 Bridges Across Borders Cambodia, Center for Housing Rights and Evictions (COHRE), Jesuit Refugee Service, *Untitled: Tenure Security and Inequality in the Cambodian Land Sector* (2009).

59 *Id.* at 3.

titling and dispute resolution mechanisms, undermining the project's aim of reducing poverty and promoting social stability.”⁶⁰

i. The Rights of Indigenous Peoples to Land

Chapter 3 of the Land Law recognizes the rights of indigenous communities to collective ownership of their lands. The lands of indigenous communities include residential and agricultural land, and encompass both land currently cultivated and land reserved for shifting cultivation. Article 23 of the Land Law states that indigenous communities should continue to manage their communities and land according to traditional customs, pending the determination of their legal status. Once they are registered with the Ministry of Interior as legal entities, communities can apply for registration of collective title. In 2009, the government further defined its policy on indigenous peoples⁶¹ and developed the procedures to implement their rights to collective land title.⁶²

The adoption of the Sub-Decree on indigenous land registration in April 2009 set in motion various initiatives by the Ministry of the Interior, Ministry of Rural Development, Ministry of Land Management, bilateral donors, the U.N., and NGOs to assist indigenous communities to register as legal entities (which supports community cohesiveness, traditional agricultural systems, and the preservation of culture and language) and to apply for collective land title. The Sub-Decree sets out the procedure for the communal land titling of indigenous people and includes detailed steps for communal land titling, involving boundary demarcation, surveying, public display, and reporting to higher governmental authorities.

Despite the efforts of indigenous communities to register as legal entities and eventually apply for land title, the granting of land concessions has been ongoing. As a result, in May 2011 the Ministry of Interior and

60 *Id.* at 1.

61 National Policy, dated Apr. 24, 2009, on the Development of Indigenous People prepared by the Ministry of Rural Development, approved by the Council of Ministers; Circular of the Ministry of Rural Development, dated July 22, 2009, on the Procedures and Methods of Implementing National Policy on the Development and Identification of an Indigenous Community.

62 Sub-Decree No. 83 ANK, BK, dated Apr. 24, 2009, on Procedures of Registration of Land of Indigenous Communities.

Ministry of Land Management, Urban Planning and Reconstruction issued an Inter-ministerial Circular to provide interim protective measures for indigenous peoples registered with the Ministry of the Interior. The goal of the circular is to protect the lands of indigenous peoples who are in the process of seeking collective ownership over their land, while awaiting the lengthy titling process to be completed.⁶³

j. Available Land Dispute Resolution Mechanisms

There are five formal conflict resolution mechanisms in Cambodia for disputes relating to land rights: the Commune Councils, the Administrative Commissions, the National Authority for Land Conflict Resolution, the Cadastral Commissions, and the courts. The Commune Councils only “reconcile differences of opinion” among citizens of communes, but do not make decisions.⁶⁴ Though not a requirement, in practice most cases go to the Commune Councils before they go to higher levels. The Administrative Commissions⁶⁵ are a temporary structure for conciliation only pertaining to untitled parcels of land, whether claimed by private actors or the state. The unsuccessful conciliation cases are sent to the National Cadastral Commission.

The Land Law of 2001 requires disputes between possessors over an immovable property to be submitted for investigation and resolution. The results of the investigation should be submitted to the Cadastral Commission, which was established in May 2002 by a sub-decree to resolve the conflicts related to unregistered immovable property (disputes occurring outside adjudication areas and disputes arising within adjudication areas that cannot be conciliated by the Administrative Committee). The National Cadastral Commission is empowered to make decisions on disputes between possessors over unregistered land subject to possession rights, and

63 Ministry of Interior and MLMUPC, Inter-ministerial Circular, dated May 31, 2011, on interim protective measures protecting lands of indigenous peoples that has been requested for collective ownership titling, while awaiting titling process according to procedure to be completed.

64 Sub-Decree No. 22 ANK/BK, dated Mar. 25, 2002, on the Decentralization of Power, Roles and Duties to the Commune/Sangkat Councils, art. 61.

65 The Administrative Commissions arose from Sub-Decree 46 on Systematic Land Registration.

in the case of dissatisfaction with the result, the disputants may complain to the courts.⁶⁶

The Cadastral Commissions consist of the National Cadastral Commission, Provincial/Municipal Cadastral Commissions in all 24 Provinces and Municipalities, and District/Khan Cadastral Commissions in all 194 districts/khans. Only the National Cadastral Commission has decision making authority, whereas provincial and municipal levels can only mediate. The District/Khan Cadastral Commission only has authority to support reconciliation, and where no agreement is reached, a case will be referred to the provincial level for conciliation or to the national level for a decision. The parties to the conflict can appeal a decision made by the National Cadastral Commission within 30 days to the courts.

In February 2006, the National Authority on Land Dispute Resolution (NALDR) was set up by a Royal Decree. This institution, which was not envisaged when the Land Law was drafted, does not have a clear place within the existing institutional framework for land management. It is mandated to hear cases which are “beyond the competence of the National Cadastral Commission” and receive “complaints from everywhere involving land disputes.”⁶⁷ The court system (Provincial/Municipal courts, Appeals Court, Supreme Court) is only mandated to adjudicate disputes over titled/registered land using the Civil Procedure Code. Parties can bring their case to the court if they disagree with the decision made by the National Cadastral Commissions or the NALDR.

k. Recent Changes in Law and Policy

The Prime Minister instigated a number of policy developments related to ELCs in the first half of 2012. In March 2012, the Council of Ministers decided that in principle, prior to the signing of all ELC contracts, the Ministry of Land Management should register state land in the Land Registry Book following the procedures in the legal framework already in force.⁶⁸ The definition of the procedure for land registration into the

66 Land Law 2001, art. 47; Sub-Decree No. 47, dated May 31, 2002, on the Organization and Functioning of the Cadastral Commission, arts. 2, 3.

67 Determination on Rules and Procedure of Work of NALDR, Dec. 11, 2008.

68 Council of Ministers, Letter No. 298 SCN.OS, dated Mar. 19, 2012. The Minister in charge of the Council of Ministers informed the ministers of the Ministry of

Land Registry Book was designated to the MLMUPC and ELC Technical Secretariat Group of MAFF. Registration of state land for ELCs can take four to five months for large scale ELCs. The land registration service fee should follow the Fee Table set by Anti-Corruption Unit (ACU).

In May 2012, the Prime Minister issued a directive to temporarily halt the granting of ELCs, and called for a review of existing concessions.⁶⁹ The directive sets out measures to strengthen and foster effectiveness for the management of ELCs. For existing ELCs, the directive instructs the relevant authorities to further implement a “leopard-skin” policy, demarcating ELCs around land already occupied, thereby aiming to lessen the effects of ELCs on communal land and decrease interruptions to the livelihood of rural communities. The directive also stated that ELCs would be cancelled for those companies that fail to comply with applicable procedures and contracts, for example companies that engage in illegal logging, encroach on land outside of the ELC, and leave the land vacant for resale. While the May 2012 directive of the Prime Minister represents a significant step in the right direction in terms of land reform, its unilateral initiation by the Prime Minister is cause for concern in terms of harmonization with the existing laws, procedures, and policies on land titling and management, and its implementation has raised a number of human rights concerns, as discussed in further detail below.

4. INTERNATIONAL LEGAL FRAMEWORK

Article 31 of the 1993 Constitution of the Kingdom of Cambodia enshrines international human rights obligations⁷⁰ into domestic law and policy. The direct applicability of international human rights norms in Cambodian

Land Management, Urban Planning and Construction, Ministry of Commerce, Ministry of Environment, and the MAFF that the RGC decides in principle among other things to register state land into Land Registry Book following the procedures in legal framework in force in advance prior to the signing of ELCs contract.

69 Royal Government of Cambodia, Directive 01 Bor.Bor, dated May 7, 2012, on the measures to strengthen and foster effectiveness for the management of ELCs.

70 “The Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the

courts was further confirmed by a decision of the Constitutional Council in 2007.⁷¹ Since 2007 there have been a number of developments related to land concessions at the international level which are relevant to Cambodia's international commitments and the development of their national laws, policy, and practices.

In September 2007, Cambodia voted in favour of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),⁷² which provides an international normative foundation for the royal government's legal framework on the recognition and registration of indigenous peoples and their right to collective land title. The adoption of the Declaration represents the culmination of decades of advocacy for indigenous peoples' rights and explicitly lays out rights to land, culture, livelihood, and consultation, among other things.

The Basic Principles and Guidelines on Development based Displacement and Evictions of 2007, developed by the Special Rapporteur on adequate housing, provide a baseline standard related to the relocation of people affected by land concessions.⁷³ The Guidelines recommend states to explore all possible alternatives to evictions and to ensure full consultation and participation of affected communities throughout the entire process, as well as provide adequate compensation and restitution.⁷⁴

In 2009, at the conclusion of its first Universal Periodic Review by the United Nations Human Rights Council, the government of Cambodia

covenants and conventions related to human rights, women's and children's rights." Constitution of the Kingdom of Cambodia, art. 31.

71 Decision No. 092/003/2007, July 10, 2007.

72 G.A Res. 61/295, U.N. Doc. A/61/PV.107 (Sept. 13, 2007).

73 Basic Principles and Guidelines on Development-Based Evictions and Displacement, Annex I of the report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, A/HRC/4/18.

74 The Office of the United Nations High Commissioner for Human Rights in Cambodia published in December 2009 the "United Nations Commentary and Guidelines on Eviction and Resettlement" in both English and Khmer, *available at* <http://cambodia.ohchr.org/WebDOCs/DocPublications/EvictionsGuidelines/EvictionGuidelines-EN.pdf>; <http://cambodia.ohchr.org/WebDOCs/DocPublications/EvictionsGuidelines/EvictionGuidelines-Kh.pdf>.

accepted all 91 recommendations made by member states.⁷⁵ Among these, several specific recommendations were made regarding land issues,⁷⁶ such as the need to implement judicial reform to address land issues, intensify efforts to promote fair access to land ownership and prevent forced evictions, if not execute a moratorium, and revise policies and practices related to resettlement and relocation.

In its concluding observations on Cambodia in June 2011, the Committee on the Rights of the Child (CRC) expressed “deep concern that thousands of families and children, especially urban poor families, small-scale farmers and indigenous communities continue to be deprived of their land as a result of land grabbing and forced evictions carried out by people in positions of power,”⁷⁷ and the Committee recommended that Cambodia “establish a national moratorium on evictions until the determination of the legality of land claims is made.”⁷⁸

In its 2010 concluding observations, the Committee on the Elimination of Racial Discrimination (CERD) expressed concerns “about reports of the rapid granting of concessions of land traditionally occupied by indigenous peoples without full consideration, or exhaustion of procedures provided for, under the land law and relevant sub-decrees (arts. 2 and 5) and recommended for the government to adopt protective measures (such as granting delays when issuing land concessions). The Committee also expressed concern over the intimidation and acts of violence against indig-

75 United Nations Human Rights Council, *Report of the Human Rights Council*, 13th Sess., ¶¶ 355-69, U.N. Doc. A/HRC/13/56 (Feb. 8, 2011).

76 United Nations Human Rights Council, *Report of the Working Group on the Universal Periodic Review on Cambodia*, Recommendations 38, 60-68, U.N. Doc. A/HRC/13/4 (Jan. 4, 2010).

77 U.N. Comm. on the Rights of the Child, *Concluding Observations: Cambodia*, ¶ 61, U.N. Doc. CRC/C/KHM/CO/2 (June 20, 2011).

78 “The Committee urges the State party to establish a national moratorium on evictions until the determination of the legality of land claims is made. The Committee also urges the State party to ensure that families and their children are not made homeless as a result of evictions for private and development activities. The Committee further recommends that the State party fully implement the recommendations of the Special Rapporteur on the situation of human rights in Cambodia in relation to access to land and livelihood (A/HRC/4/36 and A/HRC/7/42).” *Id.* at ¶ 62.

enous peoples during forced evictions or land disputes affecting them, and recommended the government to provide full protection against physical attacks and intimidation as communities seek to exercise their rights as they relate to claim communal land.⁷⁹ In 2009, the Human Rights Council expressed its concern about the issues raised by disputes relating to land ownership and called upon the government of Cambodia to resolve such issues in accordance with the 2001 Land Law by strengthening the implementation of the law through the development of national guidelines to clarify relevant procedure.

Since the 2007 SRSR Report, there have been developments at the international level with regard to the state duty to protect against human rights abuses by third parties, including the private sector, and the responsibility of business enterprises. On 16 June 2011, the United Nations Human Rights Council unanimously endorsed the Guiding Principles on Business and Human Rights (Guiding Principles).⁸⁰ While not a legally binding document, this endorsement established the Guiding Principles as the authoritative global reference point, clarifying business accountability and the responsibilities of the state. It should be noted that the concept of business and human rights includes efforts of corporate social respon-

79 “The Committee urges the State party to provide full protection to vulnerable groups against physical attacks and intimidation as they seek to exercise their rights as they relates to communal lands. It urges the State party to bring perpetrators of such violations to justice. In its effort to improve the judiciary, the State party should ensure greater efficiency of the judicial system to ensure equal access to justice for all, including minorities and indigenous peoples, in conformity with the Committee’s general recommendation No. 31 (2005) on the prevention of racial discrimination in the administration and functioning of the criminal justice system.” *Id.* at ¶ 17.

80 See United Nations Human Rights Council, *Human rights and transnational corporations and other business enterprises*, U.N. Doc. A/HRC/17/L.17/Rev.1 (June 15, 2011). The Guiding Principles on Business and Human Rights are contained in the annex to the Special Representative’s 2011 report to the Human Rights Council (A/HRC/17/31), available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.31_en.pdf.

sibility but international standards impose obligations that are neither voluntary nor ad hoc.⁸¹

The Guiding Principles are grounded in recognition of states' existing obligations to respect, protect and fulfill human rights and fundamental freedoms. Therefore, the standards on business and human rights are directly relevant to the Kingdom of Cambodia through their international legal commitments and domestic law. The Guiding Principles apply to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure. Therefore, all businesses involved in land concessions in Cambodia (the host state), including businesses operations from foreign countries (the home states) bear the responsibility to protect against human rights violations.

The Guiding Principles are a set of 31 standards to support the implementation of the United Nations "Protect, Respect and Remedy" policy framework.⁸² They are the product of six years of research and extensive consultations involving governments, businesses enterprises and associations, civil society, affected individuals and communities, and investors. They highlight what steps states should take to foster business' respect for human rights, providing a standard for stakeholders to monitor and assess these steps, and show how businesses can become aware and demonstrate to others that they respect human rights and reduce the risk of causing or contributing to human rights harm. They also stipulate what both states

81 The Office of the United Nations High Commissioner for Human Rights in Cambodia, published in Dec. 2011, the "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework" in both English and Khmer, *available at* http://cambodia.ohchr.org/WebDOCs/DocPublications/Business-and-HR-Guidelines/Business%20and%20Human%20Rights_English.pdf; http://cambodia.ohchr.org/WebDOCs/DocPublications/Business-and-HR-Guidelines/Business%20and%20Human%20Rights_Khmer.pdf.

82 The "Protect, Respect and Remedy" policy framework was unanimously welcomed in 2008 by the United Nations Human Rights Council. *See* Protect, Respect and Remedy: a framework for business and human rights, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (A/HRC/8/5); Summary of Five Multi-stakeholder Negotiations (A/HRC/8/5/Add.1) (April 23, 2008).

and business enterprises should do to enhance access to effective remedies for those whose rights have been harmed.

The new United Nations Working Group on Business and Human Rights has undertaken the promotion of the Guiding Principles, which they explain have led to a convergence of global standards and initiatives on business and human rights, including a link with the standards of the International Standardisation Organisation (ISO) Guidance on Corporate Responsibility, OECD Guidelines for Multinational Enterprises, U.N. Global Compact, and the International Finance Corporation (IFC) Sustainability Framework, among others.⁸³

The 2011 IFC Policy and Performance Standards on Environmental and Social Sustainability acknowledges “an emerging international consensus that the private sector has a responsibility to respect human rights,” including trying to close the gap in protection against forced evictions. And most recently, the Association of Southeast Asian Nations (ASEAN) announced that the first thematic study by its relatively new Intergovernmental Commission on Human Rights would focus on business and human rights in a manner that is fully compliant with the U.N. frameworks, especially the Guiding Principles.⁸⁴ The convergence of these standards is directly applicable to the Cambodian context, given the large number of business

83 United Nations Human Rights Council, *Report of the United Nations Working Group on Business and Human Rights*, U.N. Doc. A/HRC/20/29 (Apr. 10, 2012), available at http://www.ohchr.org/Documents/Issues/Business/A.HRC.20.29_AEV.pdf.

84 Remarks by Rafendi Djamin, Indonesian Representative to ASEAN Intergovernmental Commission on Human Rights, at Asia Pacific Forum of National Human Rights Institutions Regional Conference on Business and Human Rights, Oct. 11-13, 2011, Seoul, Korea.

enterprises (including international and domestic, and those wholly or partly owned by the state) involved in land concessions.⁸⁵

International Standards for Preventing and Addressing Human Rights Impact

There are a myriad of standards that set out the international legal obligations of states for addressing environmental and social impact. Business enterprises are internationally obliged to carry out “due diligence,” that is to identify, prevent, mitigate, and account for how they address their adverse human rights impacts.⁸⁶ Not only do businesses have this responsibility, but it is the duty of the state to ensure proper management and monitoring of this function. As noted earlier, states have the duty to protect against human rights abuses by third parties in their country or area of jurisdiction. Moreover, they are obligated in their international human rights obligations to exercise adequate oversight when they contract with or legislate for business enterprises.

The process for both states and businesses should include assessing the actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how such impacts are addressed. This applies to all state and donor-operated projects and to all business enterprises, regardless of size (whether transnational corporations, conglomerates, or small and medium owned enterprises), sector, structure, ownership, or country of domicile or operation (Cambodian or foreign). In the context of land concessions, it may refer directly to the environmental and social impact—carrying out assessments with good faith participation of all those affected.

Moreover, the assessment of the impact should be participatory and development planning should be inclusive of all those potentially affected.

85 Note also that the Committee on the Elimination of Racial Discrimination, in its concluding observations in 2010, encouraged business entities engaging in ELCs “to take into consideration their corporate social responsibility as it relates to the rights and well-being of local populations.” See United Nations Committee on the Elimination of Racial Discrimination (CERD), *Concluding Observations: Cambodia*, ¶ 17, U.N. Doc. CERD/C/KHM/CO/8-13 (Apr. 1, 2010).

86 United Nations Human Rights Office of the High Commissioner, *Guiding Principles on Business and Human Rights*, 17-24, U.N. Doc. HR/PUB/11/04 (2011)..

The International Covenant on Civil and Political Rights and on Economic, Social and Cultural Rights both recognize the right of all individuals and peoples to “freely pursue their economic, social and cultural development.” The United Nations Declaration on the Right to Development⁸⁷ laid the foundation for participation and consultation in development processes, which was complemented by references in the United Nations Declaration on the Rights of Indigenous Peoples, which upholds free, prior, and informed consent.⁸⁸ This language has been incorporated into other international standards, for example the 2011 update on IFC Policy and Performance Standards on Environmental and Social Sustainability.⁸⁹ In addition to the international human rights obligations of states and businesses, there are practical, operational, and logistical reasons for incorporating these requirements in business and development activities, and many governments have incorporated these standards into their national laws and policies, and companies into their standard operations.⁹⁰

5. THE LAW AND THE PRACTICE: CONCESSIONS AND COMPLIANCE WITH LEGAL REQUIREMENTS

Given the relatively well-developed legal and policy framework governing the granting and management of economic and other land concessions, as outlined in section three, it is difficult to reconcile the current practice

87 G.A. Res. 41/128, U.N. Doc. A/RES/41/128 (Dec. 4, 1986). Article 1 states that everyone is “entitled to participate in, contribute to, and enjoy economic, social, cultural and political development.”

88 U.N. Declaration on the Rights of Indigenous Peoples, art. 32(2). For a practical guide on FPIC, *see* Oxfam, *Guide to Free, Prior and Informed Consent* (July 27, 2010).

89 IFC, performance standard 7.

90 For commentaries on the utility of human rights policies for businesses, *see* Business and Human Rights Resource Centre, “Commentaries on human rights policies,” *available at* <http://www.business-humanrights.org/ToolsGuidancePortal/Policies/Commentaries>. For a list of companies which have incorporated human rights into their statements, *see* “Company policy statements on human rights,” *available at* <http://www.business-humanrights.org/Documents/Policies>. For a list of member companies of the Global Business Initiative on Human Rights, *see* <http://www.global-business-initiative.org/Members.html>. Of these members, at least Chevron,

in the granting and management of ELCs. The promotion of private sector investment appears to have taken precedent over compliance with the requirements of the law, resulting in the granting of large tracts of land in protected areas, on the land of indigenous peoples, and in primary forest areas. Moreover, there is a lack of transparency, oversight and public monitoring, and reporting in relation to the concessions granted.

There is evidence that makes it appear that concessionaires have been allowed to circumvent the 10,000 hectare limit on concessions through the acquisition of contiguous plots used for the same purpose; in some cases, the same company, sometimes using the name of a family member or affiliate, has been able to hold as concessions adjacent parcels of land by registering their land separately. Most concessions granted since the promulgation of the 2001 Land Law do not exceed the 10,000 hectare limit, but the 2007 SRSG Report cited nine ELCs that surpassed the limit.⁹¹ While difficult to track (according to the most recent MAFF list, no ELCs exceeding 10,000 hectares have been granted since the 2007 SRSG Report), there are several possible new violations.

Another phenomenon is the illicit use or non-exploitation of land after a land concession has been granted. Chapter Two of the National Strategic Development Plan Update states that “land concentration and landless people are on a rising trend, adversely impacting on the equity and efficiency of land use. On the other hand, large areas under economic land concessions have not been utilized efficiently as targeted, needing strict government measures to tackle them.”⁹² While some in the government are aware of and have made efforts to combat this problem, resulting in the cancellation of land concession contracts in some cases, there has been

Sime Darby, General Electric, Unilever, Coca Cola, Novo Nordisk, and Total operate in Cambodia.

91 SRSG 2007 report, at 11.

92 National Strategic Development Plan Update, at 10.

irregular oversight over the use of land granted through concessions, with inadequate management and monitoring.

**a. Expropriation of State Public Land,
State Private Land and Land Use Plans**

In recent years many land concessions have been granted within protected areas by means of a sub-decree.⁹³ There is concern that the sub-decree has been used as a means for the government to designate land within a protected area which is state public land and to reclassify it as state private land to then be leased to private companies. Upon review of the sub-decrees published in the Royal Gazette, it appears that they have been issued to designate parcels of land as “sustainable use zones” within protected areas with no prior assessment provided as to whether the areas qualify as sustainable use zones or community zones. It should be noted here that these are the only two types of land in protected areas with possibility of use as land concessions, pending the fulfillment of criteria. Moreover, as the name of the company is often mentioned in the sub-decree (often with reference to prior written correspondence), a reasonable observer would conclude that an arrangement has already been made between a prospective company and the Ministry of Environment (MoE). In a number of instances, some weeks or months following the initial sub-decree, a further sub-decree is issued which classifies the assigned “sustainable use zone” land as private state land, thereby ensuring its eligibility to be granted as a land concession. This has raised the question as to whether it is legal under the existing domestic legal framework for the government to reclassify state public land without going through the Parliament.

Under the 2008 Protected Area Law, the MoE is authorized to establish or modify protected areas according to specific criteria and following careful review of access to natural resources and land use. The proposal for establishing or modifying a protected area is determined by a sub-decree. At the time of writing, there was no information that the MoE had established or formally modified any protected area, but it increased the number of land concessions, including ELCs, mining concessions, and

93 A sub-decree (Anu-Kret) is adopted by the Council of Ministers and signed by the Prime Minister. A sub-decree must be in strict conformity with the Constitution and conform to the law to which it refers.

large scale development projects, among other concessions, that have been granted within protected areas.

Both the Royal Decree of 1 November 1993 on the Protection of Natural Areas, and the 2008 Protected Areas Law allow for the modification of the boundaries of each zoning system, which has to be done based on a scientific review of the ecosystem and compliance with existing policies. However, as is reportedly often happening in practice, the systematic zoning for most protected areas is not formally determined when a parcel of land is being considered for a concession or development project. Rather, it appears that the zoning within a protected area is decided upon after the granting of land concessions. Most of the government sub-decrees which serve to reclassify proposed areas for concessions within protected areas only state that “land has been determined as a sustainable use zone,” but do not mention the type of zone of the land area prior to its reclassification.

The law also prohibits clearance or building in the core or conservation zones, and any development within the sustainable use or community zones can only take place with the appropriate approval from the government at the request of the MoE. Any development in these areas or in areas adjacent to protected areas must first be subject to an environmental and social impact assessment. While there is a need for further clarification from the MoE regarding systematic zoning, it has been reported that many concessions have already been granted in the central parts of some protected areas where there is primary forest. For example, Licadho has published data stating that 22 percent of the Boeng Per Wildlife Sanctuary has been covered by a rubber plantation.⁹⁴

b. Public Consultations and Environmental and Social Impact Assessments

As described in detail above, under the Cambodian legal framework, the essential pre-conditions to granting land concessions are public consultations together with environmental and social impact assessments. Assessments are to be undertaken and reviewed and the findings shared before the granting of concessions. As mentioned in the 2007 SRSG Report, in most cases, adequate public consultations (entailing good faith efforts to

94 Licadho map published in *The Cambodia Daily* (No. 730, Saturday and Sunday, Mar. 10-11, 2012).

engage with all affected parties and reach a mutually agreed upon solution) have not been conducted prior to the granting of the concessions, with decisions affecting the land on which communities live being made without their involvement. Similarly, in most cases, genuine environmental and social impact assessments have generally not been undertaken before the granting of land for investment (or have been undertaken in some cases but not shared with affected communities), and concessions that have been granted since 2007 seem to reflect this trend.

According to the National Strategic Development Plan Update, in 2008 the MoE in collaboration with other ministries and concerned parties reviewed and provided recommendations on environmental and social impact assessment reports for 37 public and private projects, but only 15 reports in the agricultural, industrial, energy, tourism, and infrastructure sectors have been endorsed. The MoE also signed agreements with 61 project owners on environmental protection.⁹⁵

c. Compliance with the Legal Protections for the Land of Indigenous Peoples

The 2001 Land Law enshrines the rights of indigenous peoples to land and the adoption of the Sub-Decree on indigenous land registration in April 2009 set in motion various initiatives by the Ministry of the Interior, Ministry of Rural Development, Ministry of Land Management, bilateral donors, the U.N., and NGOs to assist indigenous communities to register as legal entities and apply for collective land title. A pilot project was then launched in 2009 to secure the collective land title of three indigenous communities in Rattanakiri and Mondulakiri provinces, and in December 2011, these communities received the first collective land titles in Cambodia.

Although these are positive steps for the protection of the land, culture, language, and traditions of these communities, there are many more communities across 15 provinces which are in need of support for the protection of their lands in the face of unregulated development on their traditionally occupied land. The granting of concessions on land traditionally used by indigenous peoples affects their ability to register their land and their access

95 National Strategic Development Plan Update, at 38, ¶ 125.

to the surrounding areas, in turn affecting their livelihood and ability to search for food, and the practice of their traditional and cultural rights.

Moreover, despite robust laws and policies at the national level, this process is entirely dependent on external donor aid and uneven political will on a case by case basis. It also requires the availability of field-based civil society organizations in the provinces for implementation. According to information on ongoing projects provided by ILO, who coordinates the initiatives, while areas with high populations of indigenous peoples such as Mondulkiri, Rattanakiri and Preah Vihear provinces have received the most attention and bilateral and multilateral financial assistance by GIZ, Danida, OHCHR, and others, initiatives to expand to other provinces is slow due to limited capacity and resources.

There are reportedly a myriad of challenges with the procedural requirements for registering as a legal entity and applying for collective land title, which is lengthy and over-burdened by bureaucratic steps. While the relevant policy envisages a process “simple in both administrative and technical aspects,”⁹⁶ in practice, there are currently eleven steps for legal registration and application for title, including various procedures involving national, provincial and local authorities in the self-identification of communities, community appraisal, and land demarcation and mapping (results publicly displayed). A positive aspect of the process is that the procedures are taking place with the participation of a range of stakeholders and with the full involvement of communities, and this is to be warmly welcomed.

Given the lengthy procedure for the registration of indigenous land, the May 2011 Inter-ministerial Circular, which provides interim protective measures for indigenous peoples registered with the Ministry of the Interior, is a welcome development. In effect, it should have halted the granting of land concessions on land traditionally occupied by indigenous peoples. For example, the Phnong peoples from four villages in the Keo Seima district, Mondulkiri province have been granted protection by the Mondulkiri provincial governor in 2011 and 2012 while undergoing their application for collective land title.

Nevertheless, there is one unfortunate loophole to the Circular, which in practice has served to ensure its broad non-implementation. The interim

96 Policy on Registration and Right to Use of Land of Indigenous Communities in Cambodia, art. 4.

protective measures exclude plots that the royal government has agreed in principle for investment or development before the Circular came into effect in May 2011 (so that any impact on legal private and public ownership of lands that have been legally occupied and agreed in accordance with legal provisions could be avoided). As a result, given the irregular granting of land concessions and successful efforts to circumvent the legal framework, the Circular has had minimal impact. Furthermore, the requirement for the recognition of indigenous peoples by the Ministry of Interior effectively pertains to only a very small number of communities who have benefited from development partner assistance.

6. THE BENEFITS AND NEGATIVE IMPACTS OF LAND CONCESSIONS

Cambodia as an emerging market has a stated objective of increasing exports and exploiting its natural resources for the purposes of development. As regards ELCs specifically, the National Strategic Development Plan Update specifically places priority on improving agricultural productivity and diversification.⁹⁷ Power generated by Cambodia's proposed hydropower projects will not only generate energy but also revenue, and the power will not only be used for domestic consumption but a share will also likely be exported. There are economic and social benefits that land concessions have brought to Cambodia, such as job creation (and therefore a more dynamic local market), tax revenues, and new roads and other upgrades in infrastructure. Some land concession companies participate in conservation and environmental training programmes. Some associated benefits for communities in concession areas include health posts and schools.

However, no comprehensive evidence-based report has been officially published about the benefits of land concessions, and the amount of new employment and physical investment can often be well below expectations. Moreover, there is no evidence that revenue generated from land concessions has been used by the government in concession areas for social and economic development, such as in the health and education sectors, or in infrastructure development, or has been used to alleviate poverty. On the contrary, the government continues to be dependent on foreign aid. Data and analysis on revenue generated from land concessions and the attendant

97 National Strategic Development Plan Update, Ch. Four, at 121.

benefits to the population is an area for further development. By contrast, the negative impacts have been well documented.

Overall human rights impacts

Regrettably, the human rights impact of economic and other land concessions continues along the same trends that were documented in the 2004 SRSG and 2007 SRSG reports. The impacts are numerous: the destruction of the environment due to bulldozing, clearing of land and planting of non-native plants; the lack of consultation with local communities, contributing to their marginalization and conflicts with companies and local authorities; the undermining of efforts to register indigenous peoples as legal entities so that they can preserve their culture, language and traditional agricultural practices, and apply for collective land title; encroachment on farm land and areas of cultural and spiritual significance; the loss of traditional livelihoods and the perpetuation of a gross income disparity (rural poor as compared with wealthy concessionaires and those benefiting financially from the concessions); access to clean water and sanitation; forced evictions, displacement, and relocation of people from their homes and farm lands, creating difficulties with finding or sustaining employment, income-generation and access to basic services; sub-standard labour conditions; militarization of land concessions, contributing to intimidation and violence by armed security guards, who are sometimes members of the Royal Cambodian Armed Forces and other times privately employed; and a lack of effective remedy or recourse for affected communities.

As land concessions are granted, the communities living on the land are often subjected to forced eviction, involuntary resettlement or unplanned relocation. Eviction and relocation, whether forcible or not, can often increase poverty and debt, and limit access to income generation. Other problems include the lack of access to water, sanitation, health services and education, physical and mental health problems, challenges to realizing civil and political rights (e.g. voting, access to remedy), and social stigmatization and disruption to communities and family cohesiveness. Policies, procedures, and safeguards which prevent forced eviction are either lacking or not enforced, compensation schemes are either misman-

aged or inadequate, and relocation efforts are seldom adequately planned with sufficient resources and foresight.

Domestic law and international law restrict displacement and relocation, and provide guidance if relocation is not avoidable. However, forced eviction and resettlement of local communities due to land concessions or large-scale development and infrastructure projects have been conducted without due process of law and safeguard for the rights to land and housing of the resident population. In some cases, force has been employed to carry out the eviction or relocation, and often at the behest of foreign companies. Furthermore, it is unclear who is financing the evictions.

Land concessions, whether ELCs or mining concessions, as well as large scale development projects have had a devastating impact on non-indigenous and indigenous communities alike, but the indigenous communities, whose rights to collective ownership of land are protected under domestic law and international law, are particularly vulnerable. The encroachment of their land is undermining the ability of indigenous communities to register their collective ownership of traditional lands, and enforce their rights to collective land title under the 2001 Land Law.

While indigenous peoples are reported to inhabit fifteen provinces, two thirds of the indigenous population of Cambodia are found in the north-eastern provinces of Ratanakiri and Mondulkiri, forming the majority of the population in both provinces. There are already many cases where the concessions are being developed directly on indigenous land and often-times there is little land or no land left for the indigenous community to register. The development of agro-industry is threatening the traditional agricultural systems of indigenous peoples, and therefore their food security. New farming techniques have been brought in on indigenous land, without the consultation of the communities that are most familiar with the areas. While they are often offered jobs on the new plantations—indeed there is typically a shortage of labour in remote areas—many indigenous communities have reportedly not adapted to this new way of farming. In addition, they are unable to communicate in Khmer or the language of the foreign company, and local tensions related to the expropriation of land and management of the plantations have arisen. Labour conditions are not well-monitored and reportedly below domestic and international standards. As mentioned earlier, the granting of economic land and other concessions has also undermined the work of development partners, not

only those working to assist the communities to register and gain collective titles, but also many development organizations and NGOs that have been trying to help improve the livelihoods of rural communities and indigenous peoples.

The granting of land concessions has particularly impacted certain areas, such as those related to labour, livelihood, security, and family structure and roles. Concessions contribute to the reduction of land and forest for inhabitants, causing shifts in opportunities for livelihood, and changes in labour and migration patterns. The lack of resources is exposing villagers to problems in food scarcity, and many communities must leave their area to search of work. For example, in Kratie, where the majority of ELCs have been granted, men move to other provinces in search of forest products no longer available in the local province. Women move to nearby areas to work as labourers in plantations or as domestic workers or labourers in Malaysia, for example.⁹⁸ In cases where labour opportunities as plantation workers would only be seized by male members of the communities due to cultural reasons, this could lead to a further marginalisation of women, who are generally more prone to poverty and undernourishment.

For both Khmer and indigenous women and girls in remote rural areas, with the new presence of “outsiders” (Khmer not from the area and foreigners working for the concession companies), another concern is safety, in terms of potential robbery, theft, and physical violence, including rape. This is especially important for women who traditionally go to the forest to collect food and non-timber forest products. Some women have reported that they now move in groups.

Women, children, and the elderly are often on the frontlines at protests. Women involved in the Boeung Kak Lake dispute have been especially active.⁹⁹ Previously, it was assumed by communities that women and children are less likely to be targeted by authorities and they are therefore the leaders in demonstrations, but there have been increased cases of arbitrary detention and violence against female protesters. In recent months, women have taken increasingly drastic public actions to defend against the use of

98 Margherita Maffii, *Women's Leadership: A case study in Cambodia*, supported by the Heinrich Böll Foundation (July 2011) *available at* http://www.kh.boell.org/downloads/Women_leadership_case_study_report_July_2011_1_FINAL.pdf.

99 Amnesty International, *Eviction and resistance in Cambodia: Five women tell their stories* (Nov. 2011).

force by the gendarmerie; the Boeng Kak Lake women who bared their breasts, ostensibly to avoid apprehension by the police in March 2012 was particularly alarming.¹⁰⁰

Women activists involved in land claims report harassment and intimidation against themselves and their families, which has taken a toll on their family relations and psychological welfare. Many women report feelings of hopelessness and depression, suicidal feelings, and divorce and separation related to their land disputes and involvements in land claims.

Women, who are responsible for both livelihood and caretaking of the family under duress, continue to suffer disproportionately in the eviction and relocation process.¹⁰¹ Where there are problems with access to basic services, such as water and sanitation, women and children are often disproportionately affected because they spend more time at the sites. In the case of urban land concessions resulting in eviction, women lose jobs and sources of livelihood more so than men, especially if relocated far from the city centre, and the same work at the relocation site does not enable them to earn the same standard of living as in high-density urban areas. With loss of income and the difficulties linked to relocation, drinking alcohol is reportedly more prevalent, and in many cases related to increased domestic tensions and violence. Unplanned parenthood at resettlement sites is also reportedly widespread.

The overwhelming impact on children is related to the deteriorated livelihoods associated with land tenure insecurity, environmental destruction and land encroachment, and forced eviction and resettlement. These affect their access to basic services, such as healthcare, adequate water and sanitation, as well as their educational opportunities. In cases of relocation, either children have dropped out of school or families had to separate to keep children in the city centre to finish the school year. Families also have had to pay informal fees to transfer their children between schools,

100 Amnesty International, Cambodia: Imprisoned for speaking out, update Phnom Penh's Boueng Kak Lake, § 3.4 (2012), *available at* <http://www.amnesty.org/en/library/asset/ASA23/010/2012/en/53ead91b-9f6d-4640-9585-4f6556944b77/asa230102012en.pdf>.

101 See COHRE, A survey on the impact of forced eviction on women in Phnom Penh (2011).

and the daily informal fees requested by teachers place an extra-burden on families' limited income.

Moreover, there are issues with child labour. For example, a study revealed that children have been pulled out of school in order to work and raise money for their struggling families due to the impacts caused by land concessions.¹⁰² As with the impacts on women and girls described above, the need to earn a livelihood can cause a breakdown in the family structure, domestic violence, and absent parents. Unplanned parenthood has resulted in many families having children who they cannot afford to feed or send to school. Overall, the impact of displacement and relocation can be very traumatic for children.

7. ACCESS TO AN EFFECTIVE REMEDY

As described above, there are several non-judicial and quasi-judicial mechanisms for dispute resolution, including the various levels of the cadastral system. However, the time-consuming administrative and procedural burden, financial costs associated with submitting a complaint (although there are no official fees, as with courts, transportation, lost wages, legal assistance, and so on, can prove costly for individuals), and a lack of faith in the system means that these mechanisms being used inconsistently. Complainants report that decisions by such bodies are inconsistent, irregular, and subject to political interference.

As an alternative, complainants often seek the help of individuals (e.g., local and provincial authorities, such as commune chiefs and district chiefs, as well as Oknha or tycoons) and government authorities who they view as influential and wealthy. Communities frequently make public pleas to the King and the Prime Minister and his wife for a resolution to their dispute, including submitting petitions and demonstrating in front of the Royal Palace, National Assembly, Senate, Council of Ministers, and the Prime Minister's residence. Following the exhaustion of other methods with no response or satisfactory response, there has also been a trend to participate in traditional ceremonies and prayers. Many of them also submit individual

102 *E.g.*, on the Koh Kong Sugar Plantation. See APRODEV, *Stolen Land Stolen Future, A Report on Land Grabbing in Cambodia* (2011).

or group petitions to me or come to see me during my visits to the country asking me to intervene.

Cambodia has no independent national human rights institution, but there is an inter-ministerial committee charged with coordinating human rights activities for the government: the Cambodia Human Rights Committee. The Committee's mandate to monitor and investigate individual and group complaints of human rights violations, including those related to land concessions is still pending.¹⁰³ Their capacity is limited and, while they review cases, they do not often investigate cases of land disputes at the field level. Field-based case analysis in cooperation with governmental authorities and legal aid organizations on land disputes has been targeted as an area for further development.¹⁰⁴

Owing to an uneven application of the relatively well-developed legal framework governing land rights, and an inadequate access to remedies, communities are becoming increasingly frustrated and disillusioned by formal judicial and administrative processes. Demonstrations and protests by affected communities in the capital and provinces are increasing and have become more violent. Concession-affected communities have become increasingly vocal about their complaints, filing petitions and seeking judicial redress at the provincial and national levels, organizing demonstrations in provincial capital cities and in Phnom Penh, forming road blocks, and, when all else fails, engaging in violence out of desperation.

The proliferation of displays of discontent around the country related to land disputes point to inadequate consultation and negotiation with those affected. Early and inclusive consultation can address the tensions before they escalate and contribute to preventing disputes. The United Nations Guiding Principles on Business and Human Rights promotes the use of "operational-level" grievance mechanisms to facilitate addressing disputes early and directly. These mechanisms should be accessible directly to in-

103 A sub-decree outlining their mandate is still pending, and at present most of their activities are related to capacity building on general human rights at the provincial level.

104 Note that the President of the CHRC suggested in a June 2010 meeting to form an ad hoc informal group to examine outstanding land disputes. See United Nations Human Rights Committee, *Report of the Special Rapporteur on the situation of human rights in Cambodia*, ¶ 32, U.N. Doc. A/HRC/15/46 (Sept.16, 2010) (prepared by Surya P. Subedi).

dividuals and communities who may be adversely impacted by business activities, and are typically administered by business enterprises alone or with the collaboration of local authorities and civil society organizations.¹⁰⁵ Special care should be taken to deal with language barriers (especially given the extent of foreign-owned concessions and that many indigenous peoples do not communicate in Khmer).

Some concession companies have set up procedures to deal with local level disputes and complaints, which can be an effective way of directly addressing misinformation and addressing tensions before they escalate. For example, Grandis Timber mapped out the land occupied by communities at the commencement of the concessions' activities and employed a community relations manager to deal with land and labour disputes.¹⁰⁶ However, if measures are set up only late in the dispute, they may lose their effectiveness, especially if mistrust has already been fostered. For example, a Tripartite Committee was set up in late 2009 by Socfin-KCD in the Bousra commune, Mondulkiri province. The initiative, which in principle is to be welcomed, has been criticized for being an ineffective communication channel to address grievances.¹⁰⁷ In addition, local efforts at dialogue that do not directly involve company representatives may hamper their potential success.

8. CONCLUSIONS

As can be seen from the analysis in the preceding paragraphs, the majority of the challenges in Cambodia with regard to the granting and management of economic and other land concessions derive from a failure to properly apply the domestic legal framework – that is, the laws, policies and regulations that the government itself has developed. The granting and management of economic and other land concessions in Cambodia suffer from a lack of transparency and adherence to existing laws. Much of

105 Guiding Principles on Business and Human Rights, *supra* note 86, at 28-31.

106 Grandis Timber Limited, Manual of Plantation Establishment Rules, Registration of Permanent of Residents and Mapping of Land Occupied (Dec. 21, 2009).

107 FIDH report, § 5.6.

the legal framework on these matters is relatively well developed on paper, but the challenge is implementation in practice.

Further, a pervasive problem that exists in this regard is the uneven access to information, which has contributed to concessions benefiting only a minority, as well as a proliferation of land related conflicts, which has the potential to contribute to instability. The government should be transparent in granting and rigorous in monitoring land concessions, especially when negotiating concession agreements with both foreign and national companies, avoid conflicts of interest, hold concession companies to account by exercising oversight over their activities, and resolve land disputes. In particular, the absence of transparency in such matters has bred suspicion of corruption at all levels of the government and has fueled resentment on the part of many Cambodian citizens.

Cambodia, as an emerging market, risks developing an international reputation for insecure investment in the land sector and in general. The current climate of development is characterized by low transparency and uneven access to information, inadequate consultation and participation which is not inclusive, and, in my view, is unsustainable and likely to hamper future national economic growth. Of course, some cases of land concessions seem to have had positive impacts for the people of Cambodia in terms of job creation, stimulation of the local economy, generation of revenue to finance public services, and overall contribution to national growth. However, the human cost of many concessions has been high and human rights should be at the heart of the granting and management of land concessions in order for them to have a positive impact.

The impacts of land concessions should be analyzed for both their short- and long-term consequences; indeed, any benefits should be genuine and outweigh costs for the majority in order to be considered substantial. The development of Cambodia's land and natural resources could have a positive impact on the lives of all Cambodians if undertaken in a sustainable and equitable manner and within the framework of the human rights obligations of Cambodia. To this end, the government should make information concerning land investments, land deals and bidding processes, reviews of proposals for land concessions (and the decision-making criteria for acceptance or denial of proposals), and future plans (including on commencement of concession activity) publicly accessible. Such information could be made available on public display at the provincial level and on

official governmental web sites. The process of re-classifying land as state private land and designating protected areas as sustainable use zones should be conducted in an atmosphere of transparency and openness by all concerned actors.

All relevant government bodies and business enterprises should adhere to the legal requirements for public consultation. Such consultations should be meaningful, inclusive, and accessible to affected people. Communities on land to be affected by the granting of a land concession should be consulted at the earliest stage on the land use plan and included in the decision-making process. Due consideration should be given to the current livelihood activities of the community and all efforts made to avoid their disruption. Standards of free, prior and informed consent should be rigorously applied when consulting with all indigenous peoples.

Concessions that are found to be exploitative, inactive or otherwise violating the conditions of the concession agreement should be cancelled, as per the relevant laws. Companies of all sizes, structures and modes of operation, both domestic and foreign, whether wholly or partly owned by the state, should address their human rights impact by practicing due diligence, including implementing measures to identify, prevent, and mitigate adverse human rights consequences, and account for their business activities. In the case of foreign-owned companies, the home states should ensure that representatives of private business enterprises under their jurisdiction do not contribute to adverse human rights impacts by regular monitoring and oversight. Finally, given the seemingly intractable status of long-standing land disputes and the proliferation of new disputes, efforts should be made to enhance effective and legitimate operational level grievance mechanisms, and involve communities and their representatives (communities may decide whether civil society organizations should be involved) at the early stages of the granting of a land concession and include them in the planning process.

Bringing International Human Rights Law Home: Trends and Practices of Bangladeshi Courts

Sumaiya Khair¹

1. INTRODUCTION

The matter of domestic application of international human rights law and standards has traditionally been subject to much debate owing to the seemingly inherent weaknesses of international law in terms of proper enforcement. Indeed, when it comes to the question of compliance with international human rights norms, the track record of many countries falls short of the expected level of observance. This largely proceeds from the stereotypical distinctions made between the significance of municipal law *vis a vis* international law. Undeniably, there exist differences between international law and municipal law but these differences tend to be exaggerated in ways that trigger conflicting views on the relationship between international law and municipal law and the manner in which courts in domestic jurisdictions may draw on, interpret, and apply principles of international law. While international law essentially focuses on the legal relations between sovereign states, it also confers rights and obligations on individuals, as with human rights, which has considerably eroded the traditional divide between international law and municipal law. This is precisely why it is important to discern how the rules of one system affect the decision-making processes in the courts of another.²

The most significant expansion of international law at the end of the World War II has indisputably been in the context of human rights. This is evident not only from the United Nations Charter that proclaims in its Preamble that “promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex,

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2 MARTIN DIXON, TEXTBOOK ON INTERNATIONAL LAW 82 (4th ed. 2000).

language or religion” is a primary purpose of the United Nations, but also from the development of a plethora of international instruments, termed varyingly as treaties, conventions, and covenants, relating to key areas of human rights. These developments essentially paved the way for international oversight of the manner in which states treated their citizens. Accordingly, the Vienna Declaration and Programme of Action (Part I, para. 5)³ resolved that

[a]ll human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

The importance of international human rights gradually percolated down to national legal systems to the extent that the constitutions of many countries embody, in explicit terms, core human rights principles. Notwithstanding, states have historically been reticent to adopt and conform to international law principles ostensibly on the ground that they would compromise national interests and state sovereignty. This attitude of states is derived from the principle of self-government, which recognises that human beings should be able to determine their beliefs, status and outcomes for themselves in a deliberative and participatory fashion, rather than submitting to external forces.⁴ In the context of national rights legislation, self-government would signify that, ultimately, “we have the power to determine for ourselves which purported human rights we recognize, and, by extension, what conception of personhood we hold.”⁵

The need for interaction between the universality of human rights and particularity of human rights cannot be ignored since the moral universality of human rights, codified in a set of authoritative international norms,

3 World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, Ch. III ¶ 5, U.N. Doc. A/CONF/157/23 (October 13, 1993).

4 *Id.* at 263.

5 *Id.* at 264.

can only be realised through the particularities of national action.⁶ Indeed, legal systems globally are more receptive of customary international law as evident from the unequivocal integration of international human rights in many national constitutions. While debates and dissent over the “universality” of human rights have by no means reached a consensus, courts across the world generally acquiesce to those international human rights that are less contentious, for example, the right to life and liberty, freedom from torture, and so on. Despite apparent progression in international law-based judicial thinking and action, there is no reason to think that national courts readily recognise and adhere to international human rights standards; in fact, the tendency by national courts, particularly in dualist systems like Bangladesh, to regard international human rights law as being merely “inspirational” or “persuasive” persists. This trend essentially detracts from the value and effectiveness of international human rights law in the realm of domestic rights adjudication. The present paper posits this argument against the backdrop of the trends and practices of the Bangladeshi Courts in invoking international human rights law. In so doing, the paper briefly draws upon prevalent theories impinging on the domestic application of international law, discusses the status of international law in the Constitution of Bangladesh, and looks at relevant case law in an attempt to assess judicial stance, both progressive and conservative, in invoking international human rights law domestically.

2. DOMESTIC APPLICATION OF INTERNATIONAL LAW: REVISITING COMPETING THEORIES

It is generally accepted that principles of international law, whether customary or treaty-based, are normative by character and are binding on states. Nonetheless, controversies persist over the degree and extent to which these norms may be invoked and enforced. There are two dominant theories regarding the application of international law: *monism* and *dualism*. The monism theory views both international law and national law as driving from a single body of “law” of which the international and national versions are merely particular manifestations. Accordingly, Monists advocate for the

6 JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* 181 (2d ed. 2003).

direct application of international law in state territories through domestic courts and maintain that where there is a conflict between international law and municipal law, the former shall prevail. While there are varying views as to why international law is superior to national law,⁷ there is a consensus that international law and national law are part of the same hierarchical legal order, which demands that they be ranked in order of priority in the event of a conflict. In practice, this denotes that where rights and obligations under national laws do not conform to international law, national courts should give priority to international law over domestic laws. The dualism theory regards international law and national law as two distinct systems, different from each other in terms of characteristics, application procedures, and enforcement mechanisms. For dualists, international law regulates the relations between states on an international level, whereas national law regulates rights and obligation of individuals within a state, internally. As such, under this theory, international law cannot possibly be applied directly by national courts in state territories and are not locally binding unless specifically incorporated in national laws.

Theoretically, national courts may apply rules of international law by way of what is termed as the doctrines of *incorporation* and *transformation*. According to the doctrine of incorporation, a rule of international law becomes part of the national law without being expressly adopted by the legislature or the local courts, unless clearly precluded by some provision of the national law whether by statute or judicial decision. In other words, once it is established by the national court that a rule of international law exists that is relevant to the case in hand, the doctrine of incorporation enables it to automatically take recourse to it. This practice, a manifestation of the monist approach, and often referred to as “self-executing,” enables courts to “give effect” to an international obligation ‘directly’, without an

7 According to Hans Kelsen, a noted legal theorist and monist-positivist, international law derives validity from the practice of states whereas national law derives from a state which is established in international law; therefore, international law is superior. Hersch Lautherpacht, a former judge of the International Court of Justice (ICJ), considers international law as higher because it guarantees individual liberty whereas national law cannot be entrusted with the protection of individuals as it, more often than not, persecutes them. Monist-naturalists believe that international law and municipal law are part of a hierarchy of legal orders, with natural law on the top, followed by international law, followed by national law.

intervening legislation.⁸The giving of “direct effect” to a rule of international law however does not imply that a court applies an international obligation independently of domestic law or that a provision that has direct effect is superior to national law. What is meant by “direct effect” is that the enforcement of an international obligation is not dependent on subsequent legislation that makes that particular obligation part of domestic law.⁹

The doctrine of transformation on the other hand, strictly dualist in nature, requires that rules of international law to be specifically adopted by the state in an appropriate manner, as by way of an enabling legislation. Therefore, under this doctrine, unless a rule of international law has been legally transformed into national law by deliberate inclusion, it cannot be used by the national courts.

Legal scholarship on the two doctrines demonstrates a preference for the doctrine of incorporation for apparently practical considerations. Shaheed Fatima sums this up based on various judicial observations:

[s]uppose that a rule of customary international law is proved and accepted into domestic law. Once it is part of domestic law, the doctrine of transformation subjects it to the usual domestic rules of stare decisis, i.e. the rule of customary international law must continue to be applied by lower courts until overruled or changed by a court at the same/higher level than the one initially accepting it into domestic law. By comparison, the doctrine of incorporation does not subject rules of customary international law accepted as part of domestic law to the rules of precedent. It permits changes in international law to be reflected in domestic law without first requiring the previous law to be overruled. This flexibility commends the doctrine of incorporation¹⁰

Arguably, attempts to address dilemmas over enforcement of international law simply on the basis of the above-mentioned theories can be problem-

8 See G. Sperduti, *Dualism and Monism: A Confrontation to be Overcome*, 3 ITALIAN YEARBOOK OF INTERNATIONAL LAW 31, 35 (1977); Thomas Buergenthal, *Self-Executing and Non-Self-Executing Treaties in National and International Law*, 235 RECUEIL DES COURS 303, 317 (1992).

9 ANDRE NOLLKAEMPER, NATIONAL COURTS AND THE INTERNATIONAL RULE OF LAW 120 (2011).

10 SHAHEED FATIMA, USING INTERNATIONAL LAW IN DOMESTIC COURTS 408 (2005) (drawing on Lord Denning in *Trendtex Trading Corp. v. Cent. Bank of*

atic as national legal systems increasingly have to grapple with emerging exigencies wrought by globalisation. Instead, regard has to be had to the legally binding nature of customary or treaty norms, and incurring state obligations.¹¹ Once a treaty enters into force, States Parties are duty bound to fulfill the obligations accruing under them. Clearly, a state cannot violate international law under cover of the existence or non-existence of national law. For instance, “[a state] may not invoke the provisions of its internal law as justification for its failure to perform a treaty”¹² nor may it rely on non-compliance with national law in order to deny that it has consented to be bound by a treaty.¹³ Similarly, in the *Alabama Claims Arbitration* (1872), Great Britain could not take refuge in the absence of domestic law for the non-fulfillment of its obligations of neutrality in the American Civil War. In other words, where there exists binding international obligation, a state must discharge its obligation under it, irrespective of whether its national law permits it or not.¹⁴ If it is necessary to make a new law or amend an existing law for ensuring compliance, then the state must do so pursuant to its international duty. This is essentially premised on the presumption of international legality which is a rule of legal interpretation whereby domestic law is read, wherever possible with international law and comity. As pointed out by Estey J. in *Spencer v. The Queen*¹⁵

‘Comity’ . . . is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience,

Nigeria,[1977] 1 Q.B. 529 (C.A.), 533, 554; Stephenson LJ quoting from Lord Alverstone in *West Rand Cent. Gold Mining Co. v. The King*, [1905] 2 K.B. 391 at 406-08 and Lord MacMillan in *Compania Naviera Vascongado v. SS Christina*, [1938] A.C. 485, 497.

11 M. Shah Alam, *Enforcement of International Human Rights Law by Domestic Courts: A Theoretical and Practical Study*, 53 NETHERLANDS INTERNATIONAL LAW REVIEW 399 (2006).

12 Vienna Convention on the Law of Treaties art. 27, May 23, 1969, 1155 U.N.T.S. 331.

13 *Id.* at art. 46; see also *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahr.), 1994 I.C.J. 112 (July 1).

14 DIXON, *supra* note 2, at 86.

15 *Spencer v. The Queen*, [1985] 2 S.C.R. 278 (Can.).

and to the rights of its own citizens or of other persons who are under the protection of its laws.

In other words, it is incumbent upon states to read domestic law in a manner that does not breach international law. While the rights in question must already be a part of domestic law, their nature and scope may be affected by customary international law. For example, while recognising that that the parliament can, if it chooses, legislate contrary to fundamental principles of human rights, Lord Hoffmann in *Regina v. Secretary of State for the Home Department, Ex Parte Simms*¹⁶ observed that

the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process.

Violations of international law and comity by unlawful constructions of domestic law may incur international responsibility for the concerned state unless the legislature clearly expresses its intention for doing so and the reasons underlying it.¹⁷

3. INTERNATIONAL LAW AND THE CONSTITUTION OF BANGLADESH

The war of liberation in 1971, which was fought to secure the right to self-determination, essentially marks the beginning of human rights activism in Bangladesh. Within one year of its independence, the newly emerged country applied for membership at the United Nations. On 17 September 1974, Bangladesh became the 136th member of the United Nations and as such, adhered to the 1948 Universal Declaration of Human Rights (UDHR).¹⁸ Indeed, Bangladesh's commitment to UDHR specifically, and

16 *Regina v. Sec'y of State for the Home Dep't, Ex Parte Simms*, [2000] 2 A.C. 115 (H.L.) 131E-G, in Shaheed, *supra* note 10, at 217-18.

17 GIBRAN VAN ERT, USING INTERNATIONAL LAW IN CANADIAN COURTS 100 (2002).

18 The UDHR is recognised as a statement of general principles expounding the meaning of the phrase "human rights and fundamental freedoms" envisaged in the U.N. Charter. For more, see Louis Sohn, *A Short History of United Nations*

international law obligations generally, is manifest from the Preamble of the Constitution of the People's Republic of Bangladesh¹⁹ which pledges that

it shall be a fundamental aim of the State to realise through the democratic process to socialist society, free from exploitation—a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be secured for all citizens;

...[I]t is our sacred duty. . . [to] make our full contribution towards international peace and co-operation in keeping with the progressive aspirations of mankind.

The act of ratifying or acceding to a given international Convention essentially demonstrates a State's willingness to adhere to the provisions envisaged in that Convention. Bangladesh has ratified or acceded to almost all key international human rights instruments, namely:

- International Convention on the Elimination of All Forms of Racial Discrimination (1965)
- International Convention on the Suppression and Punishment of the Crime of Apartheid (1973)
- Convention on the Elimination of all Forms of Discrimination against Women (1979) and its Optional Protocol (2000)
- Slavery Convention (1926) and the Protocol amending the Slavery Convention (1953)
- Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (1956)
- Convention for the Suppression on Traffic in Persons and of the Exploitation of the Prostitution of Others (1949)
- Convention on the Rights of the Child (1989) and its two Optional Protocols (2001)

Documents on Human Rights, in Commission to Study the Organization of Peace, United Nations and Human Rights 71 (1968).

19 BANGLADESHER SHONGBIDHAN [BANGL. CONST.] Nov. 4, 1972, preamble (Bangl.).

- International Covenant on Economic, Social and Cultural Rights (1966)
- Convention on the Prevention and Punishment of the Crime of Genocide (1948)
- Convention on the Political Rights of Women (1952)
- Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1962)
- Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984)
- Convention on the Rights of Persons with Disabilities 2006 and its Optional Protocol
- Convention against Corruption (2003)
- Rome Statute of the International Criminal Court (1998)
- International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990)

Bangladesh is also party to a number of core International Labour Organization (ILO) Conventions that impinge on human rights. These include:

- Forced Labour Convention (No. 29) (1930)
- Convention on the Right to Organize (Agriculture) (No. 11) (1921)
- Convention on the Right to Freedom of Association and Protection of the Right to Organize (No. 87) (1948)
- Convention on the Right to Organize and Collective Bargaining (No. 98) (1949)
- Convention on the Elimination of Worst Forms of Child Labour (No. 182) (1999)

The Constitution of Bangladesh, adopted in 1972 and amended from time to time, acts as a bulwark against abuse of civil and political rights. It provides fundamental rights that guarantee *inter alia* equality before law and equal protection of law, protection of life and liberty, and prohibits discriminatory treatment and forced labour. The Constitution also guarantees rights

during arrest, detention, trial, and punishment. Specific liberties of speech and expression, movement, association and assembly, trade and occupation, religion and property, security of home, and privacy are also guaranteed.

Article 26 of the Bangladesh Constitution²⁰ declares all existing laws inconsistent with the provisions of the fundamental rights as void on and from the day of the commencement of the Constitution. Furthermore, Article 26(2) divests the legislature of the power to make a law that is inconsistent with the fundamental rights; in the event such laws are passed they shall be void to the extent of such inconsistency. Therefore, Article 26 does not declare such laws void from their inception, rather from the day the Constitution comes into force. Article 26 is premised on the doctrines of eclipse and severability. It is said that a law that was valid at its inception but subsequently becomes void for its contradiction with any constitutional provision, is “eclipsed” in the sense that such a law does not die but remains dormant and revives upon removal of the contradiction.²¹ Where a law has several parts and if any one part, but not all, becomes void on for contradicting the provisions of the constitution, then only the part that is inconsistent shall be declared void and not the whole law. This is known as the doctrine of severability.²² Thus, Article 26, by declaring that a law inconsistent with the fundamental rights shall be void, acknowledges that the rest of the law shall be valid as has been enacted.

The Constitution also sets out the fundamental principles of state policy which require the State to ensure *inter alia* women’s participation in national life, free and compulsory education, public health, equality of opportunity, work as a right and duty, rural development and promotion of local government institutions, and respect for international law. Although theoretically considered to be judicially unenforceable,²³ the Supreme Court

20 BANGL. CONST., art. 26.

21 Muhammad Ekramul Haque, *Protection of Fundamental Rights through Restricted Legislative Competence: Application of the Doctrine of Eclipse and Severability*, 17 JOURNAL OF THE FACULTY OF LAW, DHAKA UNIVERSITY STUDIES, Part F 49, 58 (2006).

22 *Id.* at 59.

23 BANGL. CONST., art. 8(2).

has, on a number of occasions, upheld these fundamental principles in protecting economic and social rights of citizens.

While the Constitution *prima facie* takes a proactive view of human rights and civil liberties, it does not, however, clearly explain the status of international law in the domestic legal system, nor does it explicitly require or direct the judiciary to draw on international human rights law when adjudicating cases. It merely alludes narrowly to “international relations” and obligations pertaining thereto as envisaged in Article 25, which reads:

The State shall base its international relations on the principles of respect for national sovereignty and equality, noninterference in the internal affairs of other countries, peaceful settlement of international disputes, and respect for international law and the principles enunciated in the United Nations Charter, and on the basis of those principles shall

- (a) strive for the renunciation of the use of force in international relations and for general and complete disarmament;
- (b) uphold the right of every people freely to determine and build up its own social, economic and political system by ways and means of its own free choice; and
- (c) support oppressed peoples throughout the world waging a just struggle against imperialism, colonialism or racialism.²⁴

While respect for International Law has been briefly referred to in Article 25 above, there is a certain vagueness which, in essence, generates diverging views on the appropriateness of applying international law norms in domestic contexts. A liberal interpretation of the Constitutional provisions as envisaged in the Preamble and Article 25 respectively would be that these provisions together do, in essence, embody and give constitutional effect to certain international law norms; contrarily, a conservative interpretation may very well disagree with this view on the basis of Article 8(2) of the Constitution, which declares that Article 25 cannot be judicially enforced.²⁵

24 BANGL. CONST, art. 25.

25 Ridwanul Hoque & Mostafa M. Naser, *The Judicial Invocation of International Human Rights Law in Bangladesh: Questing a Better Approach*, 46 INDIAN JOURNAL OF INTERNATIONAL LAW 151, 160 (2006).

In attempting to reconcile the two competing views, it may be argued that notwithstanding the non-justiciability of the Fundamental Principles of State Policy and as such, Article 25, the Constitution nevertheless explicitly recognises that they are fundamental to the governance of Bangladesh and its law making process as well as a guide to the interpretation of the Constitution and other laws. It may be deduced from this that the judiciary is free to rely on and refer to international law in the interpretation and application of national laws to the extent possible.

The constitutional position on treaties is also not straightforward. Article 145A of the Bangladesh Constitution states that “all treaties with foreign countries shall be submitted to the President, who shall cause them to be laid before the Parliament.”²⁶ A proviso to this article requires that “any such treaty connected with national security shall be laid in a secret session of the Parliament.”²⁷ These provisions are steeped in ambiguities regarding for example, what treaties would fall within the ambit of Art. 145A and what procedure does the Constitution prescribe before ratification of a treaty in order to bind the state?

It is not clear from the wording in the Constitution as to what treaties would be construed as coming within the purview of the Article 145A. This gives rise to varying interpretations. Huda and Hasan, in their research, underscore several interpretations from their discussions with a cross-section of judges, lawyers and legal academics.²⁸ Some favour a strict interpretation of Article 145A of the Constitution and maintain that Article 145A by only referring to “treaties with foreign countries” precludes trade or commercial treaties, treaties with International Organizations, and International Conventions. Some surmise that Article 145A refers mainly to agreements whereby the conduct of parties is determined or which imposes on them legal duties. For others, the literal meaning of this Article appears to include bilateral, regional, and multilateral treaties. According to

26 BANGL. CONST., art. 145A.

27 A proviso was first added to Article 145A by way of the Constitution (Twelfth Amendment) Act 1991 which stated that “Provided that no such Treaty shall be so laid if the President considers it to be against the national interest so to do.” This was subsequently altered to the current form by the Constitution (Fifteenth Amendment) Act 2011.

28 SHAHNAZ HUDA & MANZOOR HASAN, *THE BANGLADESH PARLIAMENT AND INTERNATIONAL CONVENTIONS* 33-35 (2000).

Mahmudul Islam, a constitutional law expert, all agreements entered into by Bangladesh with foreign countries are not treaties within the meaning of Article 145A; only those agreements, whether called treaty, convention, covenant, protocol, charter or exchange of notes, concluded with foreign countries in written form and governed by international law, are treaties within the meaning of this Article. Islam adds that in a treaty, there has to be an intention to create a legal obligation, which must be governed by international law and not municipal law.²⁹

The Constitution is silent on the issue of treaty ratification process. It may be pointed out that Article 145A only speaks of the President “laying” treaties before the Parliament but there is no reference whatsoever to the act of ratification. Whether the term ‘laying’ has been used synonymously to mean “ratification” is likewise not clear. This ambiguity was addressed in the case of *Kazi Mukhlesur Rahman v. Bangladesh*,³⁰ more commonly known as the Berubari case, where the Court held that “treaty making is an executive act and so also ratification if a Treaty contains provisions for ratification and that both fall within the ambit of the executive power of the State.” In practical terms, however, while theoretically treaties are a prerogative of the Executive, all actions relating to treaty-making are determined by the Prime Minister and the Cabinet. This is evident from Article 55(2)(4) of the Constitution which states that the “executive power of the Republic shall ... be exercised by or on authority of the Prime Minister,” although “[a]ll executive actions of the Government shall be expressed to be taken in the name of the President.” Besides, the Rules of Business of the Government 1996 require all draft agreements, protocols, and treaties to be submitted to the Cabinet, which is headed by the Prime Minister, for approval.

Again, although a plain reading of Article 145A indicates that the President has an important role in the ratification of a treaty as he is required to place it before the Parliament, this is not actually so as the said provision has arguably been framed in the interest of deliberation and for ensuring transparency in the process of vetting and entering into a treaty

29 MAHMUDUL ISLAM, CONSTITUTIONAL LAW OF BANGLADESH 734-35 (2d ed., 2002).

30 *Kazi Mukhlesur Rahman v. Bangladesh and others*, 26 DLR (1974) (SC) 44. In this case a writ petition was filed challenging the constitutional validity of the Delhi Treaty entered into by Bangladesh and India relating to the transfer of Berubari enclave involving the cession of Bangladesh territory.

rather than ratification of a treaty. As observed by the High Court Division of the Supreme Court of Bangladesh in the case of *Major (Retd.) Akhtaruz-zaman v. Bangladesh*,³¹ though there is an obligation to lay a treaty before the Parliament, failure to do so will not affect its validity. However, if the performance of treaty obligations requires the alteration of any existing law, an Act has to be passed by the Parliament to that effect.

Similarly, changes in national boundary require Parliamentary sanction as clearly directed in *Kazi Mukhlesur Rahman v. Bangladesh*.³² It is obvious from the foregoing discussion that the Parliament does have significant powers of oversight, if not of direct ratification, of a treaty.

4. EMPLOYING INTERNATIONAL HUMAN RIGHTS LAW: CONSERVATIVE JUDICIAL PRACTICE

Progressive thinking on the part of the judiciary in Bangladesh in utilizing international human rights law is more often than not the exception rather than the rule. Although the mode of enforcement of international human rights law is not clear from the Constitution, it is common for courts in Bangladesh to rely on the principle that customary international law cannot supersede statute law. Accordingly, the courts have no power to enforce treaty rights and obligations at the behest of a sovereign government or a private individual unless the treaty becomes incorporated into the laws of Bangladesh by an Act of Parliament.³³

There are a number of cases that demonstrate judicial passivism when it comes to taking recourse to international law despite recognition and respect for it by the Court. Instead, where there is a domestic law in place that is pertinent to the dispute, the Court gives effect to the domestic law and not to customary international law. In the case of *M/s. Supermax*

31 Writ Petition No. 3774 of 1999 (unreported), in ISLAM, *supra* note 24, at 735.

32 The Court held that “though treaty-making falls within the ambit of the executive power under Article 55(2) of the Constitution, a treaty involving determination of boundary, and more so involving cession of territory can only be concluded with the concurrence of Parliament by necessary enactment . . .” *Kazi Mukhlesur Rahman v. Bangladesh and others*, 26 DLR (SC) (1974) 44.

33 ISLAM, *supra* note 29, at 735.

International Private Ltd. v. Samah Razor Blades Industries,³⁴ Mr. Justice Mohammad Fazlul Karim observed:

Though International Convention . . . could be recognized upon ratification but could only be applied in our Country only when its provisions are incorporated in our Municipal laws and thus for enforcing any International Covenants under any Convention to which this Country is a signatory, the provisions of the Convention have to be incorporated in our domestic law.

This approach is also seen in the case of *Bangladesh v. Sombon Asavhan*,³⁵ which addressed the question whether Thai fishing trawlers, captured by the Bangladesh Navy for illegally entering and fishing in the territorial waters of Bangladesh, were actually within the territorial waters or the exclusive economic zone of Bangladesh. Instead of resorting to existing international law relating to territorial waters, the Appellate Division of the Supreme Court settled the matter on the basis of *The Bangladesh Territorial Waters and Maritime Zones Act 1974*. The Court observed in precise terms:

It is well settled that where there is municipal law on an international subject the national court's function is to enforce the municipal law within the plain meaning of the statute . . . [T]he point touches international law since three fishing trawlers are involved and they are captured from a place over which Bangladesh claims sovereignty. We are relieved from entering into long discussion of diverse laws, conventions, rules and practices of international law since there is [a] complete code provided by our municipal law.³⁶

The Court explained that the Parliament adopted *The Bangladesh Territorial Waters and Maritime Zones Act 1974* pursuant to the power given by Article 143(I)(B) of the Bangladesh Constitution and accordingly, in practice, the court follows the domestic law when such a law on a given issue exists. It added that "this strictness in following the state law imposes cer-

34 M/s. Supermax International Private.ate Ltd. v. Samah Razor Blades Indus. Ltd., 2 ADC (2005) 593, at 600.

35 *Bangladesh v. Sombon Asavhan*, 32 DLR (1980) (SC) 194, at 197-8.

36 *Id.* at 201-02.

tain amount of responsibility on the lawmakers not to make laws as would encroach upon the accepted boundaries of the international community.”³⁷

In the case of *Saiful Islam Dildar v. Government of Bangladesh and others*,³⁸ the High Court Division of the Supreme Court took into account the issue of the right to self-determination under customary international law *vis a vis* the provisions of the Bangladesh Constitution. In this case a writ was filed challenging the Bangladesh Government’s readiness to extradite Anup Chetia, Secretary General of the United Liberation Front of Assam (ULFA), who was charged with treason by the Government of India. The Petitioner on behalf of Chetia contended that the latter was fighting for the right of self-determination by the people of Assam, and as such his extradition would not only contravene the peremptory norm of *jus cogens* in international law, but would also violate principles of human rights law and Article 25 of the Bangladesh Constitution. The Petitioner further argued that the right to self-determination as *jus cogens* of international law has not only been incorporated into the major human rights instruments and the U.N. Charter but has also become a universally acceptable customary norm which was binding upon all nations. Consequently, Bangladesh had an obligation to accord refugee status to Chetia. The Court took a rather conservative view of the arguments and the reference to customary international law, and rejected the petitioner’s contention that the extradition of Chetia would violate Article 25 of the Constitution. On the contrary, the learned Court held that the extradition of Chetia would, in fact, be

in consonance with the Principles of State Policy and help base its international relations on the principles of respect for national sovereignty and equality, non-interference in the internal affairs of other countries Article 25(1)(c) enjoins upon the state to support throughout the world waging a just war against imperialism, colonialism or racialism. We are afraid to accept the contention that as because Anup Chetia is struggling for “self-determination” for the people of Assam, handing him over to India would be violative of Article 25 of our Constitution. The struggle in which ULFA and its Secretary General Anup Chetia is involved is not, in our opinion, “waging a just struggle against imperialism, colonialism or racialism” . . . Nor can it be said that the right to “self-determination” as

37 S.M. Hussain & M.M. Haque, *Status of International Law in Bangladesh Courts*, 7 LAW AND INTERNATIONAL AFFAIRS 71 (1984).

38 Saiful Islam Dildar v. Bangladesh and others, 50 DLR (1998) 318.

canvassed in this petition falls within any of the three expressions viz. “imperialism”, “colonialism” or “racialism” as used in Article 25(1)(c) of the Constitution.³⁹

The manner in which the Court in this case relied on the Constitutional provisions to counter the petitioner’s claim clearly indicates the Court’s reluctance to utilize customary international law for progressive interpretation of the national laws or bring about changes to municipal law.

In the case of *M. Saleem Ullah v. Bangladesh*,⁴⁰ the Petitioner similarly relied on Article 25(1) of the Constitution and the peremptory norm of *jus cogens* to argue that the decision of the Bangladesh Government to participate in the U.N. sponsored multinational force to Haiti for restoration of the legitimate government there was illegal, as the military operation was in fact a U.S. led aggression. The Petitioner also stated that the government decision violated Article 63 of the Constitution under which only the President is empowered to declare war with the assent of the parliament. The Court observed that the government decision to participate in such a mission was taken pursuant to U.N. Resolution No. 940 and Bangladesh being a member state had taken the decision on the authority of the constitutional framework and international commitment. In the Court’s view, the decision was therefore not derogatory to any provision of the Constitution including the Fundamental Principles of State Policy. While the Court in this instance was apparently mindful of state obligations under the U.N. Charter, it virtually ignored the commitments and obligations of Bangladesh under customary international law and treaties to which it is party. This demonstrates the trend of selective implementation of international law by courts in Bangladesh.

In the case of *Hussain Muhammad Ershad v. Bangladesh and Others*,⁴¹ the Court recognized that although Universal Human Rights norms envisaged in the UDHR or in the Covenants are not directly enforceable in national courts, their provisions, if incorporated into the domestic laws, are enforceable by local courts. The Court conceded that the local laws, whether constitutional or statutory, are not always in consonance with international human rights instruments. Nonetheless, domestic courts

39 Id. at 322-23.

40 M. Saleem Ullah v. Bangladesh., 47 DLR (1995) 218.

41 Hussain Muhammad Ershad v. Bangladesh, 21 BLD (AD) (2001) 69.

should not outright ignore international obligations of the country; rather, if the national laws are unclear or devoid of a specific provision, the national courts should draw upon relevant principles enshrined in international instruments. However, where domestic laws are clear but inconsistent with international obligations of the state, the national courts, while obliged to respect the national laws, will draw the attention of the lawmakers to such inconsistencies. The Supreme Court expressed similar views in the cases of *Bangladesh v. Sheikh Hasina*⁴² and *State v. Metropolitan Police Commissioner*.⁴³

These various instances amply demonstrate the persistence with which the courts in Bangladesh have refrained from invoking international law principles in judicial reckoning. Indeed, the potential of international law norms in enhancing the effectiveness of domestic rights adjudication have largely been sidelined by the courts' obstinate endorsement of the dualist approach to international human rights treaties.

5. THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW: PROGRESSIVE JUDICIAL PRACTICE

The Supreme Court of Bangladesh has, on different occasions, formally recognized customary international law and interpreted state obligation under it. In one of its early decisions in the case of *Bangladesh v. Unimarine S.A. Panama*,⁴⁴ the Court conceded that customary international law is binding on States and States generally give effect to rules and norms of customary international law. This line of judicial reasoning has subsequently been reaffirmed in other cases. However, the use of international law by Bangladeshi courts is largely restricted to supplementing judicial observations, analyzing provisions of the law and the constitution, and generally embellishing the court's decision. An attempt is made here to

42 *Bangladesh v. Sheikh Hasina*, 60 DLR (AD) (2008) 104.

43 *State v. Metro. Police Comm'r*, 60 DLR (AD) (2008) 660.

44 *Bangladesh v. Unimarine S.A. Panama*, 29 DLR (1977) (AD) 252. The question that arose in this case was whether private foreign companies could enjoy immunity from arrest and seizures. The Court held that foreign companies did not qualify for such protection as the rules of immunity only pertained to person or property of foreign missions and diplomatic envoys under public international law.

encapsulate specific examples of judicial consideration of international law in interpreting legal and constitutional provisions.

a. Children's Rights

The courts in Bangladesh have been found to be particularly flexible in the use of the principles of international human rights law while adjudicating cases involving children. The following instances illustrate the latitude exercised by the courts in referring to international human rights law when deciding matters impinging on children.

I. CHILD CUSTODY

A scrutiny of child custody cases reveals how courts have digressed from conservative interpretations of Muslim laws on custody and instead engaged in a more liberal analysis of the same having due regard to the child's best interests.⁴⁵ In the case of *Mst. Sultana Begum v. Muhammad Shafi*⁴⁶ it was contended that if the welfare of the child lies predominantly elsewhere and awarding of custody in conformity with the dictates of the personal law would in essence be against his/her interest, then the Court must act

45 Muslim Law makes a clear distinction between custody (*Hizanat*) and guardianship (*Wilaya*) of children. According to the Sunni Hanafi school when a couple separates the mother is entitled to custody of the child. She is so entitled until the child attains puberty in case of girl and 7 years if it is boy. Under Muslim Law a mother can never be the legal guardian; she can only have the child in her custody until it reaches a certain age. This is premised on the understanding that of all the people a mother is by far the most capable of caring for her child. The mother is entitled to this right even if her husband divorces her. However, the right is forfeited if she marries a stranger, i.e., a person who is not barred to the children on grounds of consanguinity, or if she changes her religion. Under the *Hanafi* Muslim Law the father is the legal guardian of his child. The father is liable to maintain his child even where it is in the custody of the mother following dissolution of the marriage. In the absence of the father the guardianship devolves on the father's executor and in his absence, it vests in the grandfather and in his absence, in his executor in that order of priority. Therefore, the mother is never the legal guardian of her child; she can only be the legal guardian of the minor's property at the death of the father and that too, if she is so appointed by the Court or the father or the grandfather.

46 *Mst. Sultana Begum v. Muhammad Shafi*, 17 DLR (WP) (1965) 119.

according to the demands of the welfare of the child. Similarly, in *Mst. Fahmida Begum v. Habib Ahmed*⁴⁷ it was deemed permissible to depart from the rules of *Hizanat* stated in Muslim Law and grant the mother the custody of the child if the application of such rules went against the interests of the child. In *Johara Begum v. Maimuna Khatun*⁴⁸ the Court ruled that the mother's right to custody of her minor daughter was not lost simply because she took a second husband following the demise of the child's father on the ground that the child would be better looked after and cared for by the mother than anyone else. In the case of *Akhtar Ahmed v. Mst. Hazoor Begum*⁴⁹ the Court held that the mere fact that the mother has remarried does not finally determine the question of custody of the minor; rather, the welfare of the child would be of paramount consideration.

In *Md. Abu Baker Siddique v. S.M.A Bakar*⁵⁰ the Court granted custody of an eight-year-old boy to the mother who had given up her job in Saudi Arabia to come back home to care for her son. In this case, although the boy had crossed the legal age at which he could remain in the custody of his mother, the Appellate Division of the Supreme Court, after considering all the facts and circumstances, upheld the mother's right to custody. Referring to earlier decisions cited by the Appellant's counsel, the Court observed that "[T]hese decisions, while recognising the principle of Islamic Law as to who is entitled to the custody of a minor son with reference to his or her age and sex. simultaneously took into consideration the welfare of the minor child in determining the question. Courts in all these cases seem[ed] reluctant to give automatic effect to the rules of *Hizanat* enunciated by Islamic jurists. If circumstances existed which justified the deprivation of a party of the custody of his child to whose custody he was entitled under Muslim Law, Courts did not hesitate to do so... [Thus,] the court's power to determine the entitlement of a party to *Hizanat* is not limited to mere observance of the age rule so as to exclude the best interests of the child."⁵¹ The Court asserted that since there is no uniformity amongst different schools of Muslim Law regarding custody, a departure

47 *Mst. Fahmida Begum v. Habib Ahmed*, 20 DLR (WP) (1968) 254.

48 *Johara Begum v. Maimuna Khatun*, 16 DLR (1964) 695.

49 *Akhtar Ahmed v. Mst. Hazoor Begum*, 17 DLR (WP) (1965) 39.

50 *Md. Abu Baker Siddique v. S.M.A Bakar*, 38 DLR (AD) (1986) 111.

51 *Id.* at 108.

from the rules of Muslim Law was permissible. In the circumstances, the father's prima facie right to custody of his son could not have any claim to immutability. This indicates that personal laws should not be seen as fixed and defined in perpetuity but should be progressively re-interpreted in certain circumstances.

These various judicial decisions effectively demonstrate a readiness on the part of the learned judges to rely on and give primacy to international law to ensure the well-being of minors, even if entails a compromise with traditional Muslim family laws.

II. CHILDREN IN CONTACT WITH THE LAW

Judicial vigilance in applying international human rights law is perceived in cases involving children in the justice system. In one of the landmark cases on juvenile justice, *State v. Roushan Mondal Hashem*,⁵² the High Court Division embarked on an elaborate discussion on the manner in which children in the criminal justice system should be treated and the rationale underlying it. Referring to various American scholarships and legislation on the subject, the Court reiterated that a child engaged in unlawful activity should not be branded as a “juvenile delinquent” or a “wayward child” and exposed to the “rigours of the criminal justice system with all its awe inspiring paraphernalia and the stigma of criminality at the conclusion of the proceedings that find the child guilty.” It acknowledged that the Court or State stands *in loco parentis* and while ensuring that the unlawful activity of the child does not go unpunished, should adjudge that a child is in need of care and protection. With regard to juvenile trial, the Court observed that

[t]he overall aim [sic] is not punish the offender, but to seek out the root of the problem, in other words, not treating the delinquents as criminals, but treating the cause of their criminality and directing them on a path which will be acceptable to mainstream society in

52 *State v. Roushan Mondal Hashem*, 59 DLR (2007) (HCD) 72.

order to ensure their rehabilitation. More so in our case since our penal policy is basically reformative, and not retributive.⁵³

The Court further reiterated:

[T]he thrust of the International Declarations, Rules and Covenants and other instruments is towards reformation of youthful offenders and for establishment of facilities for proper education and upbringing of youths so that they are prevented from coming into conflict with the law. In the event that a child or juvenile does come into conflict with the law, then the aim is to provide a system of justice which is 'child friendly' and which does not leave any psychological scar or stigma on the child, an, on the contrary, prepares him for a fruitful future.⁵⁴

In addressing the date relevant for the assessment of the age of the child, the Court observed that

... [i]n view of the international covenants, declarations and other instruments, we feel inclined to the view that the relevant date must be the date on which the offence is committed, otherwise the whole thrust of the law to protect those who are immature, impetuous, unwary, impressionable, young, fickle-minded and who do not now the consequences of their act, would be lost. It is the mental capacity of the offender at the time of committing the offence which is of crucial importance.⁵⁵

The Court emphasized the segregation of children from adult offenders and declared that

... [the] juvenile will get the benefit of all the rights to which he would be entitled had the proceedings taken place in the Juvenile Court. That, we believe, follows the spirit and intendment of the international instruments which crave for the well being of the youthful offender and enjoin segregation of youths from adults at all stages from apprehension to incarceration.⁵⁶

This decision, by its very depth and content, demonstrates the Court's sensitivity to children in the justice system and a keenness to ensure that

53 *Id.* at 84.

54 *Id.* at 85.

55 *Id.* at 89.

56 *Id.* at 86.

these children are treated in accordance with internationally acceptable minimum standards.

In *Bangladesh Legal Aid and Services Trust v. Bangladesh and Others*,⁵⁷ the petitioner, a legal aid organisation, challenged the continued incarceration of under trial prisoners, including children, for an indefinite period of time without lawful authority. The Petitioner moved the Court following news coverage in a national daily of 155 under trial prisoners who remained in Dhaka Central Jail for up to five years or longer due to prosecution's failure to produce witnesses. The Petitioner alleged that there were other instances of prisoners, including women and children, languishing in jail in different parts of the country. It was asserted that such continued incarceration was without lawful authority and *ultra vires* relevant provisions of *The Criminal Procedure Code 1898*, the Constitution, and International Covenant on Civil and Political Rights (to which Bangladesh is Party) pertaining to a person's fundamental rights to personal liberty and speedy trial. Information from the office of the Additional Inspector General of Prison revealed that out of the total under trial prisoners in jail, 214 were children below the age of 18 years. The Court observed that children were entitled to trial before the Juvenile Courts in accordance with the relevant laws and positive steps should have been taken in this case to ensure that children were not tried jointly with adults. It directed that trial, if any, of all juveniles accused be completed expeditiously by the Juvenile Courts and instructed the concerned law enforcing agencies, prosecuting agencies, and Government Legal Aid Committees to take immediate and appropriate steps in this regard. The Court further directed the Government to move the concerned courts to discharge, withdraw or transfer to certified Homes, as the case may be, children accused in appropriate cases. The Legal Aid Committees of the Government were instructed to arrange bail for the children accused. The Court also held that children should be kept separate from other prisoners and should be allowed non-official jail visitors, including human rights activists and representatives of children's organizations.

Similar directions were given by the High Court Division in a *suo moto* initiative when its attention was drawn to a news item published

57 *Bangladesh Legal Aid and Services Trust v. Bangladesh*, 57 DLR (HCD) (2005) 11.

in a national daily which described the plight of nearly 400 children in Dhaka Central Jail.⁵⁸

In the case of *State v. Metropolitan Police Commissioner*,⁵⁹ the Court observed that the “underlying theme of international Covenants and instruments relating to children is that they are to be enlarged on bail and to be detained only as a last resort.” Pursuant to newspaper report on how an 8 year old girl was sent to jail for drug trade, the Court issued a *rule nisi* calling upon the Respondents to show why the detention in jail of a minor girl should not be declared illegal. The fact of the case in brief was that in 2008, a young girl named Arifa, along with one Ripon, was caught with 29 bottles of addictive substance strapped to different parts of her body. The police seized the incriminating goods in the presence of witnesses and produced both Arifa and Ripon before the Magistrate. It was stated in the First Information Report (FIR) that Arifa was 10 years old. The learned Magistrate nonetheless sent both Arifa and Ripon to jail custody. Subsequently, a prayer for their bail was made but it was opposed by the prosecution and rejected by the Magistrate. Arifa was sent to safe custody. The Court, after perusing though various reports, came to the conclusion that Arifa was 9 years old. It was observed by the Court that “the underlying theme of international Covenants and instruments relating to children is that they are to be enlarged on bail and to be detained only as a last resort” While the law provides that if a child who is accused of an offence is not released on bail, the Court should order him/her to be detained in a place of safety, but the question in the present case was whether such a place would be suitable for a 9-year-old girl. The Court observed that

Bangladesh was one of the first signatories to the Convention [on the Rights of the Child] and is bound to take steps for implementing the provisions thereof. Being signatory we cannot ignore, rather

58 Suo Moto Order No. 248 of 2003, by J. Amirul Kabir Chowdhury & J. Nizamul Huq.

59 *State v. Metro. Police Comm’r*, 60 DLR (HCD) (2008) 660, at 664.

we should, so far as possible, implement the aims and goals of the UNCRC.⁶⁰

The Court referred to the decision of the Indian Supreme Court in *People's Union for Civil Liberties v. Union of India*,⁶¹ which essentially maintained that provisions of international covenants and conventions which elucidate and effectuate the fundamental rights guaranteed by the Constitution, can certainly be relied on by national courts.

The Court also drew attention to the decision of the Australian Court in *Minister of State for Immigration and Ethnic Affairs v. Teoh*,⁶² which stated:

It is well established that a provision of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into our municipal law by statute . . . [But] the fact that convention has not been incorporated into Australian law does not mean its ratification holds no significance for Australian law.

... The provisions of an international convention to which Australia is a party, especially one which declares universal fundamental rights, may be used by the Courts a legitimate guide in developing the common law.

Drawing upon the above-mentioned decisions, the Bangladesh Court stated:

Let us consider some of the relevant provisions of the UNCRC in juxtaposition to our Constitution and laws. We bear in mind that Article 28(4) of the Constitution permits favourable laws to be enacted with regard to children even though it might be otherwise discriminatory ...⁶³

The Court accordingly drew extensively on the CRC in order to highlight how the best interests of the child should be invoked in this case. Recognizing that the Children Act 1974 provides for special treatment for children, the Court nonetheless recommended that

... [t]he Legislature should consider amending the Children Act 1974 or formulating new laws giving effect to the provisions of

60 *Id.* at 665.

61 *People's Union for Civil Liberties v. Union of India*, (1997) 3 S.C.C. 43 (India).

62 *Minister of State for Immigration and Ethnic Affairs v. Teoh*, (1995) 69 ALJR 423.

63 *State v. Metro. Police Comm'r*, 60 D.L.R. (2008). 660, at 665-6.

the UNCRC, as is the mandate of that Convention upon the signatories.⁶⁴

The Court opined that at all times the best interests of the child should be of paramount importance and since the Court is largely reliant on the report of the probation officer, it is desirable that the latter speak to the accused child in the manner prescribed by the UNCRC in Article 12 which states that

... the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.⁶⁵

Emphasising the role of probation officers in ascertaining the factual aspects in terms of the family background and character of the accused child, the Court directed them to seek the views of the concerned child and give them due weight in accordance with the age and maturity of the child.

In the case of *Fahima Nasrin v. Bangladesh and Others*,⁶⁶ the High Court Division referred to the UNCRC (1989) in relation to the incarceration of child offenders and the possibility of taking children out of jail to be placed in a certified institute. It stressed that it is always possible to legally revert a child from prison to a certified home, which essentially reinforces the view that children should not ordinarily be sentenced to imprisonment, unless absolutely necessary and in exceptional circumstances, and that too as a matter of last resort and for the shortest period of time. The Court emphasised that laws relating to children were special laws, enacted for their well-being. Recognising that children commit offences under the influence of a host of factors not all of which can be attributed to their own fault, the Court observed that

... [i]t is very easy to say that that a child has committed a serious offence and must be severely dealt with and be 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

64 *Id.* at 668.

65 Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

66 *Fahima Nasrin v. Bangladesh*, 61 DLR (2009) (HCD) 232.

cases of children ... They are to be given all the benefits that our Constitution and the laws of the land provide for them. We are also obliged to implement various beneficial provisions of international conventions, covenants and treaties such the Convention on the Rights of the Child (UNCRC) and the International Covenant of Civil and Political Rights, to which Bangladesh is a signatory ... [T]he rights of the child are not only protected by the Children Act 1974, but are [also] mandated by the UNCRC. Above all, the favourable provision of the law and the covenants and conventions are to be applied [for] the benefit of the child as provided by Article 28(4) of the Constitution ...⁶⁷

The Court stressed on the need to avoid retributive measures and instead create for children a congenial environment within which to develop, keeping in mind at all times the welfare and best interests of the child.

In the case of *State v. Secretary, Ministry of Law, Justice and Parliamentary Affairs and Others*,⁶⁸ a 7-year-old girl, a victim of rape by her neighbor, was sent to a safe home run by the Department of Social Welfare of the government. In a *suo motu* rule by the High Court Division, it was observed that the learned judge should have realised that it would be inhuman to separate a 7 year old girl who was brutally raped from her parents, who would be better at giving her the necessary care and protection than a government run safe home. Referring to Article 12 of the CRC, the Court held that the provisions of international instruments to which Bangladesh is a signatory should be implemented. The Court also referred to Article 3 of the CRC and stated:

[Had] the best interests of the child been considered . . . then the seven year old [would have been allowed to remain with her parents] [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 a safe home.⁶⁹

The Court further observed:

There is nothing on record to suggest that the learned Magistrate at all considered the views of the child which shows abject ignorance

67 *Id.* at 242.

68 *State v. Sec'y, Ministry of Law, Justice and Parliamentary Affairs and others*, 29 BLD (2010) 656.

69 *Id.* at 670.

of the international provisions, which are meant...for the welfare and well being 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.⁷⁰

III. CHILD LABOUR

In *Bangladesh National Women Lawyers Association (BNWLA) v. Cabinet Division, Bangladesh Secretariat, and Others*,⁷¹ the Court observed that domestic work with all the hazards of working with dangerous implements and fire, as well as working long hours, would be classified as hazardous work, especially when children aged less than 12 years are involved. The Court alluded to the provisions of ILO Convention No. 182, which Bangladesh ratified in 2001. In the present case, the Petitioner brought to the attention of the Court a newspaper story about the maltreatment of a child housemaid aged 10 years by the lady of the house who tied up the child, pushed her to the floor, and inserted the handle of a hot cooking utensil (stirrer/paddle) into her anus. The girl was in a critical condition, receiving treatment at the Dhaka Medical College Hospital. The report also describes how the girl who was sent to work by her father was subjected to routine torture on the slightest of pretexts.

In *Ain O Salish Kendra (ASK) v. Bangladesh and others*,⁷² pursuant to stories in local newspapers describing the plight of children between the ages of 8-16 years engaged in *bidi* (hand-rolled cigarette) factories in Haragacha, Rangpur, the Petitioners filed a writ 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 in the concerned *bidi* factories as illegal and unconstitutional, being a violation of the fundamental rights guaranteed under Articles 27 and 31 of the Constitution, and why they should not be directed to discharge their legal duties to ensure compliance with relevant labour laws. The Petitioner highlighted the unhealthy and unhygienic conditions under which workers, including children, worked in these factories, inhaling air polluted by tobacco dust, and how large

70 *Id.* at 671.

71 *Bangladesh National Women Lawyers Association (BNWLA) v. Cabinet Division, Bangladesh Secretariat*, 31 BLD 265 Writ Petition No. 3598 of 2010.

72 *Ain O Salish Kendra (ASK) v. Bangladesh and others*, 31 BLD (2011) (HCD) 36.

quantities of nicotine were detected in their blood systems. They also maintained that many workers were afflicted with various chronic diseases such as asthma, tuberculosis, jaundice, bronchitis, kidney infections, and skin and eye diseases. The Petitioners also pointed out that the workers in these factories earned a meagre 13.50 taka (US\$ 0.19 approximately) for making one thousand *bidi*-sticks. They also flagged the opinions of the local chest hospital which revealed that about 30 workers had died in the last five years after contacting tuberculosis and bronchitis, among whom seven were children. The learned Court observed that children's concerns were not given priority by relevant state agencies in the way they should, given that children comprise more than forty percent of the country's population. The Court conceded that while the law requires that children's cases should be heard frequently, this is not done in practice. The Court recalled the suggestion made in the case of *State v. Secretary, Ministry of Law Justice and Parliamentary Affairs and others*⁷³ where it was recommended that at least one Court in every district dedicated to hear children's cases should be established on a priority basis and that in consonance with promises made by Bangladesh to the Committee of the CRC, a Children's Ombudsman/Children's Commissioner/National Juvenile Justice Forum should be set up. Taking into consideration all such matters, the Court suggested 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. Besides, children who are compelled to work due to food insecurity and poverty should be provided a free meal and all necessary expenses for attending school as well as an income to be paid to the parents equivalent to the income likely to be earned by the child had s/he not attended school. Referring extensively to relevant provisions of the Convention on the Rights of the Child (CRC) (1989) and the ILO Convention C182 Worst Forms of Child Labour Convention (1999), the Court observed that it is now well established that the provisions of international instruments to which Bangladesh is a signatory are to be implemented in our domestic laws. Reiterating decisions in *Hussain Muhammad Ershad v. Bangladesh & others*⁷⁴ and *State v. Metropolitan Police*

73 *State v. Sec'y, Ministry of Law, Justice and Parliamentary Affairs and others*, 29 BLD (AD) (2010) 656.

74 *Hussain Muhammad Ershad v. Bangladesh*, 21 BLD (2001) 69.

Commissioner,⁷⁵ the Court emphasised that obligations under international law should not be ignored.

b. Sexual Harassment of Women and Girls

Women's issues in Bangladesh (family disputes, violence against women, etc.) are predominantly settled under the auspices of the personal laws, criminal laws or special laws, as the case may be. Activism by women's groups and human rights defenders surrounding an alarming rise in sexual harassment of women and girls in public places, at work, and learning centers culminated in judicial recognition of the urgency for effective laws and policies to prevent the phenomenon. In the case of *Bangladesh National Women Lawyers Association (BNWLA) v. Government of Bangladesh and Others*,⁷⁶ a *rule nisi* was issued calling upon the Respondents to show cause as to why the Respondents failed to adopt guidelines, or policy or enact proper legislations to address the issue of sexual harassment of women and girl children at work place, educational institutions/universities and other places, despite wide media coverage of the occurrence almost on a regular basis. The Petitioner drew the attention of the Court to a number of incidents as reported by the media and evidence based scholarly work on the subject in order to press home their concern over the issue. The Court opined that the fundamental rights guaranteed in the Constitution of Bangladesh sufficiently addresses elements of gender equality including prevention of sexual harassment or abuse. Besides, in the absence of any domestic law applicable in a particular context, international conventions and norms are to be drawn upon to supplement the fundamental rights. The Court observed that it is an accepted rule of judicial construction to interpret municipal law in conformity with international law and conventions when there is a void in the domestic law and when there is no inconsistency between them. The Court underscored the significance of international conventions and norms in the formulation of guidelines address sexual

75 State v. Metro. Police Comm'r, 60 D.L.R. (2008) 660.

76 Bangladesh National Women Lawyers Association (BNWLA) v. Bangladesh, Writ Petition No. 5916 (2008) (or WP No. 5916 of 2008).

harassment adding that the rights to education and work with dignity are basic human rights and have accordingly received global acceptance.

The Court referred to the relevant provisions of the Universal Declaration on Human Rights (UDHR), Covenants on Civil and Political Rights (ICCPR) and Economic, Social and Cultural Rights (ICESCR), and the Declaration on the Elimination of Violence against Women, and reiterated Bangladesh's obligations under them. It also recalled Article 25 of the Constitution of Bangladesh which states, *inter alia*, that the State shall base its international relations on the principles of respect for international law and the principles enunciated in the United Nations Charter.⁷⁷ The Court conceded that Bangladeshi courts do not normally invoke international covenants, treaties and conventions, even if ratified by the State, unless those are incorporated in the municipal legislation. However, the court can rely upon these conventions and covenants to aid their interpretation of the provisions of the Constitution, particularly in the determination of the rights to life liberty. It alluded to other case law on the use and interpretation of international legal principles to explain its position.

In conclusion, the Court recognized the inadequacy of safeguards against sexual abuse and harassment of women at work places and educational and issued certain directives, in the form of guidelines, to be observed at all work places and educational institutions until adequate and effective legislation is enacted.

c. Right to Life

Courts in Bangladesh generally rely on constitutional provisions when addressing issues involving the right to life. However, there are a couple of instances where the court proactively alluded to international law in arriving at a decision. In *Professor Nurul Islam and others v. Government of the People's Republic of Bangladesh*,⁷⁸ the Petitioners moved against promotional campaigns and advertisements of tobacco products. They maintained that although tobacco companies were seen as complying with statutory warnings on billboards or packets, the script was often too small that it is not readable easily. Besides, they alleged that such messages, even if legible, would have no impact on rural populations, including women

77 BANGL. CONST., art. 25.

78 Nurul Islam v. Bangladesh, 52 DLR (2000) (HCD) 413.

and children, who were predominantly illiterate. The Court held that such advertisements were detrimental to the lives and bodies of people according to Article 31 of the Constitution. It opined that Article 25(1) of the Constitution casts an obligation upon the state to have respect for international law and the principles enunciated in the United Nations Charter and World Health Organization resolution; accordingly, the government should have taken appropriate steps to ban/restrict such promotional activities.

In *Bangladesh Legal Aid and Services Trust (BLAST) and another v. Bangladesh and others*,⁷⁹ the Court on being confronted with the issue of mandatory penalty for the convicted, considered both the Petitioner's point of view that Bangladesh was a signatory to the ICCPR and as such, its provisions should be applied in considering the death penalty vis-à-vis the Constitution, and the submission of the Attorney General who maintained that the provisions of international instruments are not applicable since they have not been incorporated in national laws. In the final assessment, the learned Court observed that there was virtually no conflict in this regard given that the provisions in Article 5 of the Universal Declaration of Human Rights and Article 7 of ICCPR respectively have been reproduced almost verbatim in Article 35(5) of our Constitution which provides that "no person shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment."⁸⁰

d. Freedom from Torture

In the case of *Salma Sobhan v. Government of Bangladesh*,⁸¹ the High Court Division recognised that the practice of chaining prisoners with bar fetters amounted to cruel, degrading, and inhumane punishment, and as such, a violation of fundamental rights. While the Court did not explicitly refer

79 *Bangladesh Legal Aid and Serv. Trust v. Bangladesh*, Writ Petition No. 8283 of 2005.

80 BANGL. CONST., art. 35(5).

81 *Salma Sobhan v. Government of Bangladesh*, Writ Petition No. 2678 of 1995 (unreported), in Ridwanul, *supra* note 21, at 163.

to international human rights law against torture, its observation in this regard nonetheless appears to have been largely influenced by it.

In *Bangladesh Legal Aid and Services Trust v. Bangladesh*,⁸² the Petitioners brought to the attention of the Court the matter of public beating, caning, flogging, etc. of women pursuant to *fatwas* (pronouncements) declared by religious/community leaders for apparently transgressing social norms. The Court declared that the failure of the State to take any systematic action to address extra-judicial punishments amounts to a breach of its obligation under both the Constitution and international law. Recognizing that the prohibition of torture and other ill treatment is a basic principle of customary international law, the Court went on to elaborate that Bangladesh has an obligation under international law to prevent, prohibit, and punish torture and other cruel, inhuman, and degrading treatment or punishment. Although mindful of the fact that the national courts shall not enforce international law instruments unless they are incorporated in the municipal laws, the Court nonetheless affirmed that these conventions and covenants can be used to interpret fundamental freedoms envisaged in the Constitution.

e. Citizenship

In a citizenship matter before it, the Appellate Division of the Supreme Court made a rare departure from the usual practice of conservatism in respect of international human rights law. In *Bangladesh v. Prof. Golam Azam*,⁸³ the Court relied on some provisions of the Convention on the Reduction of Statelessness (1961) in arriving at a decision despite the fact that Bangladesh is not a party to the Convention.

It is evident from the above cases that with a few exceptions, judges generally tend to use international human rights law primarily to analyze ambiguities inherent in the national laws. Consequently, their reliance on international human rights law has largely remained confined to merely

82 *Bangladesh Legal Aid and Services Trust v. Bangladesh*, Writ Petition No. 5863 of 2009, Writ Petition No. 754 of 2010, and Writ Petition No. 4275 of 2010, available at <http://www.humanrights.asia/countries/bangladesh/cases/Judgment%20on%20Fotwa%20and%20illegal%20punishment-ejp-judgment-8July2010.pdf>.

83 *Bangladesh v. Golam Azam*, 46 DLR (AD) (1994) 194.

embellishing their judgments with perfunctory references to international sources.

6. CONCLUSION: ENSURING PRIMACY OF INTERNATIONAL HUMAN RIGHTS LAW OVER POLITICAL CONSIDERATIONS

The fact that domestic courts are not obliged to apply international law directly operates as the single greatest limitation to national enforcement of international law. In the absence of such obligation, the decision whether courts shall give direct effect to international law is primarily a political and normative choice, both for states and their courts.⁸⁴ In the context of Bangladesh, the status of international law in the domestic jurisdiction remains weak in the absence of a clear incorporating mechanism. Despite recommendations by various international treaty bodies, very few treaties that have been ratified have received vetting by the Parliament for codification into domestic law.⁸⁵ Indeed, the decision to initiate reforms in the area largely rests on the political will of the lawmakers and the independence and astuteness of the judges.

It has been suggested that “limits should be imposed upon the domestic legislative processes to make sure that the result of those processes consists of all measures necessary for the implementation of human rights consecrated by international law, or for the improvement of those rights.”⁸⁶ Therefore, once a treaty is concluded, States Parties are expected to ensure that all or at least some of its provisions are enforced by their domestic courts. This is particularly true of human rights treaties, provisions of which are reiterated in most national constitutions and as such, are en-

84 See generally D. KENNEDY, *A CRITIQUE OF ADJUDICATION: (FIN DE SIÈCLE)* 40 (1998); B. DE SOUSA SANTOS, *TOWARD A NEW COMMON SENSE: LAW, SCIENCE AND POLITICS IN THE PARADIGMATIC TRANSITION* 114 (1995).

85 BIANCA KARIM & TIRZA THEUNISSEN, *BANGLADESH*, in *INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS: INCORPORATION, TRANSFORMATION, AND PERSUASION* 115 (Dinah Shelton ed. 2011).

86 Ximena Fuentes Torrijo, *International Law and Domestic Law: Definitely an Odd Couple*, 77 *REVISTA JURIDICA UNIVERSIDAD DE PUERTO RICO* 483 (2007), available at http://www.law.yale.edu/documents/pdf/sela/XimenaFuentes__English_.pdf.

forceable in national courts. As noted by the Committee on Economic, Social and Cultural Rights:

In general, legally binding international human rights standards should operate directly and immediately within the domestic legal system of each State party, thereby enabling individuals to seek enforcement of their rights before national courts and tribunals. The rule requiring the exhaustion of domestic remedies reinforces the primacy of national remedies in this respect. The existence and further development of international procedures for the pursuit of individual claims is important, but such procedures are ultimately only supplementary to effective national remedies.⁸⁷

Indeed, state practice demonstrates that it is common for national law to regard international human rights law differently from other international laws. For example, the Canadian experience shows that Canadian law applies international human rights law differently than other international laws, for instance, international trade law, primarily because of (a) the universality of human rights, (b) the existence of a rights-protecting instrument within Canadian law, and (c) the perceived priority of human rights over other areas of law.⁸⁸ In the Canadian jurisprudence, since basic rights and fundamental freedoms inhere in the human person, they are universal and signify the legal implication of being human. As such, it would be misleading to determine the relevance of human rights instruments simply on the basis of whether they are binding or non-binding upon a state.

That human rights have a pre-eminence over other rights is also manifest from the Bangalore declarations⁸⁹ which underscore the determination of eminent judges from common law jurisdictions to give international human rights norms priority in their domestic adjudications. The 1988 Bangalore declaration affirms that “international human rights instruments provide important guidance in cases concerning human rights and fundamental freedoms” and recognizes that it is within the “well-established judicial functions for national courts to have regard

87 U.N. Comm. on Econ., Soc. & Cultural Rights (CESCR), General Comment 9, ¶ 4 U.N. Doc. E/C.12/1998/24 (Dec. 3, 1998).

88 ERT, *supra* note 17, at 233.

89 The declarations were the outcome of a series of annual meetings of leading American and Commonwealth judges that began with the Bangalore Judicial Colloquium in 1988.

to international obligations” of a country “whether or not they have been incorporated into domestic law—for the purpose of removing ambiguity [sic] from national constitutions, legislation or common law.”⁹⁰ The 1998 Bangalore declaration reads:

[T]he universality of human rights . . . transcends national political systems and is in the keeping of the judiciary It is the vital duty of an independent, well-trained legal profession, to interpret and apply national constitutions and ordinary legislation in harmony with international human rights codes and customary international law...even where human rights treaties have not been ratified or incorporated into domestic law, they provide important guidance to lawmakers, public officials and the courts.⁹¹

Clearly, “there is nothing to deter courts from considering international human rights instruments in construing domestic rights provisions because international provisions are an expression of a conception of humanity subscribed to by the state and reflected in national human rights law provisions.”⁹² As such, judges in Bangladesh can use their discretion to choose selectively from the wide array of international human rights standards to link international law obligations to the domestic legal system when adjudicating cases. It has been suggested that judges can exercise their discretion in a number of ways: “by interpreting treaties, by ordering treaty obligations in a hierarchical order, by ‘finding’ customary international law, and by determining which of these norms is directly applicable within the domestic legal system and how they interact with domestic norms.”⁹³ While recent judicial decisions signify a shift in the attitude of Bangladeshi judges regarding the value of international human rights law, their approach to international sources can still be termed as conservative; this conservatism appears to be “deeply influenced by its orthodox comprehension of its

90 ERT, *supra* note 17, at 237.

91 *Id.* at 238.

92 *Id.* at 235.

93 Eyal Benvenisti & George W. Downs, *National Courts, Domestic Democracy, and the Evolution of International Law*, 20 EUROPEAN JOURNAL OF INTERNATIONAL LAW 59, 60 (2009).

own constitutional role in invoking international human rights.”⁹⁴In the majority of cases, judges fail to recognize that certain human rights are so fundamentally universal that the treaties containing such norms can effectively be construed as self-executing. Besides, given that the fundamental rights envisaged in the Bangladesh Constitution essentially reiterate many international human rights norms, it is a judicial duty to recognize that the invocation of these universal standards is not only “constitutionally feasible but also to some extent obligatory.”⁹⁵

It has been observed that a judiciary that is independent of the national Government that employs international standards by resorting to technical, non-political, legal discourse, has the potential to interpret, apply, and develop international norms.⁹⁶ However, in Bangladesh, judges are constrained by various factors that essentially inhibit them from the innovative use of international human rights law, particularly if its invocation directly conflicts with the will of the executive. Increased politicization of the judiciary has effectively eroded its independence and apolitical status. Judicial deference to the political executive is manifest from the rigid interpretation of constitutional provisions on, for example, the right to life and liberty, freedom of expression, equality before law, etc. Arguably, the very existence of the judicial system is to secure for citizens legal rights and protect them against arbitrary use of political and economic power. Unfortunately, Bangladeshi courts have over the years become vulnerable to partisan political pressure, and as such, tend to serve political interests rather than engage in innovative legal discourse. Resultantly, judicial decisions are crafted so as not to upset government interests. While progressive judicial thinking essentially hinges on the intellectual capacity, creativity, and foresightedness of the judges, this is largely circumscribed by political appointments to judicial positions of individuals who lack the requisite qualifications and experience. Many of them have no knowledge of international legal resources, and even if they had, are unwilling to use

94 RIDWANUL HOQUE, *JUDICIAL ACTIVISM IN BANGLADESH: A GOLDEN MEAN APPROACH* 224 (2011).

95 *Id.*

96 Eyal Benvenisti, *Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts*, 4 *EUROPEAN JOURNAL OF INTERNATIONAL LAW* 159, 160 (1993).

them if they think that it might displease the political executive. This has far reaching consequences on the manner in which they adjudicate cases and their outcomes. The politicization of the judiciary has thus minimized judicial accountability, impeded judicial activism, and rendered public interest ineffective—all of which retard progressive judicial learning.

Form over Substance?

China's Contribution to Human Rights through Universal Periodic Review

*Rhona Smith*¹

1. INTRODUCTION

This article will analyse the Chinese contribution to the first cycle of the Human Rights Council's universal periodic review. In 2006, the then new U.N. Human Rights Council² was tasked with establishing the modalities of a universal periodic review of compliance by all U.N. member states with human rights and humanitarian law, irrespective of which treaties any state has elected to ratify. The Universal Declaration of Human Rights and voluntary commitments of states can be used to discern the salient human rights standard, filling any gaps in a state's framework of human rights' obligations derived from their treaty ratifications. China was a vocal member of the Like Minded Group in the U.N. during this formative period and succeeded in securing a General Assembly, then Human Rights Council, resolution which reflected the group's view of universal periodic review.

An integral part of the review process is "peer review" of the performance of states by other states. China has been very active during this inter-governmental process, contributing to the majority of reviews. There is some literature and civil society reports on China's experience of universal periodic review, on universal periodic review generally, and on China's engagement with the U.N. and international human rights. However, there is no detailed qualitative analysis of the approach China took to its interventions in the interactive dialogue of other states. This article will fill that gap. Using the comments made on behalf of China in all peri-

1 Professor of International Human Rights, Northumbria University. This article was submitted and accepted for publication in 2012.

2 G.A. Res. 60/251, U.N. GAOR, 60th Sess., U.N. Doc. A/RES/60/251 (Apr. 3, 2006).

odic reviews (taken as the reports of the working group on the interactive dialogue element of the review³), an attempt will be made to categorise the comments made by China. It will thus be possible to discern the nature of rights and issues China elected to focus on during its interventions. It will be interesting to see whether this matches areas identified by China in its voluntary human rights commitments, rights and freedoms expressed in treaties ratified, the millennium development goals and other documentation. Moreover it will be instructive to compare the areas identified by China for comment with those areas identified as areas of progress or concern by third states in China's own periodic review.

The article concludes with some observations on whether China's approach to the first cycle of universal periodic review embodies "form" (overt participation), over "substance," and thus whether or not China is making a meaningful contribution to the advancement of human rights through this mechanism.

2. UNIVERSAL PERIODIC REVIEW

China is perhaps not regarded as the most fervent advocate of international human rights' standards, and the international (UN) monitoring systems.⁴ Perhaps it is thus surprising that China has proven to be a very enthusiastic participant in the newest human rights monitoring system, universal periodic review. Indeed, as will be seen, China has proven to be one of the most active and most positive participants in the world. This development sits alongside the growth in stature of China on the international stage, joining the World Trade Organisation in 2001 and embracing human rights

3 All key documentation on universal periodic review is in the public domain, available at www.ohchr.org. Note that this article uses the English language version of all documents, where unavailable, the French language version was used as an alternative.

4 A number of NGOs regularly criticise China's human rights performance, as do a number of States – for perhaps predictable examples, see Amnesty International: China, <http://www.amnesty.org/en/region/china>; Human Rights Watch: China and Tibet, <http://www.hrw.org/asia/china>; U.S. Department of State, Annual Human Rights Reports – Latest Report on China, available at <http://www.state.gov/documents/organization/186478.pdf>. China refutes most, if not all, the claims made.

as a concept, albeit perhaps with "Chinese characteristics."⁵

During the formative stages of the Council (pre and post-establishment), China led the Like Minded Group⁶ who were against singling out any states for criticism or comment within the new Council.⁷ In such a way, it was proposed that the Council would establish itself as different from the Commission, which latterly was besmirched by allegations of bias and selective persecution or condoning of states on factors more attributable to that states' allies and power base rather than purely on the facts available.⁸ During a meeting between the General Assembly President and the (now former) Commission of Human Rights, China's ambassador conveyed the views of the Like Minded Group, welcoming the decision of the General Assembly to create the Human Rights Council: "Human rights is not about

5 See, e.g., INFORMATION OFFICE OF THE STATE COUNCIL OF THE PEOPLE'S OF REPUBLIC OF CHINA, HUMAN RIGHTS IN CHINA (1991), available at <http://www.china.org.cn/e-white/7/index.htm>. Part X of this elaborates China's involvement in International Human Rights activities: "Consideration should be given to the differing views on human rights held by countries with different political, economic and social systems, as well as different historical, religious and cultural backgrounds. International human rights activities should be carried on in the spirit of seeking common ground while reserving differences, mutual respect, and the promotion of understanding and cooperation."

6 Algeria, Bangladesh, Belarus, Bhutan, Cuba, Egypt, India, Indonesia, Iran, Malaysia, Myanmar, Nepal, Pakistan, the Philippines, Sri Lanka, Sudan, Syria, Viet Nam, and Zimbabwe.

7 For a more detailed exposition of this, see Philip Alston, *Reconceiving the UN Human Rights Regime: Challenges confronting the new UN Human Rights Council*, 7 MELBOURNE JOURNAL OF INTERNATIONAL LAW (2006).

8 See, e.g., The Secretary-General, *In Larger Freedom: Towards development, security and human rights for all*, U.N. Doc. A/59/2005 (Mar. 21, 2005); Henning Boekle, *Western States, the UN Commission on Human Rights, and the '1235' Procedure: The question of bias revisited*, 13 NETHERLANDS QUARTERLY OF HUMAN RIGHTS 367 (1995); and more recently, see Patrizia Scanella & Peter Splinter, *The United Nations Human Rights Council: A promise to be fulfilled*, 7 HUMAN RIGHTS LAW REVIEW 41 (2007); Nico Schrijver, *The UN Human Rights Council: A new 'society of the committed' or just old wine in new bottles?*, 20 LEIDEN JOURNAL OF INTERNATIONAL LAW 809 (2007).

the preach and the preached, the condemn and the condemned.”⁹ That the Commission ceased to be a credible human rights body appeared agreed, opinions on how best to ameliorate the situation differed. Nevertheless, a major cultural shift from the perceived practice of the Commission¹⁰ was supported by the Like Minded Group and, indeed, most of the United Nations’ membership.¹¹

The Council was established and held its first session in June 2006, by which time the Economic and Social Council had disbanded its Commission on Human Rights. With a more transparent, geographically representative membership, China offered its candidature for election to membership of the inaugural Council.¹² It was duly elected, with its membership renewed for a further three years.¹³ Note that it is no longer a member as the rules prevent any state from serving more than two consecutive terms.¹⁴ Of course, China can present its candidature thereafter should, as seems highly probable, the government so desire. (The former Commission had no such restriction; thus some states sat on it for a decade or more, others almost permanently.) Many functions of the Commission were taken on (subject to a review and rationalisation process) by the Council. However, the Council also had some new functions, powers and responsibilities, reflecting in part the shift in emphasis from the Commission to the Council and the perceived needs of the international community almost sixty years

9 Statement by H.E. Ambassador SHA Zukang, on behalf of the Like Minded Group, at the Meeting between the President of the General Assembly and the Commission on Human Rights, Nov. 25, 2005.

10 China was a member of the Commission from 1981, having previously attended as an observer.

11 Indeed, only Israel, USA, Palau and the Marshall Islands voted against G.A. Res. 60/251, with Belarus, Iran and Venezuela abstaining.

12 The Council has forty-seven Member States, elected taking into account their contribution to the promotion and protection of human rights, their voluntary pledges and other human rights commitments (G.A. Res. 60/251, *supra* note 2, ¶¶ 7-8).

13 For the *Note Verbale on Pledges and Commitments of the Chinese Government* leading up to the second election, see U.N. GAOR, 63d Sess. 83d pléb. mtg, U.N. Doc. A/63/840 (Apr. 30, 2009).

14 G.A. Res. 60/251, *supra* note 2, ¶ 7.

after the Commission drafted the Universal Declaration of Human Rights, establishing the basis for the modern international human rights system.

Perhaps the major innovation in the General Assembly resolution establishing the Human Rights Council in 2006¹⁵ was the introduction of universal periodic review as a mechanism for considering “the fulfilment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States.”¹⁶ Universal periodic review, applying equally to all states, is clearly in keeping with the anti-selectivity stance evinced by the Like Minded Group,¹⁷ which certainly influenced the formative stages of development. Arguably the final text of GA resolution 60/251 and, indeed, the further elucidation of the modalities of review in Human Rights Council resolution 5/1 (the institution-building resolution)¹⁸ reflects China's idea of a more supportive environment to encourage the promotion and protection of human rights. This found expression in the founding resolution (“the work of the council shall be guided by the principles of ... impartiality, objectivity and non-selectivity, constructive international dialogue and cooperation”¹⁹) and the institution-building resolution of the Council itself (“the universal periodic review should: . . . be conducted in an objective, transparent, non-selective, constructive, non-confrontational and non-politicised manner”²⁰).

Universal periodic review is the only human rights monitoring system to which every U.N. Member state submits. This process is compulsory, in

15 G.A. Res. 60/251, *supra* note 2.

16 *Id.* ¶ 5(e). For a discussion of this process, see, inter alia, Felice Gaer, *A Voice not an Echo: Universal periodic review and the UN treaty body system*, 7(1) HUMAN RIGHTS LAW REVIEW 109 (2007); Nadia Bernaz, *Reforming the UN Human Rights Protection Procedures: A legal perspective on the establishment of the Universal Periodic Review mechanism*, in NEW INSTITUTIONS FOR HUMAN RIGHTS PROTECTION 75-92 (K. Boyle ed., Oxford University Press 2009).

17 Statement by SHA, *supra* note 9.

18 Human Rights Council Res. 5/1 *Institution-building of the New Human Rights Council*, U.N. Human Rights Council, 9th mtg, U.N. Doc. A/HRC/RES/5/1 (June 18, 2007).

19 G.A. Res. 60/251, *supra* note 2, ¶ 4.

20 Human Rights Council Res 5/1, *supra* note 18, ¶ 3(g).

terms of the enabling resolution (GA Res 60/251), and comparatively new: the first cycle, covering all states, began in 2008 and completed late 2011 (twelve sessions were held); the second cycle has only just commenced (its first session was held May/June 2012). Indeed, perhaps to the surprise of sceptics, every U.N. member state complied with the new obligation to participate in the process, whether or not they voted in favour thereof during the initial U.N. General Assembly debates. Haiti was the only state to seek an exception, the exceptional circumstance of the earthquake of 2010 being sufficient to move Haiti from its initial scheduled review to the last session (October 2011). Every other state participated as and when scheduled, although a few states were not able to submit the national report in time and thus attested orally to their human record.²¹ On paper, therefore, the mechanism delivered – for the first time the U.N. secured a complete set of documentation on human rights in each and every member state. Inevitably the veracity of all the material can be questioned and, of course, the efficacy of peer review as a mechanism for ensuring respect for, and protection of, human rights is not yet clear. However, what is beyond debate is that no other U.N. system captures such information and self-evaluations of human rights in each and every state.²²

This universal periodic review process is predicated on peer review, with each state submitting a national self-evaluation report of the human rights situation pertaining in its jurisdiction.²³ This information is supplemented by two documents prepared by the Office of the High Commissioner for Human Rights: a compilation of information on the

21 See, e.g., U.N. Human Rights Council, *Report of the Working Group on the Universal Periodic Review Cape Verde*, ¶ 5, U.N. Doc. A/HRC/10/81 (Jan. 12, 2009) (statement by the head of delegation from the Ministry of Justice on the barriers to submitting a national report). South Africa submitted an oral national report to the first session of the first cycle. See U.N. Human Rights Council, *Report of the Working Group on the Universal Periodic Review South Africa*, ¶ 3(a), U.N. Doc. A/HRC/8/32 (May 23, 2008).

22 Few states have ratified every core U.N. human rights treaty and submit promptly to reviews of the fulfilment of their treaty obligations by the salient expert treaty monitoring bodies. The treaty body mechanism is thus, by definition patchy, being predicated on ratification by States of treaties.

23 See Human Rights Council Res. 5/1, *supra* note 18, ¶15 for specification of the documentation on which the review focuses.

state gathered from pre-existing U.N. treaty body, specialized agency and other reports; and “additional, credible and reliable information” provided by other stakeholders including, for example, non-governmental organizations.²⁴ Three Human Rights Council member states are selected (by lot) as rapporteurs to lead each review.²⁵ Central to the actual review is a working group during which interactive dialogue between the state under review and the Council takes place. Over the course of some three hours,²⁶ any U.N. member state (or observer state²⁷) can seek to make comments, recommendations or raise questions on the human rights situation within the state under review, with the state given appropriate opportunity to respond during the working group session and, following due consideration, thereafter. The rapporteur states then oversee the drafting of a report of

24 The Like Minded Group indicated support for improving the participation of NGOs in the work of the Council – see SHA, *supra* note 9. During China's own review, over sixty stakeholders, alone or in collation with others, contributed to the stakeholder's comments. See U.N. Human Rights Council, Working Group on the Universal Periodic Review, *Summary Prepared by The Office of the High Commissioner For Human Rights, in accordance with paragraph 15 (C) of the Annex to Human Rights Council Resolution 5/1, People's Republic of China (Including Hong Kong and Macao Special Administrative Regions (HKSAR) and (MSAR))*, U.N. Doc. A/HRC/WG.6/4/CHN/3 (Jan. 5, 2009). Of these, several groups were recognised by the U.N. Economic and Social Council as having non-governmental status, including the All China Women's Federation in Beijing, China Family Planning Association, Beijing, and the China Society for Human Rights Study in China, Human Rights Watch (Switzerland) and Amnesty International (UK) – the latter two are, of course, not recognised in China. Several others were in China, including China Human Rights Lawyers Concern Group, Hong Kong Human Rights Commission (a collation of NGOs based in Hong Kong), Centre for the Study of Human Rights at Nankai University, Tianjin and the Institute of Law, Chinese Academy of Social Sciences, Beijing. Of course, a number of other stakeholders were located outwith China with views generally not accepted by China – Amnesty International and Human Rights Watch were mentioned above, and other examples include the Centre of Housing Rights and Evictions (Switzerland), the Tibetan UPR forum (a coalition), the World Uyghur Congress (USA) and the Falun Gong Human Rights Working Group (USA).

25 Human Rights Council Res. 5/1, *supra* note 18, ¶ 18.

26 The time limits are intended to insure a degree of parity of treatment of all States.

27 Palestine and the Holy See made contributions to several reviews.

the working group on each state under review – these reports record the interventions made by all states and thus form the basis of the present analysis. This report and responses by the state under review are remitted to the full Human Rights Council for discussion (the state under review is invited to be present and NGOs can make comments at this juncture). A decision of the Human Rights Council adopts the final outcome of the review. The latter (final outcome) is a “perfunctory statement”²⁸ that the review has been conducted and comprises the documents noted above along with any comments of the state under review.

As is apparent, the interactive dialogue “peer review”²⁹ aspect of the process is key to ensuring all states are treated the same and to rendering the review transparent.³⁰ Such a public forum also enables monitoring. The mechanism is “cooperative” rather than censorial and should fully involve the state under review with due consideration of “capacity-building needs” of the state.³¹ This reflects the views of the Like Minded Group and, indeed, others: Neumayer notes that “for the most part, countries take relatively little interest in the extent of human rights violations in other countries.”³² Universal periodic review has been hailed as “a genuinely innovative concept.”³³ As such, the success of the review process partly depends on

28 Human Rights Council Decision 11/110, U.N. Human Rights Council, *Report of the Human Rights Council on its eleventh session*, 56, U.N. Doc. A/HRC/11/37 (Oct. 16, 2009) (“The Human Rights Council . . . adopts the outcome of the universal periodic review on China which is constituted of the report of the Working Group on the review of China (A/HRC/11/25), together with the views of China concerning the recommendations and/or conclusions, as well as its voluntary commitments and its replies presented before the adoption of the outcome by the plenary to questions or issues that were not sufficiently addressed during the interactive dialogue in the Working Group (A/HRC/11/37, chap. VI”).

29 On “peer review” as opposed to “periodic review,” see Gaer, *supra* note 16.

30 Requirements of Human Rights Council Res. 5/1, *supra* note 18.

31 G.A. Res. 60/251, *supra* note 2, ¶ 5(e).

32 Eric Neumayer, *Do International Human Rights Treaties Improve Respect for Human Rights?*, 49 JOURNAL OF CONFLICT RESOLUTION 925-26 (2005).

33 Navanethem Pillay, *Human rights in United Nations action: Norms, institutions and leadership*, EUROPEAN HUMAN RIGHTS LAW REVIEW 1, 5 (2009); see also, Nazila Ghanea, *From UN Commission on Human Rights to UN Human Rights Council: One step forward or two steps sideways?*, INTERNATIONAL COMPARATIVE

how states respond to the call to review other states' human rights performances and, of course, how states react to comments made to them during their own review. This was not easy to predict as the system is arguably without precedent. Peer review, whilst not unique, is not completely unknown in transnational and regional organisations. However, the system operationalised by the Human Rights Council is without parallel in terms of geographical remit,³⁴ subject matter³⁵ and because it is mandatory.³⁶

Literature analyzing aspects of this new mechanism is emerging. Reviewing the first session, Redondo observes that many interventions were positive, congratulatory "pats-on-the-back" for states.³⁷ Meanwhile, Abebe considers the first two universal periodic review sessions, noting the power of regional alliances in issuing "shaming" criticisms and congratulatory comments during the interactive dialogue (his specific focus was African states though the phenomenon can be observed outwith that region),³⁸ whilst Ramcharan notes that the process has "one Achilles heel: many member states with atrocious human rights records are treated by their peers with kid gloves."³⁹ Arguably this adds weight to the fears expressed by the Like Minded Group – their warning of "the condemn

LAW QUARTERLY 695, 704 (2006); though see Alston, *supra* note 7, and Ladan Rahmani-Ocra, *Giving the Emperor Real Clothes: The UN Human Rights Council*, 12 GLOBAL GOVERNANCE 15 (2006) (noting an earlier, similar (failed) UN peer review initiative).

34 The African Peer Review Mechanism, in contrast, is regional and voluntary. See generally, African Peer Review Mechanism, www.aprm-au.org; and more specifically, see, e.g., Magnus Killander, *The African Peer Review Mechanism and Human Rights: The first reviews and the way forward*, 30 HUMAN RIGHTS QUARTERLY 41 (2008).

35 No other such mechanism focuses on all human rights.

36 The IMF and OECD systems are voluntary, as indeed is the African peer review system.

37 Elvira Domingues Redondo, *The Universal Periodic Review of the UN Human Rights Council: An assessment of the first session*, 7 CHINESE JOURNAL OF INTERNATIONAL LAW 721, 731 (2008).

38 Allehone M. Abebe, *Of Shaming and Bargaining: African States and the Universal Periodic Review of the United Nations Human Rights Council*, 9 HUMAN RIGHTS LAW REVIEW 1, 19 *et seq.* (2009).

39 BERTRAND RAMCHARAN, THE UN HUMAN RIGHTS COUNCIL 64 (2011).

and the condemned” as quoted above although Alston considers that the very concept of universal periodic review responds to previous criticisms of both the Like Minded Group and western countries.⁴⁰ They argued that this would be counter-productive to the goal of encouraging states to improve the human rights situation. Certainly a less flexible, “pass/fail” style, approach is not likely to prove an incitement to states. The public nature of universal periodic review (as noted above all documentation is in the public arena and available free online in official languages) inevitably means states wish at least to be seen to comply with the process and with the applicable standards. The inherent vagueness of some human rights standards assists in this respect. However, care must be taken to ensure that the process is meaningful and promotes progress, rather than just a mere paper exercise.

Sweeney and Saito approach the first two sessions from an NGO perspective, raising a number of issues concerning state selectivity of topics raised during the reviews, and a general vagueness of future activity based on review outcomes to improve human rights on the ground.⁴¹ This proved prescient and will be picked up later in this article. Naturally, the process is inter-governmental; thus it is not feasible to eradicate politicization when the membership of the Council remains states. Nevertheless, universal periodic review should include a wider range of participants than is the case in other inter-state mechanisms as other stakeholders, including NGOs, should be involved at the stage of drafting national state reports, contributing to the stakeholders report compiled by the Office of the High Commissioner for Human Rights, and reviewing the working group’s report during the Human Rights Council session and, of course, at the implementation of the review’s accepted recommendations and voluntary commitments undertaken by the state within the territory of the State concerned.⁴²

In terms of the enabling resolution, the universal periodic review process is expected not to present an excessive burden to states, rather

40 SHA, *supra* note 9; Alston, *supra* note 7.

41 Gareth Sweeney & Yuri Saito, *An NGO Assessment of the New Mechanisms of the UN Human Rights Council*, 9 HUMAN RIGHTS LAW REVIEW 203 (2009).

42 *Id.* (expressing caution over the effectiveness of this, based on their observations of the initial two sessions of review).

it is promulgated as complementary to the existing treaty monitoring process, something “extra” and worthwhile.⁴³ Few states have ratified and submitted timely reports to all the core U.N. human rights treaty bodies; thus the Human Rights Council has a much wider remit than the treaty bodies. Moreover, as the universal periodic review process is based on the Charter of the U.N., the Universal Declaration of Human Rights and voluntary pledges and commitment made by the state under review, as well as the treaties to which it is party,⁴⁴ the scope is considerably broader than that of the treaty bodies. Indeed, Gaer argues that universal periodic review could provide added value and complements the treaty bodies.⁴⁵ His analysis is based on the initial review sessions, thus no comment was possible on how the review outcomes would be used by treaty bodies and the effect they could have. In any event, it appears that little use is made of review outcomes before the treaty bodies although there is some evidence of states (including China) using selective treaty reports as a basis for questions and comments during interactive dialogues.⁴⁶

For the current paper, China will provide a vehicle for examining the review process and the non-confrontational stance espoused by the Like Minded Group it headed. Like every other U.N. member state, China can participate in the universal periodic review process in two ways: as a reviewee, in accordance with the prepared schedule; and as a reviewer. The

43 “[C]omplement and not duplicate the work of the treaty bodies” *quoted in* G.A. Res. 50/261, *supra* note 2, ¶ 5(e).

44 Human Rights Council Res. 5/1, *supra* note 18, ¶ 1.

45 Gaer, *supra* note 16, at 136.

46 China cited treaty body reports and those of special procedures with respect to Japan. *See, e.g.*, U.N. Human Rights Council, *Report of the Working Group on the Universal Periodic Review Japan*, ¶ 18, U.N. Doc. A/HRC/8/44 (May 30, 2008). On reservations, for example, China welcomed Mauritania’s withdrawal of its reservation to CEDAW. *See* U.N. Human Rights Council, *Report of the Working Group on the Universal Periodic Review Mauritania*, ¶ 68, U.N. Doc. A/HRC/16/17 (Jan. 4, 2011). On ratifications, for example, China’s recommended that Norway consider ratifying the Convention on the Rights of Persons with Disabilities. *See* U.N. Human Rights Council, *Report of the Working Group on the Universal Periodic Review Norway*, ¶ 105(2), U.N. Doc. A/HRC/13/5 (Jan. 4, 2010).

focus of this article is on China as a reviewer, however, it is pertinent to first reflect on China's experience as a reviewee.

3. CHINA UNDER REVIEW

China was itself reviewed during the fourth session of the first cycle of review. Its working group was notable as it attracted one of the largest number of intervening states of the entire first cycle.⁴⁷ Of the one hundred and fifteen states who sought to comment, sixty were permitted to participate in the interactive dialogue with some fifty-five "timed out" (as noted above there are strict time limits to ensure equality of treatment of all states⁴⁸) though offered the opportunity of contributing in writing through the intranet. In keeping with the then prevailing practice, China was reviewed whilst serving as a member of the Human Rights Council.⁴⁹ That China's working group dialogue attracted considerable interest is not surprising, the notable distinction between more critical comments by Western European and Others Group (WEOG) and East European EU member states and more positive supportive comments by almost every other state perhaps was. Several states expressed concern and regret at the politicization of human rights situation in China during the review process.⁵⁰ In the case of

47 Shortly thereafter, the modalities were adjusted and a maximum of sixty states was rarely permitted within the time frame of the "face-to-face" interactive dialogue.

48 For summaries on the treatment of People's Republic of China as compared to Nauru, *see* Rhona Smith, *Equality of "Nations Large and Small": Testing the theory of the universal periodic review in the Asia-Pacific*, 11 ASIA-PACIFIC JOURNAL ON HUMAN RIGHTS AND THE LAW REVIEW 36 (2011).

49 Human Rights Council Res. 5/1, *supra* note 18, Annex ¶ 8, stipulated that each state should be reviewed when a member of the Council. This provision has been removed. Human Rights Council Res. 16/21, ¶ 4, U.N. Doc. A/HRC/RES/16/21 (Apr. 12, 2011), provides for the order of review established for the first cycle to be maintained; equitable periodicity thus takes precedence over reviewing States during tenure at the Council.

50 For examples of countries commenting on the politicization of human rights in China and/or the review process, *see* U.N. Human Rights Council, *Report of the Working Group on the Universal Periodic Review China*, ¶ 33 (comments by Algeria), ¶ 39 (comments by Sri Lanka), ¶ 88 (comments by Pakistan), ¶ 94 (comments by Myanmar), U.N. Doc. A/HRC/11/25 (Oct. 5, 2009).

China, arguably the result of the review was, in places, “a thinly veiled and fairly coordinated challenge to certain practices – [especially] in China’s case its retention and use of capital punishment,”⁵¹ the Western European and Others Group being particularly vocal in this regard. Of course, China retains the death penalty and has not ratified any human rights treaty which expressly prohibits its continued use (assuming compliance with minimum standards); thus technically it is not required in law to stop the practice. Perhaps this partially explains why China did not accept a number of the recommendations made during its review. McMahon and Ascherio classified all recommendations during the first six sessions of the review cycle with reference to the degree of action required of the state under review to fulfil any given recommendation. They then analysed the number of each classification of recommendation which was accepted by the states in the various U.N. regional groupings, highlighting some individual states. In the case of China, they note that China “accepted all forty-one of Asia and Africa’s recommendations, thirty-eight of which fell into categories [requiring continuation of existing good practice, sharing of information and practice, general acceleration of practices] (by contrast, China only accepted eight of WEOG’s [Western European and Others Group] sixty-nine recommendations, two-thirds of which were in categories [requiring the state to consider change or undertake specific action to effect change]).”⁵² As noted above, many of these WEOG recommendations related to the death penalty. The actual non-acceptance rate is thus arguably less than the statistics would suggest. Nevertheless, the death penalty was not the sole topic on which China received Western European and Others Group’s recommendations. Perhaps the most noteworthy (for the present purpose) statistic is the acceptance rate of those recommendations praising Chinese practices and progress as, in the next section, the article will note that China itself generally contributes such positive, supportive recommendations to the reviews of other states. This suggests either such an approach has an effective impact on the Chinese government, or such comments are easily

51 Rhona Smith, *More of the Same or Something Different? – Preliminary Observations on the Contribution of Universal Periodic Review with Reference to the Chinese Experience*, 10 CHINESE JOURNAL OF INTERNATIONAL LAW 565, 586 (2011).

52 Edward McMahon & Marta Ascherio, *A Step Ahead in Promoting Human Rights? The Universal Periodic Review of the UN Human Rights Council*, 18 GLOBAL GOVERNANCE 231, 245 (2012).

achieved and thus almost devoid of meaning as a mechanism for improving human rights on the ground.

China states that it had “undertaken its first Universal Periodic Review with an open and frank attitude and in a highly responsible manner.”⁵³ This is obviously a subjective viewpoint but there can be little doubt that China’s participation was perhaps more proactive than some detractors may have anticipated, with China even considering and responding to criticism levied by other states.⁵⁴ Despite such international comments and external praise,⁵⁵ the review was largely absent in national (Chinese) press, with reporting restricted to acknowledgement of the positive comments made by a large number of states.⁵⁶ China is by no means unique in

53 Note verbale, *supra* note 13, at annex; Aide Memoire, *infra* note 61, ¶ 4.

54 *ee, e.g.*, Report of the Working Group on the Universal Periodic Review China, *supra* note 50, for comments made by France which drew on the stakeholders’ reports to query various confinement practices as well as making recommendations on media practices and the death penalty (¶ 56) while the UK expressed concern over the use of the death penalty, issues related to the Tibetan Autonomous Region and media freedom (¶ 42).

55 *See, e.g.*, Report of the Working Group on the Universal Periodic Review China, *supra* note 50, in which Mexico welcomed China’s efforts in the area of human rights and the early achievement of the millennium development goals (¶ 38), South Africa welcomed the achievement of the Millennium Development Goals and China’s collaboration with the OHCHR (¶ 40), Sri Lanka praised China’s history effusively (¶ 39), UAE commended China’s progress and policy of openness and reform (¶ 53) and Iran commended China’s strong commitment to human rights (¶ 59). Even Western European and Others Group states included praise in their interventions. *See, e.g.*, the initial comments by Australia (¶ 27), Canada (¶ 28), UK (¶ 42), and Sweden (¶ 92).

56 For the official English language newspaper reports, *see Human Rights Discourse*, CHINA DAILY, Feb. 11, 2009, *available at* http://www.chinadaily.com.cn/cndy/2009-02/11/content_7463263.htm, reporting on the first review and mention made further in *Rights of Women, Kids, Elderly, Disabled Ensured*, CHINA DAILY, Apr. 14, 2009, *available at* http://www.chinadaily.com.cn/cndy/2009-04/14/content_7673716.htm.

this regard. Few states evidence detailed reports in popular media on the process or indeed on other U.N. treaty body procedures.

Overall China's experience was comparable to those of many other states. The comments received were if anything more positive when viewed in comparison to the reviews of other states - indeed China was the most positively rated Asian group country.⁵⁷ There is thus arguably some evidence of states queuing up to praise China's progress,⁵⁸ echoing the concerns of Abebe, Ramcharan and others.⁵⁹ However, there was also, indeed, some evidence of politicisation, albeit not as much as perhaps was feared.⁶⁰

4. CHINA AS A REVIEWER STATE

China's putative approach to the work of the Human Rights Council was indicated in the Aide Memoire submitted in 2006 to support China's initial candidature for the Human Rights Council.⁶¹ Therein China notes that

... the Human Rights Council should respect the historical, cultural and religious backgrounds of different countries and regions; . . . attach equal importance to civil and political rights on the one hand and economic, social and cultural rights on the other/ the Council should ensure impartiality, objectivity and non-selectivity in the consideration of human rights issues, and the elimination

57 All reviews of all States have been coded positive or negative. Thus it is possible to comment on the review of China against the wider context of the entire first cycle.

58 Very positive reviewers of China include the Report of the Working Group on the Universal Periodic Review China, *supra* note 50, ¶ 29 (comments by Singapore), ¶ 41 (comments by Saudi Arabia), ¶ 50 (comments by Viet Nam), ¶ 55 (comments by India), ¶ 93 (comments by Thailand), ¶ 91 (comments by Colombia).

59 See Abebe, *supra* note 38, RAMCHARAN, *supra* note 39; Rosa Freedman, *New Mechanisms of the UN Human Rights Council*, 29 NETHERLANDS QUARTERLY OF HUMAN RIGHTS 289 (2011).

60 Several States commented on the politicisation of China's review although there was limited mention of sensitive issues such as the Tibetan Autonomous Region / Tibet and the Uighyurs in Xinjiang (NW China). *Supra* note 54.

61 Aide Memoire for 2006 inaugural candidature of China to the Human Rights Council, available at <http://www.un.org/ga/60/elect/hrc/china.pdf>.

of double standards and politicization.⁶²

This statement reflects the views previously expressed by the Like Minded Group and which, as noted above, find expression in the enabling resolutions. Three years later, when presenting for re-election, China pledged to continue “to take an active part in the work of the Human Rights council and the Third Committee of the General Assembly, . . . encouraging the above-mentioned institutions to deal with human rights issues in a fair, objective and non-selective manner.”⁶³ There is little scope to claim that China failed to deliver on its promised involvement in the Council. However, notwithstanding that fact, it is possible to question the impact of China’s involvement – whether it contributed towards the improvement of the human rights situation in states.

China has proven to be a very active reviewer state, participating in the interactive dialogue of virtually every working group during the first cycle of the review process (and indeed, the initial review of the second cycle).⁶⁴ This article considers every intervention made by China during the first cycle of universal periodic review. To do this, the reports of each working group were examined, with China’s comments isolated. The principal topics mentioned, even in passing, were identified and listed. A table of subjects of most interest to China thus emerged. The frequency with which China mentioned these most repeated topics is reflected in *Figure 1* (Comments by China). Note that no judgment is made as to whether China was supportive or positive in respect of any single topic for this chart, simply the mention of the topic itself was sufficient. Moreover, each topic is only recorded once, even if China makes repeated mentions of it within any particular report. This provides the data for the following analysis.

a. Topics Addressed by China

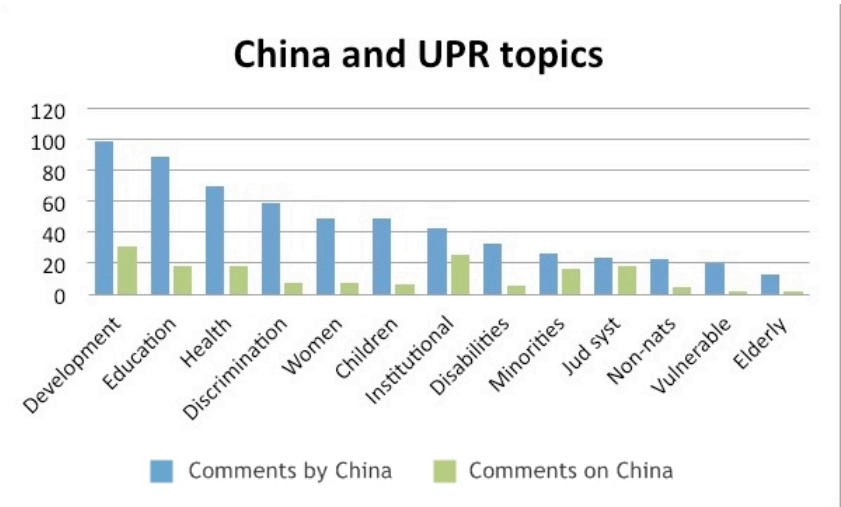
In general, a disparate range of topics are covered in each review, occasionally a single topic proves especially popular – e.g. the death penalty

62 Aide Memoire, *supra* note 61, at 9.

63 Note verbale, *supra* note 13, at point 4.

64 China did not comment on very few States and was timed out of commenting on a further six (Singapore, Lebanon, Turkey, Italy, Qatar and Nicaragua), though, of course, for those States it could file comments, questions and recommendations on the intranet.

FIGURE 1



during China's first review, as noted above. Ramcharan notes a “scatter-shot process”⁶⁵ to the selection of topics by member states. This is perhaps inevitable as the human rights situation is, of course, different in each states. A reviewing state is thus likely to identity different issues in different states. China certainly does this, although the data suggests the prevalence of certain topics.

As can be seen (figure one), development issues feature most prominently in the list of topics the Chinese delegation chose to focus on. In this category, fulfilment of the millennium development goals, economic development, social progress, poverty and employment are categorized together. Such issues were raised by China in over ninety periodic reviews. China's emphasis on poverty and development, health and education is perhaps unsurprising. There are two strands of explanation- firstly, that these are rights China considers crucially important and thus prioritises or secondly, these are rights which China itself fulfils to a greater rather than lesser degree.

On the former, China has long been a proponent of the preeminence of basic survival rights such as food, housing, healthcare and the development

65 RAMCHARAN, *supra* note 39, at 55.

through education within a strong institutional structure.⁶⁶ These are also rights which appear in China's first National Human Rights Action Plan 2009-2010,⁶⁷ a two year plan published following, but intimated during, China's own periodic review.⁶⁸ Perhaps they are thus "soft" options upon which China can comment from a relative position of strength, whilst still accepting advice on good practice to further develop its own position. A number of states commented positively on China's progress on development and its fulfilment of the millennium development goals.⁶⁹

The use of universal periodic review as a tool for securing the advancement of economic, social and cultural rights has been questioned and examined by Duggan-Larkin.⁷⁰ She notes that there is a degree of selectivity evident in the initial years of the process, least developed states facing far more questions on economic, social and cultural rights than developed states.⁷¹ This pattern certainly continued throughout the first cycle and appears to have continued in the initial session of the second cycle. China, however, did raise such issues irrespective of the development status of the country under review,⁷² although poverty and "development" are un-

66 White Paper Human Rights in China 1991, *supra* note 5, Part I, notes that the right to subsistence is the foremost human right the Chinese people fight for.

67 National Human Rights Action Plan for China 2009-2010, the Information Office of State Council, 2009 and indeed, subsequently appear in the second national plan of action 2012-2015 available online in English translation, *available at* http://news.xinhuanet.com/english/china/2012-06/11/c_131645029.htm.

68 This was welcomed during the working group. *See, e.g.*, Report of the Working Group on the Universal Periodic Review China, *supra* note 50, ¶ 30 (comments by Netherlands), ¶ 33 (comments by Algeria), ¶ 44 (comments by Uzbekistan).

69 *See, e.g.*, *supra* notes 55, 58.

70 Jessica Duggan-Larkin, *Can an Intergovernmental Mechanism Increase the Protection of Human Rights? The Potential of Universal Review in Relation to the Realisation of Economic, Social and Cultural Rights*, 28 NETHERLANDS QUARTERLY OF HUMAN RIGHTS 548 (2010).

71 *Id.* at 576.

72 For examples of China's participation in the reviews of developed States, *see, e.g.*, U.N. Human Rights Council, *Report of the Working Group on the Universal Periodic Review Canada*, ¶ 66, U.N. Doc. A/HRC/11/17; U.N. Human Rights Council, *Report of the Working Group on the Universal Periodic Review New Zealand*, ¶ 64, U.N. Doc. A/HRC/12/8; U.N. Human Right Council, *Report of the Working*

doubtedly more frequently mentioned in respect of less developed states. The fact that economic, social and cultural rights are often “progressively realisable” leads to a necessary flexibility in defining standards.⁷³ There are obvious benefits for progressively realizable rights should additional technical assistance be forthcoming. This issue is frequently mentioned by China, calling for technical assistance in the reports of several states, including Mauritania,⁷⁴ Democratic Republic of the Congo,⁷⁵ and Afghanistan.⁷⁶ It will be interesting to discover whether technical assistance has been offered, with those more developed states using the UPR process to channel their resources. The evidence so far (from interim reports) is not especially positive, but the reality will only become apparent as the second cycles reports emerge – part of the focus of the second cycle is to

Group on the Universal Periodic Review United States of America, ¶ 21, U.N. Doc. A/HRC/16/11. All make reference to economic and social rights, including health and education.

- 73 This will prove interesting when the Optional Protocol to the Covenant on Economic, Social and Cultural Rights enters into force. See, e.g., Malcolm Langford, *Closing the Gap? – An Introduction to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, 27 NORDISK TIDSSKRIFT FOR MENNESKRETTIGHETER 1 (2009); Claire Mahon, *Progress at the Front: The Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, 8 HUMAN RIGHTS LAW REVIEW 617 (2008). For earlier discussions, see, e.g., Michael Dennis and David Stewart, *Justiciability of Economic, Social and Cultural Rights: Should there be an international complaints mechanism to adjudicate the right to food, water, housing and health?*, 98 AMERICAN JOURNAL OF INTERNATIONAL LAW 462 (2004); Philip Alston, *No Right to Complain about being Poor: The need for an Optional Protocol to the Economic Rights Covenant*, in *THE FUTURE OF HUMAN RIGHTS PROTECTION IN A CHANGING WORLD* (A. Eide & Elgesen eds., 1991).
- 74 U.N. Human Rights Council, *Report of the Working Group on the Universal Periodic Review Mauritania*, ¶ 68, U.N. Doc. A/HRC/16/17 (Jan. 4, 2011).
- 75 U.N. Human Rights Council, *Report of the Working Group on the Universal Periodic Review Democratic Republic of the Congo*, ¶ 65, U.N. Doc. A/HRC/13/8 (Apr. 1, 2010).
- 76 U.N. Human Rights Council, *Report of the Working Group on the Universal Periodic Review Afghanistan*, ¶ 74, U.N. Doc. A/HRC/12/9 (July 20, 2009).

consider “the implementation of the accepted recommendations and the development in the human rights situation in the state under review.”⁷⁷ As states do not generally refute offers of technical assistance or recommendations that technical assistance be sought, this could prove informative as to whether assistance was forthcoming and had any benefit for human rights on the ground.

On the second strand (that China itself adequately fulfils the rights raised), China is a proponent of the right to development and related rights. Indeed China commenced its own interactive dialogue in its working group session by highlighting the fact it is the largest developing state in the world.⁷⁸ China has ratified relevant core treaties such as the International Covenant on Economic, Social and Cultural Rights. Moreover, in terms of the UNDP’s Human Development Index, China has a notable positive trajectory over the last thirty years.⁷⁹ China also secured early achievement of Millennium Development Goals. China has a good record of achievement in respect of development, making substantial progress towards achieving and now surpassing the Millennium Development Goals, a key indicator of development.⁸⁰ Within the U.N., the Chinese government have long participated in the evolution (from conceptualisation to adoption) of the Declaration on the Rights to Development and regularly co-sponsored the former Commission on Human Rights’ resolutions on the right to development. In the words of the State Council’s 1991 White Paper, “China pays close attention to the issue of the right to development.” Support for development has continued since the collapse of the Commission. Finally, China has education and health as focal points for its current governmental strategies, which, in human rights terms, find expression in the first (and indeed now also second) national plan of action for human rights.

77 G.A. Res. 65/281, *supra* note 2, at annex, ¶ C.1.6.

78 Report of the Working Group on Universal Periodic Review China, *supra* note 50, ¶ 18.

79 UNDP Human Development Index, China, *available at* <http://hdrstats.undp.org/en/countries/profiles/CHN.html>.

80 *See, e.g.*, MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE’S OF REPUBLIC OF CHINA, CHINA’S PROGRESS TOWARDS THE MILLENNIUM DEVELOPMENT GOALS REPORT 2010, *available at* http://www.undp.org/content/dam/undp/library/MDG/english/MDG%20Country%20Reports/China/China_MDGReport_2010.pdf.

Overall, social progress including education and health are central tenets of government policy.

Whilst it is undoubtedly easier to manoeuvre standards and espouse differing views of progress in respect of economic, social and cultural rights as opposed to instantly realizable and challengeable civil and political rights, China does comment on a number of issues concerning judicial reform in, for example, Poland⁸¹ and Bahrain,⁸² and the status and condition of prisons and detainees during reviews of various states including Zambia,⁸³ Cuba⁸⁴ and Malta.⁸⁵ It even comments on the internet, expression and the need to control pornographic material during the review of the Netherlands.⁸⁶ Of course, China itself prioritises judicial reform in its national action plans and other domestic initiatives and makes claims on progress in, *inter alia*, its national plan of action and its statement to the working group undertaking its own review.⁸⁷

Thus there is evidence that China elects to comment across the full range of human rights,⁸⁸ not simply economic and social rights. Admittedly,

81 U.N. Human Rights Council, *Report of the Working Group on Universal Periodic Review Poland*, ¶ 42, U.N. Doc. A/HRC/8/30 (May 23, 2008).

82 U.N. Human Rights Council, *Report of the Working Group on Universal Periodic Review Bahrain*, ¶ 33, U.N. Doc. A/HRC/8/19 (June 9, 2008).

83 U.N. Human Rights Council, *Report of the Working Group on Universal Periodic Review Zambia*, ¶ 12, U.N. Doc. A/HRC/8/43 (June 2, 2008).

84 U.N. Human Rights Council, *Report of the Working Group on Universal Periodic Review Cuba*, ¶ 66, U.N. Doc. A/HRC/11/22 (May 29, 2009).

85 U.N. Human Rights Council, *Report of the Working Group on Universal Periodic Review Malta*, ¶ 63, U.N. Doc. A/HRC/12/7 (June 4, 2009).

86 U.N. Human Rights Council, *Report of the Working Group on Universal Periodic Review Netherlands*, ¶ 46, U.N. Doc. A/HRC/8/31 (May 31, 2008). *See also*, U.N. Human Rights Council, *Report of the Working Group on Universal Periodic Review Mauritius*, ¶ 69, U.N. Doc. A/HRC/11/28 (Mar. 3, 2009).

87 National Action Plan, *supra* note 67. *See also*, *Report of the Working Group on Universal Periodic Review China*, *supra* note 50, ¶¶ 9-11. Of course, external bodies debate China's progress in some of these fields.

88 *See, e.g.*, U.N. Human Rights Council, *Report of the Working Group on Universal Periodic Review Cameroon*, ¶ 15, U.N. Doc. A/HRC/11/21 (May 29, 2009) (comments by the Chinese delegation on fair trial rights in Cameroon); U.N.

the most common issue raised which can come under civil and political rights is discrimination and the treatment of women and children – these issues of course appear not only in the International Covenant on Civil and Political Rights, which China has not yet ratified,⁸⁹ but also in the Conventions on Elimination of Discrimination against Women and on the Rights of the Child which it has. The prohibition on discrimination is, of course, pervasive; thus it applies also to economic, social and cultural rights. As figure 1, series 1 shows, after development (discussed above) China commented most frequently on education, health and discrimination. China has made significant gains in education and health, not least as evidenced by China's success in meeting millennium development goals in those areas. Discrimination, as noted above, is pervasive. China has commented on discrimination in a number of fields, including gender, national minorities, and the urban/rural differentiation of enjoyment of rights. Women and children also featured prominently, in almost fifty reviews. Both topics were often raised at once, perhaps indicating China's view that similar issues beset each group. Obviously, China has ratified both the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child, and thus

Human Rights Council, *Report of the Working Group on Universal Periodic Review Monaco*, ¶ 61, U.N. Doc. A/HRC/12/3 (June 4, 2009) (torture in Monaco); U.N. Human Rights Council, *Report of the Working Group on Universal Periodic Review Cambodia*, ¶ 48, U.N. Doc. A/HRC/13/4 (Jan. 4, 2010) (land reform in Cambodia); U.N. Human Rights Council, *Report of the Working Group on Universal Periodic Review Egypt*, ¶ 51, U.N. Doc. A/HRC/14/17 (Mar. 26, 2010) (corruption); U.N. Human Rights Council, *Report of the Working Group on Universal Periodic Review Mongolia*, ¶ 40, U.N. Doc. A/HRC/16/5 (Jan. 4, 2011) (environment).

- 89 In China's first commitments and pledges lodged when seeking membership of the inaugural Human Rights Council, China stated it was "in the process of amending its Criminal Civil and Administrative Procedure Laws and deepening judicial reform to create conditions for ratification at an early date." Aide Memoire, *supra* note 61, at IV. This disappeared from the pledges and commitments tendered in support of its re-election in 2009. Note verbale, *supra* note 13. The second national human rights action plan 2012-2015, published June 2012, notes only that China "has continued to carry out administrative and judicial reforms and prepare the ground for approval of the 'International Covenant on Civil and Political Rights.'" National Human Rights Action Plan of China (2012-2015) at part V, ¶ 1, *supra* note 67.

can mention women and children as key issues, reflecting ratifications of China and other states, as well as issues of concern for the U.N. generally.⁹⁰

With respect to treaty obligations, China does not systematically refer to the treaty ratification status and reporting obligations of states. However, there is evidence of China referring to treaty ratifications during the working group dialogues.⁹¹ In each of these instances, China is referring to treaties which the state has already signed or indicated a willingness to accept. Already, the High Commissioner on Human Rights has noted the positive effect of universal periodic review on treaty ratifications⁹² – arguably China could thus have made more recommendations concerning treaty ratification thereby demonstrating a first step towards impact on human rights. On cooperation with the Council, other human rights bodies and the OHCHR, China did make several relevant comments. For example, China commented on participation with the U.N. treaty bodies

90 For example, the U.N. created the U.N. Women (<http://www.unwomen.org>) as an umbrella to support women's empowerment and gender equality. Gender mainstreaming remains aspirationally embedded in all U.N. activities. Children are considered regularly by the U.N. General Assembly. Most recently, the third optional protocol to the Convention on the Rights of the Child was adopted, extending the right of individual communication to victims of infringements of that convention.

91 See, e.g., U.N. Human Rights Council, *Report of the Working Group on the Universal Periodic Review Jamaica*, ¶ 70, U.N. Doc. A/HRC/16/14, (Jan. 4, 2011); U.N. Human Rights Council, *Report of the Working Group on the Universal Periodic Review USA*, *supra* note 72, ¶ 21; U.N. Human Rights Council, *Report of the Working Group on the Universal Periodic Review Marshall Islands*, ¶ 29, U.N. Doc. A/HRC/16/12 (Apr. 18, 2011); U.N. Human Rights Council, *Report of the Working Group on the Universal Periodic Review Niger*, ¶ 60, U.N. Doc. A/HRC/17/15 (Mar. 25, 2011).

92 The Secretary-General, *United Nations Reform, Measures and Proposals: Note by the Secretary-General*, p. 18, *delivered to the General Assembly*, U.N. Doc. A/66/860 (June 26, 2012) (a note by the Secretary-General introducing the Report of the UN High Commissioner for Human Rights on the Strengthening of the Human Rights Treaty Bodies).

for several states, including Indonesia,⁹³ Czech Republic,⁹⁴ and Tunisia.⁹⁵ Once again, however, it stopped short of clear criticism of shortcomings. China itself pledged to fulfil its treaty obligations, “submit timely reports on implementation, and conduct constructive dialogues with relevant treaty bodies”⁹⁶ thus (again) is not commenting on anything it does not already claim it does.

b. Nature of Comments Made by China

What is particularly striking when reviewing all China’s interventions is the positivity of China’s contributions. Thus in very few situations does China request a state to undertake any positive action.⁹⁷ Rather, the Chinese government’s active interventions tend to suggest a state share its experiences (thus highlighting good practice) or simply respond to requests for further information. Indeed, when all comments made by all states are rated positive or negative, to the same criteria, China is the most positive Asian participant and, indeed, one of the most positive of all states participating in the review process.⁹⁸ This arguably demonstrates China’s understanding that the process should be constructive and non-

93 U.N. Human Rights Council, *Report of the Working Group on the Universal Periodic Review Indonesia*, ¶ 40, U.N. Doc. A/HRC/21/7 (July 5, 2012).

94 U.N. Human Rights Council, *Report of the Working Group on the Universal Periodic Review Czech Republic*, ¶ 30, U.N. Doc. A/HRC/8/33 (May. 23, 2008).

95 U.N. Human Rights Council, *Report of the Working Group on the Universal Periodic Review Tunisia*, ¶ 20, U.N. Doc. A/HRC/21/5 (July 9, 2012).

96 Note verbale, *supra* note 13, annexe at point 4.

97 In initial working group reports, the full comment including recommendations of the intervening state was noted in one paragraph, the recommendations being extracted at the end. In later reviews, the comments appear in order but the recommendations are extracted and only appear at the end of the report, with the State making the recommendation noted. It is thus possible to ascertain whether any State is deemed to have made recommendations, irrespective of the year of the review.

98 China’s most negative interventions are in respect of the United States of America, see Report of the Working Group on Universal Periodic Review, United States of America, *supra* note 72, ¶ 21; and St Lucia, see U.N. Human Rights Council, *Report of the Working Group on Universal Periodic Review, Saint Lucia*, ¶¶ 89.57, 89.62, U.N. Doc. A/HRC/17/6 (Mar. 11, 2011).

confrontational⁹⁹ and should ensure fulfilment of the objective of review specified by the Human Rights Council,¹⁰⁰ including the sharing of best practices. This China frequently does. Given the disparate human rights situations around the world, it is appropriate to question China's approach: will positive rhetoric really achieve the first objective of the review, *viz.* "[t]he improvement of the human rights situation on the ground,"¹⁰¹ or indeed, other objectives such as "fulfillment of the State's human rights obligations"?¹⁰² If no positive recommendations are made to seek international aid and technical assistance, even those comments of China related to that may not achieve their goal.

Some political commentators characterise China's attitude towards human rights (and other international issues) as "soft power"¹⁰³ – a relatively subtle diplomatic exercise, little by little extending influence and reach through non-confrontational means, demonstrating by doing, rather than pontificating. By focussing on positives and on development issues, China is well-placed to succeed with such an approach, choosing topics in which it arguably can claim to lead by example. In human rights terms, this reflects a pragmatic approach – the process is engaged with without delivering (and conversely, inviting) criticism. In any case, it is well-established that states are, traditionally, unwilling to comment on the human rights situation in another state unless either their nationals are involved¹⁰⁴ or the situation is such that it could either spill over into their territory (should the state be a neighbour) or threaten international peace and security.

5. EVALUATION OF CHINA'S CONTRIBUTION

To determine the contribution made by China to the review process, it is useful to first revisit the objectives of the first cycle of review. These were

99 As noted above, *see* Human Rights Council Res. 5/1, *supra* note 18, annexe ¶ 3(g), and the view of the Like Minded Group.

100 Human Rights Council Res. 5/1, *supra* note 18, annex ¶ 4.

101 *Id.* at ¶ 4(a).

102 *Id.* at ¶ 4(b).

103 *See, e.g.*, JOSHUA KURLANTZICK, CHARM OFFENSIVE: HOW CHINA'S SOFT POWER IS TRANSFORMING THE WORLD (Yale University Press 2007), for a fairly polemical view of China's rise against, in particular, the United States.

104 It thus becomes an issue of direct concern to the state.

stated as being improving the human rights situation and advancing the fulfilment of the state's human rights obligations as noted above,¹⁰⁵ as well as enhancing the state's capacity and technical assistance, sharing of best practice, support for cooperation and encouragement of engagement with the Council, other human rights bodies and the Office of the High Commissioner for Human Rights.¹⁰⁶ First and foremost, universal periodic review should have a demonstrable effect on human rights in every state, as noted above, it should not be simply a paper exercise. There are, of course, many different options for analysing the interventions made by China within the first cycle of universal periodic review. For the purpose of this article, the extent to which China is advancing the objectives of the review process is deemed central. This will be considered in the closing paragraphs. As a precursor, it is useful to first consider whether China's interventions are rooted in reciprocity and then the extent to which the comments reflect the tenor of the foundation U.N. documentation which tabulates the purpose of the review (General Assembly resolution 60/251 and Human Rights Council resolution 5/1).

a. Is Reciprocity a Factor?

China cannot be responding on the basis of reciprocity of comments. As noted above, China was not reviewed in the first session of the first cycle of reviews and thus commented on countries which did and did not comment on it. Furthermore, China participated in reviews of almost every state whilst (only) 115 states sought to comment on it. Obviously, maintaining such a level of involvement with the entire process allows China to monitor the mechanism by direct observation and participation. Given China's initial concerns over the process evolving into one of condemnation, rather than support, this is a sensible strategy. Moreover the topics raised by China do not necessarily reflect the topics raised by other states with respect to China (see figure 1, Comments on China). During China's own review, development issues (usually praise for China) then institutional issues (primarily ratification of treaties and institutional reforms of national bodies) were raised repeatedly. Although not shown on the comparative figure, the next most popular topic raised in comments on China was civil

105 *Supra* note 16 *et seq.*

106 Human Rights Council Res. 5/1, *supra* note 18, annexe ¶ 4 (a)-(f).

and political rights drawn primarily from the International Covenant on Civil and Political Rights, to which China is not a party. Religious freedom, freedom of expression and freedom of association were frequently raised and inevitably China was criticized (as noted above, primarily by members of the WEOG group) for failing to reach the required standards. Although China has not ratified the International Covenant, it does accept, indeed its representatives helped to draft,¹⁰⁷ the Universal Declaration of Human Rights which also proclaims expression and religion as basic freedoms. Moreover, the White Paper and the subsequent papers and national plans of action also contain detailed provision on this.¹⁰⁸

As figure 1 shows, after development (discussed above) China commented most frequently on education, health and discrimination. These were also popular topics to raise in respect of China's review. Education and health are two issues in which China has demonstrated considerable success (again, discussed above). Discrimination is pervasive across many/all rights and freedoms. For the purpose of figure 1, the main issues commented on involved gender-based discrimination, national minorities and discrimination of rural dwellers as opposed to urban dwellers. The latter is an acknowledged issue in China which the government claims to be addressing.¹⁰⁹ China also regularly commented on issues concerning women and children, making interventions on each (and usually both) in some fifty state reviews. Although similar issues were raised in respect of China, the numbers of comments are far less than those on institutional issues, minorities (status of rather than discrimination) and the judicial system. Even on a state by state review, there is little evidence that China raises topics which were raised in respect of it specifically by any state.

b. Are the UN Guidelines Followed?

China's approach may be considered to follow, almost exactly, the guidance issued by the General Assembly and then the Human Rights Council. Almost every state under review has ratified the U.N. Convention on the Rights of the Child, most have also ratified the Convention on the Elimi-

107 Dr. Peng Chun Chang of China helped draft the Universal Declaration.

108 *Supra* note 5; National Action Plans, *supra* note 67.

109 National report submitted by China, U.N. Doc. A/HRC/WG.6/4/CHN/1 and national action plans, *supra* note 67.

nation of Discrimination Against Women and the two international covenants (International Covenant on Economic, Social and Cultural Rights; International Covenant on Civil and Political Rights). Accordingly, under the relevant resolution, these issues fall within not only the Universal Declaration of Human Rights but also the human rights instruments to which a state is party.¹¹⁰ Moreover, addressing these rights and freedoms meets the objectives of improving human rights in the country under review, progressing the fulfilment of the state's human rights obligations and enhancing the state's capacity.¹¹¹

China certainly made frequent reference to the need for international technical aid and assistance to help countries combat poverty and develop.¹¹² The principal argument against such an approach is that China elected to make very few concrete recommendations to states under review, not even regularly recommending that technical assistance be sought. This can be problematic although it is acknowledged that there is a narrow line between support and interference. China has long maintained that the international community has little right to interfere in matters deemed within national sovereignty. It is thus not especially surprising that it takes a non-interventionist approach to the human rights situation within other states.¹¹³ However, does that really help the universal periodic review process improve the human rights situation on the ground? It is submitted that it does not. China's approach tends to the highlighting of good

110 Human Rights Council Res. 5/1, *supra* note 18, at annexe ¶¶ 1(b)-(c).

111 *Id.* ¶¶ 4(a)-(c).

112 See, e.g., Report of the Working Group on the Universal Periodic Review Democratic Republic of the Congo, *supra* note 75, ¶ 65; Report of the Working Group on the Universal Periodic Review Afghanistan, *supra* note 76, ¶ 74.

113 A much debated example of this is the Chinese government's negotiations based on the potential invocation of veto in the Security Council when discussing issues related to interventions in third States. For example, China abstained from the vote authorizing military enforcement of a no-fly zone ostensibly to protect civilians in Libya. Press Release, Security Council, Security Council Approves 'No-Fly Zone' Over Libya, Authorizing 'All Necessary Measures' to Protect Civilians, By Vote of 10 in Favour With 5 Abstentions, U.N. Doc. SC/10200 (Mar. 17, 2011). However, the threat of veto by China and Russia has prevented the Security Council from taking action (as of the submission of this article) in respect of Syria. In 19 July 2012, China and Russia vetoed a draft resolution on sanctions which could not then proceed to a formal resolution.

practice with little mention, particularly when dealing with less developed states, of action conducive to the improvement of the prevailing human rights situation. However, as noted above,¹¹⁴ China did not accept many recommendations for concrete change within its own territory during its review. It would thus be hypocritical for the Chinese government to take a more proactive, interventionist stance towards other states. In spite of the foregoing, China did make several references to national human rights institutions. These are, of course, considered to be beneficial in promoting the protection of international human rights within states,¹¹⁵ although China does not have one. It is thus perhaps striking that the state chose to comment on national institutions in several working group dialogues.¹¹⁶ The prevailing U.N. view is undoubtedly that national human rights institutions should be encouraged. Indeed, considerable efforts are ongoing in Asia and the Pacific, for example, supporting the establishment of such bodies in states in the region.

China clearly projects a very non-confrontational stance, one which many commentators consider to be predicated on geography and/or development. McMahon and Ascherio,¹¹⁷ Freedman¹¹⁸ and Abebe¹¹⁹ are amongst the commentators noting a north-south divide, or to be more precise, West-

114 U.N. Human Rights Council, *Final Outcome of the Universal Periodic Review, China*, U.N. Doc. A/HRC/11/37 (June 3, 2009); Human Rights Decision 11/110, *supra* note 12; McMahon & Ascherio, *supra* note 52.

115 Paris Principles relating to the Status of National Human Rights Institutions, G.A. Res. 48/134 (Dec. 20, 1993); *see also*, Human Rights Council Res. 9/12, U.N. Human Rights Council, *UN Voluntary Goals on Human Rights*, article 1(c), U.N. Doc. A/HRC/RES/9/12 (Sept. 18, 2009).

116 *See, e.g.*, U.N. Human Rights Council, *Report of the Working Group on the Universal Periodic Review Mali*, ¶ 24, U.N. Doc. A/HRC/8/50 (June 13, 2008); U.N. Human Rights Council, *Report of the Working Group on the Universal Periodic Review Sri Lanka*, ¶ 27, U.N. Doc. A/HRC/8/46 (June 5, 2008); U.N. Human Rights Council, *Report of the Working Group on the Universal Periodic Review Cyprus*, ¶ 66, U.N. Doc. A/HRC/13/7 (Jan. 4, 2010); U.N. Human Rights Council, *Report of the Working Group on the Universal Periodic Review Suriname*, ¶ 51, U.N. Doc. A/HRC/18/12 (Oct. 22, 2010).

117 McMahon & Ascherio, *supra* note 52.

118 Freedman, *supra* note 59.

119 Abebe, *supra* note 38.

ern European and Others Group augmented by EU members of the Eastern European bloc against the rest of the U.N. Western and Eastern European states are of course all subject to fairly robust human rights standards through the Council of Europe's Convention on Human Rights, overseen by the European Court of Human Rights. Other members of the Western Europe and Others Group have their own strong national systems: Canada, Australia and New Zealand, for example. A more adversarial type of approach is thus normal in these states and human rights standards prevalent in each state are regularly challenged in courts and tribunals. However, these are also relatively established, developed states, ranking amongst the highest levels of development in the world. They thus may view the periodic review process more as mechanism for fast-tracking states to higher levels of compliance with human rights than a means to discuss problems and challenges. For China, a much more literal approach is taken to ensuring the review process is cooperative, non-judgmental, etc. Whether this will result in positive changes remains to be seen. For sure, most African and Asian states take a similar approach to that evinced by China. Neumayer¹²⁰ is one commentator noting the general reluctance of states to criticise each others' human rights performance. In part this reticence can be traced to a fundamental tenet of public international law – non-interference in national sovereignty,¹²¹ a doctrine China avidly supports.¹²²

6. CONCLUDING COMMENTS

Without doubt China is notable in the working group reports as making very supportive and encouraging comments to some of the least developed states on earth, drawing attention to small gains and the presence of political will for change. This certainly permits China to claim credit in its promotion of human rights around the world.¹²³ However, the lack

120 Neumayer, *supra* note 32.

121 U.N. Charter article 2(7).

122 See, e.g., *supra* note 113.

123 CHEN Dingding explores the growth of China's participation in international human rights in Dingding Chen, *China's Participation in the International Human Rights Regime: A state identity perspective*, 2 CHINESE JOURNAL OF INTERNATIONAL POLITICS 399 (2009). See also, Bjorn Ahl, *Statements of the Chinese Government before the Human Rights Treaty Bodies: Doctrine and practice of treaty*

of criticism and constructive comments requiring positive action belies passivity on the part of China. Arguably, it is all show – overt indication of a willingness to participate occluding a lack of engagement with proactive change agents within states. China's involvement in the process is perhaps inevitable, given how hard it lobbied for a softly approach. It would be hypocritical of it to then absolve itself of participation. Although China can, on the basis of statistics, claim to be an active participant, it is clear that China's involvement is more passive than active. China's involvement is a classic case of “much ado about nothing” – justifying a fanfare and claims of “credit” on the international stage, without any underpinning substance.

It can be averred that China's successful negotiation, on behalf of the Like Minded Group, of a more “watered-down” version of universal periodic review than perhaps would otherwise have been the case, marked China's card. It was not open to China to do anything other than go along with the new mechanism; after all, it had in effect got what it wanted and thus was under a moral obligation to demonstrate willingness. For China, this is a “win, win” situation as China's participation is unequivocal evidence of its participation in the U.N. human rights system. That China has fully engaged with the process is beyond question even although there are criticisms that China's participation has skewed the process away from a critical analysis of state performance.

At the inaugural session of the Human Rights Council, the Vice Minister of Foreign Affairs of the People's Republic of China concluded his remarks with the following words of an ancient Chinese poem: “[t]he new will invariably supersede the old, and change is expected of every generation.”¹²⁴ The veracity of that statement with respect to international human rights monitoring is incontestable. Whether H.E. Mr Yang's aspiration that “the Human Rights Council will go farther along the right track

implementation, 12 AUSTRALIAN JOURNAL OF ASIAN LAW 82 (2012), which analyses many of the apparent inconsistencies with the approach of the government to the treaty bodies. For a general review of China's evolving role, see Bjorn Ahl, *Exploring Ways of Implementing International Human Rights Treaties in China*, 28 NETHERLANDS QUARTERLY OF HUMAN RIGHTS 361 (2010).

- 124 YANG Jiechi, Vice Minister of Foreign Affairs of the People's Republic of China at the Inaugural Session of the United Nations Human Rights Council Geneva, p. 5 (June 20, 2006), available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/statements/china.pdf>.

and make greater contribution to improving human well-being”¹²⁵ is less obvious. China has undoubtedly been an active and vocal participant in universal periodic review thus it would appear the Chinese government considers universal periodic review to be the “right track” for monitoring human rights. What is difficult is determining the extent to which China’s positive, supportive interventions actually contribute to “improving human well being,” and, of course, the “human rights situation on the ground.” China has good form with active participation in universal periodic review, the substantial benefits however remain to be seen.

POSTSCRIPT

Since this article was finalised, China has been re-elected to the Human Rights Council for a full three year term (2014-2016) and has completed its second cycle universal periodic review (October 2013, working group interactive dialogue; February 2014, China’s views on recommendations communicated).

125 *Id.*

Keeping Rights Alive: Reform and Reconciliation in Post-War Sri Lanka

Mario Gomez¹

1. INTRODUCTION

a. The End of the War

The war in Sri Lanka came to a sudden end in May 2009 when the Sri Lankan military defeated the Liberation Tigers of Tamil Eelam (LTTE) and eliminated its senior leadership. The United Nations (U.N.), international organizations and domestic organizations alleged that thousands of civilians died in the final phases of the war.² These claims were strenuously denied by the government and the military. Till now there has been no accounting process of the final stages of the war.

In January 2010, the President called an election two years before the end of his term and won a landslide victory. His victory at the election was fuelled to a large extent by his government's victory over the LTTE. In April 2010, a Parliamentary election was held in which the ruling United People's Freedom Alliance (UPFA) coalition won convincingly and came close to securing a two thirds majority in Parliament.

Many other societies that transited from war to peace or dictatorship to democracy were forced to negotiate political compromises, establish new institutions and constitutions, and in some cases, probe the past. However, not in Sri Lanka. The government's decisive victory over the LTTE has

1 Executive Director, International Centre for Ethnic Studies (ICES) and Visiting Lecturer, University of Colombo.

2 See U.S. DEP'T OF STATE, REPORT TO CONGRESS ON INCIDENTS DURING THE RECENT CONFLICT IN SRI LANKA (2009); INT'L CRISIS GRP., WAR CRIMES IN SRI LANKA, ASIA REPORT No. 191 (2010).

enabled it to ignore the issues that gave rise to the violence and focus on securing a political future for the regime.³

Sri Lanka is a much safer place to live in than it was three years ago. The horrific violence that destroyed lives, property, relationships, childhoods, aspirations and social life is a thing in the past, at least for the moment. The insecurities and fear that the violence generated have been extinguished.

Yet the unwillingness of the state to address long standing and deep rooted social and political issues is slowly generating a new set of fears and insecurities. Despite the rhetoric, little has occurred since the end of the war to suggest that reconciliation, constitutional reform or the rule of law are priorities for the government. Rather, the only constitutional amendment that was passed has strengthened the power of an already powerful President, made it possible for him to contest a third term and undermined the credibility of the country's independent institutions. Post-war reconstruction and rebuilding has been tightly controlled with little consultation with stakeholders. Impunity, which has been a problem for over thirty years, has not been addressed. Accompanying this has been an unprecedented crackdown on dissent and the media, sometimes resulting in the death or disappearance of the dissenter.⁴

3 See the statement of the "*The Elders*" in 2010. The Elders consist of Martti Ahtisaari, Kofi Annan, Ela Bhatt, Lakhdar Brahimi, Gro Brundtland, Fernando Henrique Cardoso, Jimmy Carter, Graça Machel, Mary Robinson and Desmond Tutu (Chair). Nelson Mandela and Aung San Suu Kyi are honorary Elders. See Press Release, Sri Lanka's Disturbing Actions Met by 'Deafening Global Silence' (Aug. 3, 2010), <http://theelders.org/article/sri-lankas-disturbing-actions-met-deafening-global-silence>.

4 See INT'L BAR ASS'N, JUSTICE IN RETREAT: A REPORT ON THE INDEPENDENCE OF THE LEGAL PROFESSION AND THE RULE OF LAW IN SRI LANKA 57 (2009). According to Journalists for Democracy, the number of journalists killed between 2004 and August 2009 was 34, and according to the News Safety Institute more than 50 journalists have left the country. See TRANSPARENCY INT'L SRI LANKA, SRI LANKA: GOVERNANCE REPORT 2009 50 (2009), available at <http://www.tisirilanka.org/pub/pb/pdf/sgr2009.pdf>; INT'L FED'N OF JOURNALISTS, KEY CHALLENGES FOR MEDIA AFTER WAR'S END: REPORT OF THE INTERNATIONAL PRESS FREEDOM MISSION TO SRI LANKA (2010), available at <http://www.ifj.org/assets/docs/236/115/1d464ec-8892c73.pdf>. See also <http://www.i-m-s.dk/files/publications/Key%20challenges%20for%20media%20after%20war%27s%20end->

b. The Last Phase of the War

Few would have predicted such a rapid end of the war in Sri Lanka. The last phase of the war commenced in 2006 soon after the LTTE attempted to assassinate the Army Commander and the Defense Secretary, both of which did not succeed. As late as February 2009, the LTTE sent two light aircrafts into the city of Colombo in a sortie that caused considerable panic. By the middle of May that year, however, the war was over and one of Asia's longest civil wars had come to an abrupt end. Fighting alongside the government forces were a breakaway faction of the LTTE and other Tamil groups that had previously fought against the Sri Lankan state.⁵

U.N. officials estimated that about 7,500 were killed and about 15,000 were wounded between January and early May 2009 when the LTTE and the government fought the final battles.⁶ Many more are thought to have died between early May and May 19th when the government announced the elimination of most of the LTTE leadership.⁷ The International Crisis Group (ICG) estimates that "tens of thousands" died in the last phase of the war.⁸ According to the ICG, there were frequent violations of international humanitarian law by both the government and LTTE in the five months leading to the end of the war.⁹

According to the ICG, there is credible evidence that the armed forces repeatedly shelled civilians in "No Fire Zones" declared by the government, shelled hospitals and makeshift medical facilities, and shelled humanitarian operations and food distribution points. The report also charges the LTTE with shooting civilians who attempted to flee into government controlled

IFJ%20Mission%20report-dec09-ENG.pdf.

5 For a "ringside" account of the last phase of the war, see GORDON WEISS, *THE CAGE: THE FIGHT FOR SRI LANKA AND THE LAST DAYS OF THE TAMIL TIGERS* (2011).

6 INT'L CRISIS GRP., *supra* note 2, at 5.

7 *Id.* at 1-2.

8 *Id.* at 5.

9 *Id.*

areas and forcibly keeping civilians against their will despite the threats to their lives and the lack of food and other basic supplies.¹⁰

The U.S. Department of State in its report lists several hundred incidents which it stated may amount to violations of international humanitarian or human rights law or constitute crimes against humanity committed by both the armed forces and the LTTE.¹¹

The government appointed Lessons Learnt and Reconciliation Commission (LLRC) concluded that the armed forces did not deliberately target the civilians during the large stages of the war. It recommended, however, that specific events including the shelling of hospitals and “No Fire Zones” be investigated further.¹²

c. Background to the Conflict

Sri Lanka consists of seven major population groups: Sinhalese – mainly Buddhist, but also Christian; Tamils – mainly Hindu, but also Christian; Muslims; Tamils of Recent Indian Origin – who were brought from India to work the tea plantations and who live mainly in the Central part of the country; Burghers – descendants of the Dutch, Portuguese and British who inter-married; Malays – Muslims who were part of a migration from South East Asia; and other smaller groups of minorities.

Charges of discrimination have been hurled from different groups. The Sinhalese contended that the Tamils wielded a disproportionate amount of public power when Sri Lanka was known as Ceylon and a British colony. It was argued by the Sinhalese that this was a part of a deliberate policy on the part of the British to “divide and rule.” A consequence of this policy was a disproportionate number of public service appointments that was held by the Tamils, at the time of independence. It is also alleged that educational and other facilities in the Northern Province, which is almost 90 percent

10 *Id.*

11 U.S. DEP’T OF STATE, *supra* note 2.

12 LESSONS LEARNT AND RECONCILIATION COMM’N, REPORT OF THE COMMISSION OF INQUIRY ON LESSONS LEARNT AND RECONCILIATION (2011) [hereinafter *LLRC Report*], on file with the author. See below for a fuller discussion of the LLRC Report.

Tamil, were at a better stage of development than other predominantly Sinhalese areas at that time.

From the Tamil's come allegations that there has been a consistent policy of discrimination by Sinhalese dominated governments since independence. Few government resources have been channeled into areas where Tamils reside, and they have been discriminated against with regard to the use of the Tamil language, educational opportunities, and access to public service jobs.¹³

I. VIOLENCE BY SINHALA GROUPS

Sri Lanka has experienced a number of bouts of political violence over the past 40 years. In 1971, the Janatha Vimukthi Peramuna (People's Liberation Front) or JVP sought to capture state power through a violent struggle that was crushed ruthlessly by the government at that time.¹⁴

In 1987, the JVP staged a comeback. During a two year period they brought the country to a halt through a series of tactics that entailed intimidation and fear. The violence came to an end in November 1989 when most of the leadership was killed. Some escaped, returned to Sri Lanka and formed a mainstream political party which is now represented in Parliament.

II. VIOLENCE BY TAMIL GROUPS

In 1976, a Tamil political party adopted the "Vaddukoddai Resolution" which called for the creation of "a free, sovereign, secular, socialist state of Tamil Eelam" based on the right of self-determination inherent to every

13 See JOHN RICHARDSON, *PARADISE POISONED: LEARNING ABOUT CONFLICT, TERRORISM AND DEVELOPMENT FROM SRI LANKA'S CIVIL WARS* (2005); R. HOOLE ET AL., *THE BROKEN PALMYRA, THE TAMIL CRISIS IN SRI LANKA, AN INSIDE ACCOUNT* (1992); K. M. DE SILVA, *REAPING THE WHIRLWIND: ETHNIC CONFLICT, ETHNIC POLITICS IN SRI LANKA* (2000); M. R. NARAYAN SWAMY, *TIGERS OF LANKA: FROM BOYS TO GUERRILLAS* (2006) (1994).

14 H.A.I. GOONETILLEKE, *THE APRIL 1971 INSURRECTION IN CEYLON: A BIBLIOGRAPHICAL COMMENTARY* (2d ed. 1975).

nation. The resolution argued that the Tamils had tried to live together with Sinhalese but this was now not possible.

The Vaddukodai Resolution marked the commencement of a struggle for the establishment of a separate state of Tamil Eelam. While there had been many demands for Tamil's independence before, this Resolution articulated for the very first time, in very clear terms, the demand for an independent state for the Tamil Nation based on their historical habitation in the Northern and Eastern provinces.¹⁵

The Resolution came four years after the adoption of the 1972 Constitution. The 1972 Constitution made Sri Lanka a unitary state for the first time, gave "foremost" place to Buddhism, and made Sinhala the official language. It also expressly precluded the courts from reviewing the constitutional validity of legislation and removed an important safeguard for minorities that was in the previous constitution. At around this time, language based "standardization" with regard to entry to Sri Lankan universities had angered Tamil youth. The Vaddukodai Resolution and the 1972 Constitution are turning points in Sri Lankan politics. They resulted in the marginalization of moderate forces and the emergence of the radical forces among the Tamils of Sri Lanka.

Tamil groups began to embrace violence in the mid-1970s. Over a period of time the LTTE emerged as the strongest group. In 1983, thirteen army soldiers were killed by the LTTE in Jaffna and soon after ethnic riots erupted in Colombo. Many Tamils were killed and many lost property. Many left for overseas with disgust and anger. There was substantial evidence to show that the state was involved in fuelling the riots or at the very least "standing by" while the rioting and looting took place.¹⁶

Since then, the war was fought brutally by both the government and LTTE. Both sides have attacked not only military targets but also civilians and their property, and other places including temples and places of historical and intellectual value. Over the years, the U.N. Special Procedures

15 The Vaddukodai Resolution was adopted by the Tamil United Liberation Front (TULF) at its First National Convention. It was held at Vaddukodai on May 14, 1976 under the chair of S.J.V. Chelvanayakam.

16 PAUL SIEGHART, *SRI LANKA: A MOUNTING TRAGEDY OF ERRORS: REPORT OF A MISSION ON SRI LANKA IN JANUARY 1984 ON BEHALF OF THE INTERNATIONAL COMMISSION OF JURISTS AND ITS BRITISH SECTION, JUSTICE* (1984).

and human rights groups have documented thousands of human rights violations by both the state and non-state actors.

The Muslims, many of whom have lived for years in the North and East, have suffered particularly. In 1990, about 70,000 Muslims were evicted overnight from the North by the LTTE and many have still not been able to return. During the conflict, Muslim villages were attacked and Muslim villagers were butchered by the LTTE who accused Muslims for collaborating with Sri Lankan armed forces. Both Muslims and Tamils share the same language.¹⁷

In January 2003, a group of students led by the student body of the South Eastern University adopted the Oluvil Declaration at a mass political rally held in Oluvil in the Ampara District of the Eastern Province. The Oluvil Declaration argued that the Muslims of the North East are a separate nationality and nation with a distinct identity, religion and culture. It noted that the North East is the traditional homeland of the Muslims and called for an autonomous, self-governing political unit linking all Muslim majority areas of the north and east (Muslim Thesam).

Tamil groups had previously presented similar ideas in what is commonly known as the “Thimpu Principles” and the Oluvil Declaration is in some respect a response to the “Thimpu Principles.” At the Peace Talks held in Thimpu, Bhutan in July 1985 six Tamil groups presented four cardinal principals which they said should shape any solution to the ethnic conflict:

1. Recognition of the Tamils of Sri Lanka as a distinct nationality.
2. Recognition of an identified Tamil homeland and the guarantee of its territorial integrity.
3. Based on the above, recognition of the inalienable right of self-determination of the Tamil nation.

17 THE QUEST FOR REDEMPTION: THE STORY OF THE NORTHERN MUSLIMS: FINAL REPORT OF THE CITIZENS’ COMMISSION ON THE EXPULSION OF MUSLIMS FROM THE NORTHERN PROVINCE BY THE LTTE IN OCTOBER 1990 (2011).

4. Recognition of the right to full citizenship and other fundamental democratic rights of all Tamils who look upon the island as their country.¹⁸

In the 1980s, there was support for the militant Tamil groups from India and many of the armed groups received secret military training supported by the Research and Analysis Wing (RAW). Indian support for the LTTE began to wane when a LTTE suicide bomber killed Prime Minister Rajiv Gandhi in the 1990s.

In 1987, the Indian government persuaded the government of Sri Lanka and the LTTE to sign a peace accord and agree to a quasi-federal state. Although the Sri Lankan government introduced the 13th and 16th Amendments to the Constitution and introduced a quasi-federal structure, the agreement collapsed and the war resumed.¹⁹

For many years, the LTTE had been in control of a portion of the North East of the country, mainly in the Jaffna, Mannar, Killinochchi, Mullativu and Vavuniya districts. In those regions, it established rudimentary state structures, including its own police force and a courts system. In LTTE controlled areas, both free movement and free expression were subject to restrictions and any form of dissent tightly controlled.²⁰

A new phase in the conflict commenced in 2006. After the LTTE launched a series of claymore mine attacks and attempted to kill the Army Commander and the Secretary Defense in suicide attacks, government

18 Statement made by a delegation of Tamil groups consisting of PLOTE, EPRLF, EROS, LTTE, TELO, and the TULF at the peace talks between the Government of Sri Lanka and Tamil groups held in Thimpu, Bhutan, July 1985. See *TAMIL UNITED LIBERATION FRONT TOWARDS DEVOLUTION OF POWER IN SRI LANKA: MAIN DOCUMENTS AUGUST 1983 TO OCTOBER 1987 (1988)*, also commonly known as the "Thimpu Principles." See also KETHESHWARAN LOGANATHAN, *SRI LANKA: LOST OPPORTUNITIES: PAST ATTEMPTS AT RESOLVING ETHNIC CONFLICTS* (1996).

19 *India- Sri Lanka: Agreement to Establish Peace and Normalcy in Sri Lanka*, 26 AMERICAN INTERNATIONAL LEGAL MATERIALS 1175 (1987), available at <http://www.jstor.org/stable/20693151>. See KEETHAPONCALAN S. I., *CONFLICT AND PEACE IN SRI LANKA: MAJOR DOCUMENTS: WITH AN INTRODUCTORY NOTE ON EACH DOCUMENT* 104 (2009).

20 See JAYADEVA UYANGODA, *ETHNIC CONFLICT IN SRI LANKA: CHANGING DYNAMICS* (Muthiah Alagappa ed. 2007).

forces launched a sustained military campaign to eliminate the LTTE. This culminated in the defeat of the LTTE as a military force in May 2009.

d. The 2002–2003 Peace Process

There have been many attempts to negotiate peace in Sri Lanka, the most serious of which was in 2002–2003. The United National Front government was elected to power in December 2001 and the LTTE declared a unilateral ceasefire on the Christmas Eve of that year. The government responded and the two parties signed a Norwegian-brokered Ceasefire Agreement in February 2002.²¹ After a year of unexpected progress and six rounds of talks in Thailand, Norway, Japan and Germany, the process stopped as suddenly as it started.

The Ceasefire Agreement of 2002 was based on an acceptance of the then-military balance of power, which meant an acceptance by the Sri Lankan State that the LTTE controlled certain areas of territory and the recognition of those forward defence lines and an equal parity of status for the LTTE. The Ceasefire Agreement also emphasised the urgency of restoring a sense of normalcy in the North of the country and an opening of the only land route – the A9 highway – between the North and South. It ensured that Norway would continue as a mediator and establish the Sri Lanka Monitoring Mission (SLMM), consisting of Scandinavian monitors led by Norway and local monitoring teams to monitor the ceasefire.²²

e. The Tsunami of 2004

The tsunami in December 26, 2004 killed over 30,000 people and destroyed livelihoods and property on an unprecedented scale. It devastated coastlines on the North, East, South and West coasts of Sri Lanka and shattered the hopes and aspirations of people from all communities. Many of those who suffered from the tsunami had already suffered as a result of the conflict. While the scale of the tsunami was unprecedented, the wave of human solidarity it generated was similarly unparalleled. It mobilised Sri Lankans and non-Sri Lankans, both within and outside the country on an unprecedented scale. Many from all around the world were moved to pledge large sums

21 KEETHAPONCALAN, *supra* note 19, at 414, 428.

22 For an insider's account of the peace process, see AUSTIN FERNANDO, *MY BELLY IS WHITE* (2008) (Austin Fernando is the former Secretary of Defense).

of money for reconstruction and rebuilding. Others were moved to visit and participate physically in the reconstruction and rebuilding process. Governments from all parts of the world also responded magnificently with generous pledges of humanitarian aid and other assistance.

At the time the tsunami struck, there was some apprehension that the ceasefire would not hold much longer. Soon after the tsunami hit, and in the light of the destruction caused to the Northern and Eastern regions of the country, some foresaw that the wave of destruction had opened a window of opportunity to revive and nourish a stagnant peace process. It provided an opportunity to look at the creation of new arrangements in relation to post-tsunami rebuilding and reconstruction in the hope that these initial arrangements would metamorphose into something more permanent for the North and East. However, this did not materialize as anticipated.

The LTTE and the government began discussions on a joint post-tsunami aid mechanism but this process was shattered by the assassination of a senior LTTE leader in February 2005. Negotiations resumed through the facilitation of the Norwegian Government, and then in late June 2005, the Sri Lankan Government and the LTTE signed the Post Tsunami Operational Management Structure (P-TOMS) Agreement.²³ This agreement envisaged the establishment of a three-tiered system that would involve the government, the LTTE and the Muslims in the supervision and implementation of post-tsunami rebuilding activities. It was the first time that the LTTE had entered into an agreement with the government on a matter pertaining to governance.

The P-TOMS Agreement drew considerable criticism from most sections of the Muslim community. Muslims, especially those in the Eastern coastal regions, suffered significantly as a result of the tsunami and the Muslims were angered because of their exclusion from the process of negotiations and also because of the role that was assigned to them in the P-TOMS structure. The agreement was challenged by members of the Janatha

23 KEETHAPONCALAN, *supra* note 19, at 461.

Vimukthi Peramuna (JVP) before the Supreme Court and the Court stayed parts of the agreement in an Interim Order given in July 2005.²⁴

2. POST-WAR DEVELOPMENTS

a. The Eighteenth Amendment of the Constitution

The end of the ethnic war provided a huge window of opportunity to seek ethnic accommodation through a power sharing mechanism and to initiate a process of reconciliation for the three main ethnic groups – Sinhalese, Tamils and Muslims – devastated and traumatized by 30 years of conflict. Instead, what one saw a little over a year after the war ended, was a constitutional amendment that enhanced the powers of an already strong President and undermined the credibility of the country's independent institutions.

At the end of August 2010, the government suddenly announced that it was proposing to introduce the Eighteenth Amendment of the Constitution which was to make radical changes to the scheme of the Seventeenth Amendment. The Eighteenth Amendment was endorsed by the President and Cabinet of Ministers as an “urgent bill” on August 30, 2010 and sent for review to the Supreme Court on August 31, 2010.

On September 1, 2010, six petitioners argued that the Bill violated entrenched provisions of the Constitution and required the approval of the people at a referendum apart from the two thirds majority in Parliament. In an opinion communicated to the Speaker of Parliament the Supreme Court held that the amendment did not require a referendum and could be passed with the two thirds majority.²⁵

The Eighteenth Amendment was passed by Parliament on September 8, 2010 with the two-thirds majority. Although the ruling alliance did not secure the two-thirds majority at the April parliamentary elections, it managed to win over some members of the opposition, including support

24 Wimal Weerawansa v. Attorney Gen., Supreme Court of Sri Lanka Minutes of July 15, 2005 (Interim Order of the Court).

25 THE CONSTITUTION OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA [SRI LANKA CONST.] Sep. 7, 1978 art. 120-24.

from the Sri Lanka Muslim Congress that helped it to secure the required two-thirds majority.

The amendment restores the unfettered power that the President previously had to make appointments to key public institutions with little consultation.²⁶ It also removed the two-term limit on the Presidency.

Prior to the Eighteenth Amendment, the President could hold office for a maximum of two six-year terms. The Eighteenth Amendment removed this restriction and allowed the President to hold office for as many terms as possible. While the Constitution gives the President sweeping powers, the two term limit guaranteed that an incumbent could hold office for a maximum of 12 years. It provided hope to those aspiring for political power that they could aspire to the Presidency within the framework of the Constitution and without resorting to extra-constitutional means. These guarantees have now been removed.

The Eighteenth Amendment also repealed the Seventeenth Amendment to the Constitution, passed unanimously by Parliament in October 2001. The Seventeenth Amendment had previously established the Constitutional Council that was one of the few fetters on the exercise of Executive power.

The Seventeenth Amendment has established a multi-partisan Constitutional Council that consisted of the Speaker (Chairperson), the Prime Minister (PM), the Leader of the Opposition, a nominee of the President, five persons nominated jointly by the PM and the Leader of the Opposition, and one person nominated by the majority of members who belonged to political parties other than the parties to which the PM or Opposition Leader belonged. The Seventeenth Amendment also sought to establish an independent Election Commission, National Police Commission, Public Service Commission and an Administrative Appeals Tribunal, and to enhance the independence of the Judicial Service Commission.²⁷

The Constitutional Council was responsible for approving or recommending appointments to several of the independent institutions in the country including the Human Rights Commission, the Police Commission, the Election Commission, the Supreme Court, Court of Appeal, and the Attorney General. The Seventeenth Amendment took away the unbridled

26 See discussion on the 17th Amendment to the Constitution below.

27 SRI LANKA CONST. amend. XVII (certified 2001).

power that the President previously had with regard to the making of these key public appointments. Since then several statutes also integrated the Constitutional Council into their schemes of appointments. For example, the three appointments by the President to the Monetary Board of the Central Bank must now be made with the concurrence of the Constitutional Council.²⁸ Appointments to the Public Utilities Commission must be made by the Minister with the concurrence of the Constitutional Council.²⁹ Appointments to the Welfare Benefits Board must be made by the Minister in consultation with the Constitutional Council.³⁰

The Constitutional Council became defunct in 2005 when the terms of six of its members expired.³¹ For about two years, minority parties in Parliament could not agree on who their nominee to the Constitutional Council would be. Yet even once this was resolved in January 2008, the President refused to make the appointments and constitute the Constitutional Council.

In July 2006, the government set up a Parliamentary Select Committee to review the Seventeenth Amendment and suggested reforms, and in March 2008, the Prime Minister stated the President would not constitute the Constitutional Council until he received the Select Committee Report. After nine meetings, the Committee submitted an interim report recommending certain amendments to the 17th Amendment.³²

In the meantime, the President continued to make appointments to key public positions, including the courts and the independent commissions, in a violation of the explicit constitutional provisions that such appointments

28 Monetary Law (Amendment) Act (Act No. 32/2002) § 3(c) (Sri Lanka).

29 Public Utilities Commission of Sri Lanka Act (Act No. 35/2002) § 3(1).

30 Welfare Benefits Act (Act No.24/2002) § 4(2) (Sri Lanka).

31 For a more detailed discussion of these developments, see TRANSPARENCY INT'L SRI LANKA, *THE FORGOTTEN CONSTITUTIONAL COUNCIL: AN ANALYSIS OF THE CONSEQUENCES OF THE NON IMPLEMENTATION OF THE 17TH AMENDMENT* (2008), available at <http://www.tisrilanka.org/?p=229>; Cyrene Siriwardena, *Public Institutions and de-politicization: Rise and the fall of the 17th Amendment*, in SRI LANKA STATE OF HUMAN RIGHTS 2007, LAW & SOCIETY TRUST 237-61 (2008).

32 *Interim Report of the Select Committee of Parliament on the 17th Amendment to the Constitution*, 18 LAW & SOCIETY TRUST REVIEW 1 (2007).

could be made only after receiving recommendations or the approval of the Constitutional Council.³³

While the President refused to appoint members to the Constitutional Council, the Cabinet of Ministers transferred the functions and powers of the National Police Commission to the Inspector General of Police, and the powers of the Public Service Commission to the Secretaries of Ministries and Heads of Departments.³⁴

Under the Eighteenth Amendment, the Constitutional Council has been replaced by an ineffective Parliamentary Council that consists entirely of members of Parliament. The President is required to seek the observations of the Parliamentary Council but is not obliged to follow those observations. The unbridled power that the President previously had in the making of key public appointments has been restored.

b. The Presidency

These Constitutional changes have to be assessed in the light of an ultra-strong Executive President that wields enormous powers. The Presidency has been the single most dominant factor affecting the exercise of power in Sri Lanka. It has allowed for the exercise of vast amounts of political power with very little accountability.³⁵

The President is the Head of State, Head of the Executive and the Government, and the Commander in Chief of the Armed Forces.³⁶ The President is elected directly by the people for a fixed term of six years and is not a member of the Legislature.³⁷ As a result of a subsequent constitutional amendment, the President may call for an election after four years, at his or her discretion.

The current Constitution enables the President to assume any Ministerial responsibility, including that of Finance, and appoint members of the cabinet with no obligation to consult with the Prime Minister or the

33 See TRANSPARENCY INT'L, *supra* note 30.

34 *Id.*

35 See JOSEPH A. L. COORAY, CONSTITUTIONAL AND ADMINISTRATIVE LAW OF SRI LANKA (1995); A. JEYARATNAM WILSON, THE GAULLIST SYSTEM IN ASIA: THE CONSTITUTION OF SRI LANKA (1978) (1980).

36 SRI LANKA CONST. art. 30.

37 *Id.* at art. 30(2).

Legislature on these appointments.³⁸ He or she is immune from judicial review while he or she is in the office and has the power to dissolve a democratically elected legislature without assigning reasons; in some cases after the legislature has completed one year in the office and in other cases even within the first year.³⁹ In 2003, the then President assumed three crucial ministries, dissolved what was a democratically elected legislature without assigning any reason, and called a fresh election in April 2004.

The President may also declare an emergency and govern by way of emergency regulations with little judicial oversight.⁴⁰ A small fetter on the President's power was the Constitutional Council introduced by the Seventeenth Amendment to the Constitution in 2001, which has now been repealed.

The vast powers reposed in the office of the President has enabled the office holder to influence many of the independent institutions that are responsible for protecting and promoting human rights, including the judiciary, the Attorney General, and the Human Rights Commission. Soon after the April 2010 Parliamentary election, the Attorney General was brought directly under the purview of the President. Ensuring a more equitable balance of power among the three organs of the government – the Executive, the Legislature and the Judiciary – is a priority if effective institutions are to emerge in Sri Lanka.

c. Withdrawal of GSP Plus Concessions

In August 2010, the European Union suspended the GSP Plus trade concession to Sri Lanka. According to the E.U., there were significant shortcomings in the way Sri Lanka was implementing three core U.N. human rights treaties which entitled it to the special tariff concession.

The E.U.'s GSP Plus concession enabled developing countries to export to E.U. markets under a reduced tariffs rate so long as they conformed to certain governance and human rights standards. Sri Lanka applied for and was granted the GSP Plus benefits in 2005. At that time the country stated

38 *Id.* at art. 44-6.

39 *Id.* at art. 70.

40 See SRI LANKA CONST. art. 154(J)(2), according to which a proclamation of emergency by the President under the Public Security Ordinance cannot be challenged in a court of law.

that it had ratified and was effectively implementing 16 core human rights and labor conventions.⁴¹ In 2008, the country sought continuation of the GSP Plus benefits stating that there was tangible progress in complying with the relevant conventions.

According to the government, exports to EU markets grew by 42% over a five-year period as a result of the GSP Plus concession. The apparel industry, which provided direct employment to about 270,000 and indirect employment to a further one million, benefitted in particular.⁴²

In October 2008, the EU decided to initiate an investigation to ascertain whether the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the Convention on the Rights of the Child (CRC) were being effectively implemented in Sri Lanka. The E.U. appointed three independent experts to assist the investigation.⁴³ The government of Sri Lanka refused to participate in the investigation.

After a review of the report submitted by the three independent experts, a review of U.N. and other documents, the E.U. concluded in October 2009 that there were significant shortcomings in the way the three conventions (ICCPR, CAT and CRC) were being implemented. In February 2010, it announced that it was suspending the GSP Plus concessions with effect from August 15, 2010.

Subsequently, the E.U. identified 15 measures to enable a six-month extension of the GSP Plus concession. These included a recommendation to

41 COMMISSION OF THE EUROPEAN COMMUNITIES, REPORT ON THE FINDINGS OF THE INVESTIGATION WITH RESPECT TO THE EFFECTIVE IMPLEMENTATION OF CERTAIN HUMAN RIGHTS CONVENTIONS IN SRI LANKA (2009), *reprinted in* 20 LAW & SOCIETY TRUST REVIEW 4 (2010).

42 See GOVERNMENT OF SRI LANKA, THE OBSERVATIONS OF THE GOVERNMENT OF SRI LANKA IN RESPECT OF THE "REPORT ON THE FINDINGS OF THE INVESTIGATION WITH RESPECT TO THE EFFECTIVE IMPLEMENTATION OF CERTAIN HUMAN RIGHTS CONVENTIONS IN SRI LANKA" (2009), *reprinted in* 20 LAW & SOCIETY TRUST REVIEW (2010).

43 See Interim Report by an Expert Committee of the European Union in Respect of Renewal of the Special Incentive Arrangement for Sustainable Development and Good Governance (GSP+), Aug. 19, 2009, THE IMPLEMENTATION OF CERTAIN HUMAN RIGHTS CONVENTIONS IN SRI LANKA (2009), *reprinted in* 20 LAW & SOCIETY TRUST REVIEW (2010).

repeal or modify the Emergency Regulations and the PTA (Prevention of Terrorism Act) to bring them in line with the ICCPR; to permit the ICRC to monitor the conditions of detainees; to inform the family members of detainees of their whereabouts and to release them or bring them to trial; to ensure that appointment to key institutions are in accordance with the Seventeenth Amendment; and to extend invitations to the U.N. Special Procedures that had sought permission to visit.

The government, however, did not find these recommendations acceptable. In the face of the government's intransigence, its unwillingness to engage in a genuine dialogue and its unwillingness to make even some basic changes, the EU was forced to withdraw the concessions despite the consequences it may have on the employees of the various industries that were exporting to the E.U.

d. The Trial of the Former Army Commander

Sarath Fonseka was the Commander of the Sri Lanka Army at the time the state unleashed its final assault on the LTTE in 2008 and 2009. He escaped an LTTE suicide assassination attempt in April 2006.

Soon after the war against the LTTE ended in May 2009, Fonseka was appointed as the Chief of Defense Staff, a largely ceremonial position with little real power. This was done to prevent the possibility of an army takeover in the public euphoria following the elimination of the LTTE and the killing of its leadership.

Fonseka then resigned from the army and decided to contest the incumbent President at the January 2010 poll as the candidate from the Opposition alliance. For the Opposition, the only way they could have matched the soaring popularity of a President (who had ended the war) was to field another "war hero" in the form of General Fonseka. Despite Fonseka's popularity as the general who led the war, President Rajapakse won the election comfortably and took office for the second term.

Fonseka's decision to contest the President was viewed as an act of betrayal by the regime and Fonseka was made to pay heavily for this. After he lost the contest for the Presidency, Fonseka contested the Parliamentary elections in April 2010 and was elected as a Member of Parliament. The President then constituted a court martial under the Army Act to try

Fonseka on several counts while he was holding office as Commander of the Army.

On September 17, 2010, the Court Martial convicted General Fonseka, stripped him of his rank and sentenced him to an aggregate of 30 months imprisonment. The conviction and sentence was confirmed by the President on September 29, 2010, as he was required to do. In this case, the court martial was established by the President, the members were appointed by the President, and the conviction and sentence were affirmed by President, as required by the Army Act.⁴⁴ As a result of his conviction, Fonseka lost his Parliamentary seat. Imprisonment for a period in excess of six months disqualifies a person from being elected as a Member of Parliament.⁴⁵

Fonseka challenged his expulsion from Parliament before the Supreme Court. One of the issues before the court was whether a Court Martial was a “court” in terms of the constitutional provisions. Five judge benches of the Supreme Court held that it was and affirmed the conviction of Fonseka.⁴⁶

From Constitutional perspective, expulsion of members of the legislature must be done after observing all the guarantees of due process and a fair trial. Where the Executive initiates a process of expulsion and interferes with the trial, there is an obvious violation of the separation of power. The initiation of the process of disqualification by the Executive would also constitute a violation of the franchise which is vested in the people according to the Constitution.⁴⁷

One of the consequences of this process has been that the only serious political contender to the incumbent President (because of his participation in the war against the LTTE) has now been marginalized and incarcerated through a process that has taken place within the formal confines of the law. It is a process that has received the stamp of approval from the Supreme

44 Army Act (Act No. 17/1949) (Sri Lanka).

45 SRI LANKA CONST. art. 89(d).

46 Gardihewa Sarath Fonseka v. Dhammika Kithulegoda, Supreme Court Minutes of Sri Lanka of January 10, 2011.

47 See SRI LANKA CONST. art. 4(e).

Court. In May 2012, Fonseka received a pardon from the President and was released from prison.

e. The U.N.'s Accountability Panel

On June 22, 2010, Secretary General Ban Ki-moon appointed a three-member panel to advise him on violations of human rights and humanitarian law that occurred during the final stages of the conflict. The Panel consisted of Marzuki Darusman (Indonesia), Steven Ratner (USA) and Yasmin Sooka (South Africa), and the Panel commenced its work on September 16, 2010.

According to the U.N., the panel was established in accordance with the agreement that the Secretary General reached with the President during his visit to the country in May 2009, soon after the end of the war. At the end of his visit, the Secretary General and President issued a joint statement in which the President of Sri Lanka agreed to address accountability issues in relation to the violation of international humanitarian law and human rights law during the final stages of the conflict. According to the Secretary General, addressing accountability was an essential foundation for durable peace and reconciliation in the country and the Panel of Experts was appointed as a follow up to this joint statement. The report of the Panel of Experts was released in April 2011.⁴⁸

The government tried to prevent the appointment of the U.N. panel by constituting a "Lessons Learnt and Reconciliation Commission" under the Commissions of Inquiry Act in May 2010. The LLRC, however, was asked to inquire into events only between 2002 and 2009 and was given a narrow and ambiguous mandate.

The government's version of the last stages of the war was that it pursued a humanitarian operation with the aim of implementing a policy of "zero civilian casualties." According to the Panel of Experts, however, there were credible allegations, which if proven, show that there were a range of serious violations of international humanitarian law and human rights law committed by both the Government of Sri Lanka and the LTTE, some of which would amount to war crimes and crimes against humanity. According to the Panel, the conduct of the war "represented a grave assault

48 U.N. Secretary-General, *Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka*, (Mar. 31, 2011), http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf.

on the entire regime of international law designed to protect individual dignity during both war and peace.”⁴⁹

The Panel noted that the government repeatedly shelled three “No Fire Zones” in which it had asked civilians to congregate and repeatedly shelled hospitals on the frontlines. The Panel also found that there were credible allegations that the LTTE had fired at civilians attempting to flee their control, used civilians as a buffer, recruited children, and used military equipment in the proximity of civilians.

The Panel’s report generated hostile reactions from the government, some sections of the media and the political Opposition, and the government engaged in a major diplomatic offensive with a focus on China, Russia and members of the Non-Aligned Movement in an effort to prevent further action by the U.N.

The Panel was appointed to advise the Secretary General on the measures he should take to address accountability. Without authorization from the Security Council, General Assembly or the Human Rights Council, it is unlikely that the Secretary General could take steps to implement the recommendations of the report.

f. The Lessons Learnt and Reconciliation Commission

The government tried to prevent the appointment of the U.N. panel by constituting a “Lessons Learnt and Reconciliation Commission” under the Commissions of Inquiry Act in May 2010. The LLRC was given a narrow and ambiguous mandate and asked to inquire into events only between 2002 and 2009. The establishment of the LLRC was viewed with skepticism and the independence of some of its members was questioned.⁵⁰

Despite the narrowness of its mandate and the initial reservations that many had, the LLRC issued a report in November 2011 with a broad range of recommendations for reconciliation and institutional reforms.⁵¹ As the LLRC observed:

the root cause of the ethnic conflict in Sri Lanka lies in the failure of successive Governments to address the genuine grievances of

49 *Id.* at ii.

50 See INT’L CRISIS GRP., RECONCILIATION IN SRI LANKA: HARDER THAN EVER, ASIA REPORT No. 209, 22-6 (2011).

51 LLRC Report, *supra* note 12.

the Tamil people. The country may not have been confronted with a violent separatist agenda, if the political consensus at the time of independence had been sustained and if policies had been implemented to build up and strengthen the confidence of the minorities around the system which had gained a reasonable measure of acceptance.⁵²

A political solution is imperative to address the causes of the conflict. Everybody speaks about it, though there is no agreement about the diagnosis and the prescription. It is a process that is ongoing at the moment. At such a moment it is most opportune to look back at what is not so long a period of history of Sri Lanka as an independent country. ... and some commentators even remarked that after 63 years of independence the country is, in some ways, back at square one.⁵³

The LLRC concluded however, that there was no deliberate targeting of civilians during the large stages of the war although it recommended that specific events be further investigated.

g. The Human Rights Council Resolution

In March 2012, the U.N. Human Rights Council adopted a resolution on Sri Lanka. This was the first resolution against Sri Lanka by the new Human Rights Council, a similar resolution in May 2009, soon after the war ended, having been defeated.

The U.S sponsored resolution welcomed the recommendations contained in the LLRC's report

... including the need to credibly investigate widespread allegations of extrajudicial killings and enforced disappearances, demilitarize the north of Sri Lanka, implement impartial land dispute resolution mechanisms, re-evaluate detention policies, strengthen formerly independent civil institutions, reach a political settlement on the devolution of power to the provinces, promote and protect the right of freedom of expression for all and enact rule of law reforms.⁵⁴

The resolution called upon the government to "implement effectively the constructive recommendations made in the report of the Lessons Learnt

52 *Id.* at 291.

53 LLRC Report, *supra* note 12, at 291.

54 U.N. Human Rights Council, Promoting Reconciliation and Accountability in

and Reconciliation Commission, and to take all necessary additional steps to fulfill its relevant legal obligations and commitment to initiate credible and independent actions to ensure justice, equity, accountability and reconciliation for all Sri Lankans.”⁵⁵ The resolution asked the government to present “a comprehensive action plan detailing the steps that the Government has taken and will take to implement the recommendations made in the Commission’s report, and also to address alleged violations of international law.”⁵⁶ The government engaged in a major diplomatic initiative to prevent the adoption of the resolution, but did not succeed. India was among those countries that supported the resolution.

One of the country’s most respected diplomats, now retired, writing after the event called it the “Death of Sri Lankan diplomacy by suicide!”⁵⁷ According to Dhanapala, “domestically, the Geneva resolution might help to ensure the re-election of the President; but internationally, it may destabilize the entire country, dragging us all into a dystopia that our people do not deserve.”⁵⁸

3. IMPUNITY IN SRI LANKA

a. Post-Conflict Justice

Impunity has been one of the major human rights issues over the past thirty years. Despite several hundred extra judicial killings, abductions, suicide bombings, claymore mine attacks, torture and other acts of violence and intimidation, few of the perpetrators have been made accountable for their

Sri Lanka, U.N. Doc. A/HRC/19/L.2 (Mar. 22, 2012).

55 *Id.*

56 *Id.*

57 Jayantha Dhanapala, *The Death of Sri Lankan Diplomacy by Suicide*, LANKA MONTHLY DIGEST, (May, 2012), <http://www.LMD.lk>, as reprinted in THE NATION, May 20, 2012, <http://www.nation.lk/edition/news-features/item/6259-death-of-sri-lankan-diplomacy-by-suicide.html>.

58 *Id.*

crimes.⁵⁹ Both the state and non-state actors have been guilty of human rights violations and violations of international humanitarian law.

The state has been reluctant to use the criminal law to pinpoint accountability and formal court processes have been employed only on limited occasions. So far prosecutions have been initiated and sustained only in a handful of cases. Three of the most high profile of these cases was the Krishanthi Kumaraswamy case,⁶⁰ the Embilipitiya massacre,⁶¹ and the Bindunuwewa massacre.⁶² In the Bindunuwewa case, the conviction was overturned in appeal.⁶³ As an eminent human rights scholar observes “a once respected legal and institutional system that upheld the rule of law has over some three decades been degraded into one characterized by pervasive immunity.”⁶⁴

Rather than using the regular justice system, the state has instead chosen to rely on a variety of ad hoc commissions, most of which have had little or no impact.⁶⁵ The Commission of Inquiry Act, under which

59 See Mario Gomez, *Sri Lanka: Case Study on Post-Conflict Justice*, in 2 THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE: A WORLD STUDY ON CONFLICTS, VICTIMIZATION, AND POST-CONFLICT JUSTICE 763-84 (M. Cherif Bassiouni ed., 2010).

60 The Krishanthi Kumaraswamy Case, (1998) High Ct. Decision of July 3, 1998-(Sri Lanka). See also SHYAMALA GOMEZ & MARIO GOMEZ, GENDER VIOLENCE IN SRI LANKA: FROM RIGHTS AND SHAME TO REMEDIES AND CHANGE 102-03 (1999).

61 State v. Dayananda Lokugalappathi and others, (2002) High Ct. 121 of 1994, conviction on Feb. 10, 1999 (Sri Lanka).

62 The Bindunuwewa Case, High Ct. (2002) 763 of 2002 (Sri Lanka). See also Alan Keenan, *Bindunuwewa: Justice Undone?*, in SRI LANKA: STATE OF HUMAN RIGHTS 2004, LAW & SOCIETY TRUST 185-242 (2004); Alan Keenan, *Making Sense of Bindunuwewa – From Massacre to Acquittals*, 15 LAW & SOCIETY TRUST REVIEW (2005).

63 *Sammy v. Attorney Gen.*, Supreme Court of Sri Lanka Minutes of May 27, 2005, reprinted in 15 LAW & SOCIETY TRUST REVIEW (2005).

64 Nigel Rodley, quoted in Kishali Pinto-Jayawardena, *Still Seeking Justice in Sri Lanka: Rule of Law, the Criminal Justice System and Commissions of Inquiry since 1977* vii INTERNATIONAL COMMISSION OF JURISTS (2010).

65 See Amnesty International, *Twenty Years of Make-Believe: Sri Lanka's Commissions of Inquiry* (2009); Kishali Pinto-Jayawardena, *Still Seeking Justice in Sri Lanka: Rule of Law, the Criminal Justice System and Commissions of Inquiry since 1977*,

most of these commissions have been established, gives the Executive the power to determine the scope of the inquiry, select the commissioners, control its finances, and order termination of the inquiry with no reasons having to be provided. There is no obligation on the Executive to ensure the publication of commission reports.

By and large, there has been no accountability for serious human rights violations and impunity has been allowed to flourish.⁶⁶ Some of the commissions of inquiry found evidence of the systematic use of violence by state officers and recommended prosecution. Despite these findings, few prosecutions were initiated and fewer sustained. In majority of the cases, there have been no investigations. Survivors of some victims have received compensation and other government assistance as a result of the

INTERNATIONAL COMMISSION OF JURISTS (2010); KISHALI PINTO-JAYAWARDENA, A LEGACY TO REMEMBER: SRI LANKA'S COMMISSIONS OF INQUIRY, 1963-2002 (2010).

- 66 See also Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Mission to Sri Lanka*, U.N. Doc. E/CN.4/2006/53/Add.5 (Mar. 27, 2006) (by Philip Alston); Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Follow-up to Country Recommendations*, U.N. Doc. A/HRC/8/3/Add.3 (May 14, 2008) (by Philip Alston); Colombo, *Sri Lanka: Press Statement by the U.N. High Comm'r for Human Rights on the Conclusion of Her Visit to Sri Lanka*, Asian Human Rights Commission, Oct. 13, 2007; Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Mission to Sri Lanka*, U.N. Doc. A/HRC/7/3/Add.6 (Feb. 26, 2008) (by Manfred Nowak); U.N. Human Rights, Office of the High Comm'r for Human Rights, Joint Civil Society Report for Universal Periodic Review of Sri Lanka to the U.N. Human Rights Council (May, 2008), <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRLKStakeholdersInfoS2.aspx>; U.N. Human Rights, Office of the High Comm'r for Human Rights, UN Experts Concerned at Suppression of Criticism, Impunity, (Feb. 9, 2009) (quoting the views of 10 independent U.N. experts and special rapporteurs); Statement by Ms. Magdalena Sepúlveda, Independent Expert on Human Rights and Extreme Poverty, delivered on behalf of all Special Procedures of the Human Rights Council at the Eleventh Special Session of the U.N. Human Rights Council on the Human Rights Situation in Sri Lanka *in* Press Release, Human Rights Council, Human Rights Council Opens Eleventh Special Session on Situation of Human Rights in Sri Lanka (May 29, 2009); UNIV. TEACHERS FOR HUMAN RIGHTS, A MARRED VICTORY AND A DEFEAT PREGNANT WITH FOREBODING (2009); See Kishali Pinto-Jayawardena, *supra* note 64; International Crisis Group, *supra* note 2, at 27-30.

findings of some of the ad hoc commissions of inquiry. Memorials have been built in a few cases.

At the moment, it is highly unlikely that the state will pursue any process of accountability with regard to serious human rights violations committed in the past. There may be some prosecutions of LTTE cadres, but there will certainly be no prosecution against state officials. There is also unlikely to be any form of truth seeking that will enable victims from all communities to place their stories before an official panel and create a historical record of the conflict.

Article 12 of the Sri Lankan Constitution guarantees the right to equality before the law and the right to equal protection of the law. Article 4(d) of the Constitution obliges all organs of government to respect, secure and advance the fundamental rights recognized by the Constitution. Despite these clear constitutional guarantees and the international obligations that the country has taken on, there is unlikely to be any accountability for human rights violations committed by the state in the recent past. A change of regime may provide a small window of opportunity for holding perpetrators responsible. But this is unlikely to occur in the near future, and even if it does occur, it will need to be made use of quickly.⁶⁷

b. A Crisis of Institutions

Sri Lanka has witnessed a progressive decline in the independence and effectiveness of most of its democratic institutions over these past forty years. These include the police, the public service, the Parliamentary Oversight Committees, the Attorney General's Department, the judiciary, the Public Service Commission, the Human Rights Commission, the Police Commission, and the Commission to Investigate All Forms of Bribery or Corruption (CIABOC). At the moment there is no national institution that

67 "Regime change" has historically provided an opportunity for positive change. However, regimes tend to be more open to change at the beginning of their tenure and tend to adopt more confrontational positions as they become more secure in power.

commands the credibility and respect of all sections of Sri Lankan society and of all its communities.⁶⁸

In 2007, the High Commissioner for Human Rights Louise Arbour, observed that “people from across a broad political spectrum and from various communities have expressed to me a lack of confidence and trust in the ability of existing relevant institutions to adequately safeguard against the most serious human rights abuses.”⁶⁹

The concentration of power, first in a supreme Parliament in the seventies, followed by a concentration of power in a strong executive Presidency since 1978, has affected all of the country’s institutions in a profoundly negative way. As a result of this concentration of power, Sri Lankan institutions have been rendered ineffective for the most part through politicization or dominance by the Executive.⁷⁰

4. TRANSITING FROM WAR TO THE RULE OF LAW

a. The Challenges of Transition

Sri Lanka post-war experiences are different to many other post-war societies in two ways. First, the war ended without a negotiated peace agreement and with a clear victor: the Sri Lankan state. Second, there have been no major constitutional, institutional or other changes to accommodate and respond to the root causes of the war. The only major constitutional

68 See also INT’L BAR ASS’N, *supra* note 4; INT’L CRISIS GRP., SRI LANKA’S JUDICIARY: POLITICIZED COURTS, COMPROMISED RIGHTS, ASIA REPORT No. 172 (2009); TRANSPARENCY INT’L SRI LANKA, NATIONAL INTEGRITY SYSTEM ASSESSMENT: SRI LANKA 2010 (2011); BASIL FERNANDO, RECOVERING THE AUTHORITY OF PUBLIC INSTITUTIONS: A RESOURCE BOOK ON LAW AND HUMAN RIGHTS IN SRI LANKA (2009).

69 Statement of Louis Arbour, High Commissioner for Human Rights (Oct. 13, 2007).

70 See also TRANSPARENCY INT’L SRI LANKA, SRI LANKA: GOVERNANCE REPORT (2008); TRANSPARENCY INT’L SRI LANKA, *supra* note 4; LAW & SOCIETY TRUST, SRI LANKA: STATE OF HUMAN RIGHTS 2007, 237-61 (2007).

change that occurred was aimed at consolidating the regime's hold on political power.

The post-war situation in many countries provides a unique opportunity to investigate past human rights violations and prosecute serious violators; initiate a process of reparations, reconciliation and healing; engage in institutional re-building and reform; and probe the causes that gave rise to the conflict. In many post-war societies, pressures from external actors and pressures from victims and civil society within the country have forced the political regime to engage in a search for accountability and in institutional reform. The U.N. intervened in the former Yugoslavia, Rwanda, Sierra Leone, Timor and Cambodia. The situations in the Democratic Republic of Congo, the Central African Republic, Northern Uganda and Kenya are now before the International Criminal Court. In South Africa pressures from within ensured that reconciliation and accountability were not ignored in a post-apartheid society.⁷¹

Sadly, this has not been the case in Sri Lanka. The political regime has steadfastly refused to deal with issues of accountability or address questions of power sharing and has resisted external governments and entities that have raised these issues. One of the longstanding demands from Tamil political actors has been the demand for a power sharing agreement that will enable Tamils in North and East to exercise some degree of control over those geographical areas. The government's failure in the past to respond to these demands led to the civil war and a reluctance to respond yet again risks another cycle of violence.

b. Real Reconciliation

The ending of a nearly three decades of protracted and bloody conflict has opened many opportunities for bringing about reconciliation between the different communities, especially among the Sinhalese, Tamils and the Muslims... Acknowledging the losses and suffering of the past and providing mechanisms for recompense, social justice and for restoration of normalcy and expressions of empathy and solidarity, are steps aimed at redress. Relationship - building following violent conflict, addressing issues of lack of

71 M. Cherif Bassiouni ed., *supra* note 58.

trust, prejudice, and intolerance whilst accepting commonalities and differences, is the essence of reconciliation.⁷²

People from all corners of the country who came before the Commission left with the Commission an almost palpable impression that this is Sri Lanka's moment of opportunity for Sri Lankans to collectively chart a vision for a harmonious future for our nation and a wholesome Sri Lankan identity.⁷³

Most Sri Lankans are basking in a peace that the end of the war has brought. The sense of fear that previously prevailed has been lifted and optimism has begun to grow. For many other people however, especially those living in the North and East, and those whose lives were closely entwined in the conflict, life continues to be problematic. While the direct violence has stopped, some of them still live in fear and others in a sense of insecurity. The military presence, especially in the North, remains strong, many still pine for and seek information on the fate of family and friends and there is a fear of a deliberate alteration of the ethnic balances in the North and East. Transparency and participation remain a big concern. The government has embarked on a major development drive to re-build damaged areas, build new infrastructure, and promote tourism and investment. Yet much of this policy is tightly controlled. There is little transparency and little consultation with stakeholders.

The end of the war three years ago has provided Sri Lanka with a unique opportunity to build a plural and democratic society wedded to human rights and the rule of law. It has provided an opportunity to forge a national consensus on major social and political issues, pursue equitable and sustainable economic growth and enhance the country's social capital.

Yet developments over the past three years indicate otherwise. The current regime's unwillingness to address the issues that led to the violence; the unwillingness of the regime to be transparent and to engage in widespread consultation on reconciliation and economic policy among other things; and the sense of unease and sometimes fear that prevails in some parts of the country, hover like a dark cloud. Sri Lankans have missed several previous opportunities to forge a sustainable peace.⁷⁴ This is perhaps the

72 LLRC Report, *supra* note 12, at 8.136.

73 *Id.* at 8.140.

74 KETHESHWARAN LOGANATHAN, *supra* note 18; JOHN RICHARDSON, PARADISE POISONED: LEARNING ABOUT CONFLICT, TERRORISM, AND DEVELOPMENT FROM

best opportunity the country has had in the recent past, and yet there is a sense of unease that this opportunity may also be squandered.

The end of the violence is a necessary first step in the process of transforming the Sri Lankan conflict. In Sri Lanka the direct violence has ceased, not through a negotiated settlement or a military stalemate, but through a decisive military victory. Moving from here to a place where differences are reconciled peacefully, where the voices of all social groups are heard, and where equality, equity and transparency will form fundamental principles of governance, is the more challenging next step.

Many other societies that have moved from war to peace, or from dictatorship to democracy, have been forced to negotiate political compromises and put in place new constitutional and institutional arrangements. Some have even dealt with the past. Not so in Sri Lanka. The state's decisive military victory has enabled it to craft its own agenda. One would have expected a political regime basking in the afterglow of victory to seek reconciliation and deal with some of the political issues that gave rise to the violence. This has not happened. Instead there has been a move towards a further consolidation of power in the ruling regime and a reluctance to tolerate dissent. The LLRC has noted in its report:

From the representations made to the Commission it has formed the distinct impression that the problem is far from solved. There is a sense of unhappiness among the minorities that the State had neglected its responsibility towards them. Since it is a political problem, it needs to be addressed politically. It is necessary to address the root causes of the conflict. It is the primary duty of the State to be proactive and the citizenry should respond in a spirit of give-and-take.⁷⁵

The Commission was also reminded that despite the lapse of two years since the ending of the conflict, the violence, suspicion and sense of discrimination are still prevalent in social and political

SRI LANKA'S CIVIL WARS (2007).

75 LLRC Report, *supra* note 12, at 8.141.

life. Delay in the implementation of a clearly focused post conflict peace building agenda may have contributed to this situation.⁷⁶

c. Sustaining the Peace

Reach out to those you fear
Touch the heart of complexity
Imagine beyond what is seen
Risk vulnerability one step at a time

John Paul Lederach⁷⁷

Forging a sustainable peace will at a minimum, require the following:

I. CONSTITUTIONAL AND INSTITUTIONAL REFORM

A new Constitution, drafted with the participation of all ethnic and social groups, will need to incorporate an effective scheme for the sharing of power among local government areas, the regions and the center.⁷⁸ The powers to be exercised by each sphere of government should be defined precisely and should not be capable of modification without the consent of the regions.⁷⁹

The Executive Presidency should either be abolished or amended and a more equitable balance of power must be established amongst the three organs of state: the Executive, the Legislature and the Judiciary. If the Presidency is amended, the President should not be permitted to hold any ministerial portfolio. The Cabinet of Ministers should consist entirely of

76 *Id.* at 8.147.

77 JOHN PAUL LEDERACH, *THE MORAL IMAGINATION: THE ART AND SOUL OF BUILDING PEACE* (2005).

78 See *AUTONOMY AND ETHNICITY: NEGOTIATING COMPETING CLAIMS IN MULTI-ETHNIC STATES* (Yash Ghai ed., 2000), for a discussion of how multi-ethnic states have addressed diversity and difference through constitutional and other arrangements.

79 See EDRI SINHA, GOMEZ, THAMILMARAN AND WELIKALA, *POWER SHARING IN SRI LANKA: CONSTITUTIONAL AND POLITICAL DOCUMENTS, 1926 – 2008* (2008), for an analysis of previous attempts at power sharing; *A NEW CONSTITUTIONAL FRAMEWORK FOR SRI LANKA: PROPOSALS FROM BUSINESS AND CIVIL SOCIETY* (Mario Gomez ed., 2007).

Members of Parliament. The immunity provided to an incumbent President must be removed.

A constitutional right to access information that should be in the public domain must be guaranteed. This must be supported by the enactment of a Right to Information law that will spell out in detail the procedures for accessing public information. Such a law must be drafted in consultation with the media and civil society.⁸⁰

II. DEALING WITH THE PAST

A Truth and Reconciliation Commission should be established. Such a Commission must be independent and be established under special legislation passed for this purpose. It must be empowered to probe human rights violations over the past 40 years; identify perpetrators; recommend sanctions or other appropriate action; recommend compensation and other reparations; and identify measures to promote reconciliation and healing among the different ethnic and social groups.

III. A TRANSPARENT LAND POLICY

Access to land was one of the drivers of the conflict and is a potential source of future conflict and violence. Land policy in a post-war environment must be based on transparent and principled criteria and administered by an independent institution. Displaced persons have a right to return to their places of origin and to have their housing, land and other property restored to them. Where restoration is not possible, as determined by an independent tribunal, then they have a right to adequate compensation or other reparations.⁸¹

IV. THE RIGHT TO DISSENT

The right to free expression, publication and dissent must be respected and promoted. The killing, disappearance and abduction of journalists

80 Mario Gomez, *Lifting the Veil of Secrecy: The Right to Information in Emerging and Existing Democracies* 2012 (unpublished paper).

81 See *The Pinheiro Principles: United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons*, CTR. ON HOUS. RIGHTS AND EVICTIONS (2005); U.N. Secretary-General, U.N. Guiding Principles on Internal Displacement, <http://www.unhcr.org/43ce1cff2.html> or U.N. Comm'n on Human

must be investigated and the perpetrators brought to justice. State media institutions (radio, television and print) should be freed from state control. They should be run as public trusts and administered by an independent and impartial Board of Directors. The right of civil society to organize and function freely should be respected and promoted. The state should refrain from interfering in the work of civil society or humanitarian organizations.

V. A LOST OPPORTUNITY?

At one level ensuring a sustainable peace will require some fundamental constitutional, institutional and policy changes. At another level it will require a change in mindsets and magnanimity on the part of the state to reach out to all communities and social groups or, as Lederach calls it, the capacity to generate, mobilize and build the moral imagination.⁸² Political leadership has so far not shown the political will or the magnanimity to make and implement changes in a principled way that will create a win-win situation for different political elites and the country as a whole.

Sri Lanka has squandered many opportunities in the past. The events of the past three years suggest that this moment may also slip by.

Rights, *Guiding Principles on Internal Displacement*, U.N. Doc. E/CN.4/1998/53/Add.2 (Feb. 11, 1998). See also Mario Gomez, *Extinguishing Fear: The Challenge of Land Policy in Eastern Sri Lanka* (2011).

82 For John Paul Lederach, transcending violence is forged by the capacity to generate, mobilize and build the moral imagination; See LEDERACH, *supra* note 76.

The Fukushima Daiichi Nuclear Power Plant Accident: A Provisional Analysis and Survey of the Government's International & Domestic Response

*Kanami Ishibashi*¹

On March 11, 2011 at 14:46, Japan was hit by a massive 9.0 earthquake. It left approximately 25,000 people dead or missing² and was referred to as the “Great East Japan Earthquake”. It generated a huge tsunami that triggered the catastrophic accident at the Fukushima Daiichi Nuclear Power Plant owned and operated by the Tokyo Electric Power Company (TEPCO). The magnitude of the accident is estimated to have reached Level 7 on the International Nuclear Event Scale (INES).³ There were altogether six units in the Fukushima Daiichi Nuclear Power Plant. Half of the reactor units (Nos. 4, 5, and 6) were under periodic inspection and not in operation on that day. The first three reactor units of the power plant were automatically shut down (by the SCRAM function) due to the earthquake.

Even though the SCRAM functioned automatically to halt the operation of the reactor units, the nuclear reactors remained hot for some time afterwards and needed to be cooled down as soon as possible. However, due to the loss of the main electrical power because of the earthquake, only emergency electrical power was available for cooling.

The nuclear power plant was subsequently hit by a large tsunami that was estimated to be 14 to 15 meters high.⁴ The tsunami submerged all of

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2 NUCLEAR EMERGENCY RESPONSE HEADQUARTERS GOVERNMENT OF JAPAN, REPORT OF JAPANESE GOVERNMENT TO THE IAEA MINISTERIAL CONFERENCE ON NUCLEAR SAFETY: THE ACCIDENT AT TEPCO'S FUKUSHIMA NUCLEAR POWER STATIONS, Contents of summary, at 4 (2011), *available at* http://www.kantei.go.jp/foreign/kan/topics/201106/pdf/00-2_outline.pdf [hereinafter Contents of Summary].

3 *Id.* at 25.

4 *Id.* at 5.

the emergency electricity generation facilities except for that of unit 6.⁵ It became impossible for the intake water to cool the reactors and the nuclear waste pool. Most importantly, the nuclear reactor fuel rods were exposed for hours (unit 1 for 14 hours) without cooling water. This accelerated the onset of the core meltdown.⁶

As a result, the fuel rods of units 1, 2, and 3 became overheated and eventually their cores melted down. In addition, the operators failed to ventilate the pressures inside the containment vessels contrary to normal procedure in nuclear plant accidents. Consequently, the pressure within the containers reached a critical level, and eventually a hydrogen explosion occurred inside the buildings that housed the reactors of units 1, 3, and 4 which also caused significant damage to the upper areas of the reactor buildings. This released radioactive substances outside. However in unit 4, all the fuel rods were transferred to the spent fuel pool for periodic inspection and therefore it is unclear whether the release of radioactive substances was caused by the explosion of unit 4. Also in unit 2, there was a hydrogen explosion near the suppression chamber.

The amount of radioactive release was measured in iodine 131 up to 900 Peta Bq, which was almost equal to one-sixth of that of the Chernobyl nuclear power plant accident. It spread to 1,800 square kilometers in Fukushima Prefecture where people were exposed to more than 5 mSv per year in the air dosage rate.⁷

To respond to such accidents, the Japanese government developed the Emergency Response Support System (ERSS). This is a remotely-monitored computer system that observes the condition of machines in affected areas, analyzes the degree of the emergency situation, and predicts its process. It

5 *Id.*

6 *Id.* at 10. "Water injection seemed to have stopped for 14 hours and 9 minutes, After the total loss of AC power at 15:37 on March 11 until the start of freshwater injections at 5:46 on March 12. From the results of the evaluation by NISA (on the assumption that the HPCI was not operating), it seems that the fuel was exposed due to a drop in the water level around 17:00 on March 11, and that the core melt started afterwards."

7 NUCLEAR ACCIDENT INDEPENDENT INVESTIGATION COMMISSION, THE OFFICIAL REPORT OF FUKUSHIMA NUCLEAR ACCIDENT INDEPENDENT INVESTIGATION COMMISSION, at 19 (2012), available at https://www.nirs.org/fukushima/naaic_report.pdf.

was operated by the Nuclear and Industrial Safety Agency (NISA) and the Incorporated Administrative Agency Japan Nuclear Energy Safety Organization (JNES). However, the investigation into the accident confirmed by December 2011 that such a system could not fully operate during an emergency because of systemic problems including a lack of information at the source.⁸

The Act on Special Measures Concerning Nuclear Emergency Preparedness⁹ was enacted after the Tokaimura nuclear accident of September 30, 1999. It resulted in the death of two people in the nuclear fuel fabrication facility operated by JCO (formerly Japan Nuclear Fuel Conversion Co.) in Tokaimura, Ibaraki Prefecture.¹⁰ In cases where an abnormal level of radiation is detected, articles 1 and 15(2) of the Act enable the Prime Minister to publically declare the occurrence of a nuclear emergency situation, and to take measures for protecting the lives, physical health, and property of citizens from a nuclear disaster.¹¹

Under the Act, Prime Minister Naoto Kan declared a nuclear emergency situation on March 11, 2011 at 19:03. The same day at 21:23, he ordered people living within a 3-kilometer radius of the plant to evacuate.¹² People living within a 3 to 10-kilometer radius of the plant were to take shelter indoors. However, the next day, March 12 at 15:36, there was an explosion in unit 1 of the power plant. The containment building was destroyed as the roof and wall blew out, leaving the steel frame exposed. The cause was a hydrogen explosion resulting from the failure to ventilate the pressure of the containment vessel. Nuclear contaminated substances were accidentally released to the air. The Prime Minister responded to this situation by ordering people living within a 20-kilometer radius of the plant to evacuate on March 12,

8 Contents of Summary, *supra* note 2, at 19.

9 Act on Special Measures Concerning Nuclear Energy Preparedness, Law No. 156 of 1999, *available at* http://www.japaneselawtranslation.go.jp/law/detail_main?id=106&vm=&re. [hereinafter Act on Nuclear Energy Preparedness].

10 As compared to the Fukushima accident, the scale of the Tokaimura accident was at level 4 on the International Nuclear Event Scale (INES) and its adverse effects had been kept inside the facility.

11 Act on Nuclear Preparedness, *supra* note 9, arts. 1, 15(2).

12 Contents of Summary, *supra* note 2, at 18.

2011 at 18:25. This was followed with an order for the people living within 30-kilometer radius of the plant to take shelter indoors on March 15 at 11:00.¹³

As for the effects on human life and health, though long-term studies are necessary, so far human casualties appear to be low. There were two operators who were engaged in recovering electricity who dipped their shoes into contaminated water of about 400 mSv. They evacuated to a hospital, but death or serious injury by radiation exposure has not been reported.¹⁴

Cooling of Reactors and Coping with Meltdown

There were reactor meltdowns in units 1 to 3 and a portion of nuclear fuel accumulated at the bottom of the pressure containers. To resolve the problem of the reactors, one of the most urgent and important issues involved cooling the temperature by pouring water into the pressure container and stopping the thermal reaction. It was feared that the accumulated nuclear fuel at the bottom of the pressure container would be released due to container damage.

On December 16, 2011, Prime Minister Yoshihiko Noda declared that they successfully made a cold shutdown of the nuclear reactors, as the second step of a planned roadmap towards decommissioning them. Although he explained that the reactors at this stage were safe even if trouble again occurred outside of the reactors, foreign states and the media were quite critical of his announcement. They pointed out that it could be misleading because a “cold shutdown” of a reactor does not mean there is a “safe” environment outside the power plants unless the decontamination work has been completed. In fact, water continued to be introduced to keep the reactors cool.

13 *Id.* The accident escalated as follows: On March 14, there was another explosion in unit 3 and on March 15, there was an explosion in unit 2, also due to the failure to ventilate properly.

14 *Fukushima genpatsu 3-goki de sagyo-in 3-nin hibaku 2-ri ga byoin e hanzo* [Three Workers Exposed to Radiation in Unit 3 of Fukushima Nuclear Power Plant, Two Sent to Hospital], ASAHI SHINBUN DIGITAL, Mar. 24, 2011, available at <http://www.asahi.com/special/10005/TKY201103240302.html>; but see Contents of Summary, *supra* note 2, at 22 (The workers' exposure was fortunately limited to 2 or 3Sv).

(1) SYSTEM FOR PREDICTION OF ENVIRONMENTAL EMERGENCY DOSE INFORMATION (SPEEDI) ISSUE

Another problem arose regarding SPEEDI, a system designed to figure out how to respond to nuclear emergencies that takes into account information at the source, weather conditions, and geological formations. Because the ERSS system, which monitors any changes and transmits that data, is supposed to facilitate a prompt response, but could not fully operate at the time of the accident due to certain systemic problems, SPEEDI was expected to function as an alternative. SPEEDI did make valid predictions for the diffusion of nuclear substances that would spread northwest of the plant, but this information was not made available to the public. As a tragic consequence, about 2,000 people were evacuated to an area where SPEEDI had already predicted as potentially contaminated. Chief Cabinet Secretary Edano indicated that it was regrettable that SPEEDI could not be used and the government should take political responsibility for its failure to use SPEEDI to minimize the adverse impact of the nuclear substances on those evacuated.

(2) THE ESTABLISHMENT OF THE NATIONAL DIET OF JAPAN FUKUSHIMA NUCLEAR ACCIDENT INDEPENDENT INVESTIGATION COMMISSION (NAIIC) FOR MORE COMPREHENSIVE AND NEUTRAL INVESTIGATION

The NAIIC was created by the Act Regarding Fukushima Nuclear Accident Independent Investigation Commission (NAIIC Act) and established by the National Diet of Japan. Its members are comprised of independent experts. It targeted the following points for analysis in accordance with Article 10 of the NAIIC Act: the direct and indirect causes of the Tokyo Electric Power Company Fukushima nuclear power plant accident; the direct and indirect causes of the damage; and the investigation and verification of the emergency response to both the accident and the subsequent damages. The outcome of investigation will be available in 2012.

(3) EFFECT ON JAPANESE ENERGY POLICY: WHETHER TO CONTINUE TO USE NUCLEAR POWER

Before the accident, Japan relied on nuclear power plants to generate electricity because it contributed less to global warming than coal or oil powered thermal plants. Japan planned to export its nuclear power plants to developing countries such as Vietnam under the Agreement between the Government of Japan and the Government of the Socialist Republic of Vietnam for Cooperation in the Development and Peaceful uses of Nuclear Energy that was adopted on January 20, 2011. Even after the Fukushima accident, there does not seem to be any change in the policy concerning the export of nuclear power plants because the project was finally approved by the Diet on December 9, 2011 for implementation in 2012.¹⁵

However, current public opinion over whether Japan should continuously use nuclear power plants for energy within Japan has been marked by controversy. After the accident, the resumption of operations of suspended nuclear power plants has been problematic. The operation of the Hamaoka Nuclear Power Plant was stopped at Prime Minister Naoto Kan's request on May 6, 2011,¹⁶ and the operation of the Genkai Nuclear Power Plant was shut down on December 25, 2011, leaving only six of Japan's 54 reactors remaining in operation at the time.¹⁷

15 Press Release, Ministry of Foreign Affairs of Japan, Notification for the Entry into Force of the Japan-Viet Nam Nuclear Cooperation Agreement (Dec. 22, 2011), *available at* http://www.mofa.go.jp/announce/announce/2011/12/1222_02.html.

16 Naoto Kan, Prime Minister, Press Conference by Prime Minister Naoto Kan (May 6, 2011), *available at* http://www.kantei.go.jp/foreign/kan/statement/201105/06kaiken_e.html.

17 Mari Iwata, *Shutdown Leaves Japan with Six Nuclear Reactors Up*, WALL STREET JOURNAL, Dec. 25, 2011, *available at* <http://www.marketwatch.com/story/shutdown-leaves-japan-with-six-nuclear-reactors-up-2011-12-25>.

Japan's Notification and Report to the International Community

As to the accident, Japan's early response from March 11 to December 31, 2011 to the international community and its reaction are as follows:

(1) NOTIFICATION TO THE INTERNATIONAL COMMUNITY

The government of Japan provided briefings every day from March 13 to May 18, 2011 and three days a week after May 19. However, it is regrettable that Japan failed to inform the international community on certain matters. Aside from the emergency vent, Japan was forced to release so-called "low-level contaminated water" into the sea. At the early stages of the accident, it needed to pour huge quantities of water continuously on the container to cool it. The water became contaminated with nuclear substances and had to be kept in tanks for storage. However, on April 2, 2011, it was discovered that a leakage of highly contaminated water made its way to the sea. To secure space in the storage tanks, low-level contaminated water was intentionally released into the sea. This intentional release of the low-level contaminated water into the sea was not announced and was seriously criticized by the international community.¹⁸

(2) REPORT OF THE ACCIDENT AND PROPOSAL TO THE INTERNATIONAL COMMUNITY

In June 2011, Japan submitted a report on the Fukushima Daiichi Nuclear Power Plant accident to the ministerial meeting of the International Atomic Energy Agency (IAEA)¹⁹ and in September 2011, to the general assembly of the IAEA.

To promote nuclear security in the world, Japan proposed to strengthen the functions of IAEA and international agreements for nuclear safety. Such a proposal was reflected in the 2011 IAEA Action Plan on Nuclear Safety²⁰

18 Contents of Summary, *supra* note 2, at 21-22, 24-25.

19 NUCLEAR EMERGENCY RESPONSE HEADQUARTERS GOVERNMENT OF JAPAN, REPORT OF JAPANESE GOVERNMENT TO THE IAEA MINISTERIAL CONFERENCE ON NUCLEAR SAFETY: THE ACCIDENT AT TEPCO'S FUKUSHIMA NUCLEAR POWER STATIONS (2011), *available at* http://www.kantei.go.jp/foreign/kan/topics/201106/iaea_houkokusho_e.html.

20 INTERNATIONAL ATOMIC ENERGY AGENCY, IAEA ACTION PLAN ON NUCLEAR SAFETY, *available at* <http://www.iaea.org/newscenter/focus/actionplan/>.

that was adopted at the IAEA General Conference. For example, the Action Plan underlined the need for member states to promptly undertake assessments of the safety and vulnerabilities of their nuclear plants, especially in reference to “the design of nuclear power plants against site specific extreme natural hazards.”²¹

The Action Plan also stated the need to improve the effectiveness of the international legal framework which consisted of the Convention on Nuclear Safety; the Joint Convention on the Safety of Spent Fuel Management and the Safety of Radioactive Waste Management; the Convention on the Early Notification of a Nuclear Accident; and the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency. The Action Plan even stressed to amend the Convention on Nuclear Safety and the Convention on the Early Notification of a Nuclear Accident. The making of such a proposal appeared to be due to the Japan’s delay in informing the international community of the accident and the reaction to it.

(3) SUPPORT FROM THE INTERNATIONAL COMMUNITY

Japan received letters of sympathy and offers of support to dispatch international disaster relief teams and experts. It accepted emergency supplies and funds, and the support of foreign forces and overseas NGOs.

Japan has also been on the receiving end of criticism from the United States, the European Union, China, Russia, Taiwan, and Hong Kong, which have regulated the import of agricultural and industrial goods and travel to Japan. According to the Ministry of Foreign Affairs of Japan, such negative responses have been mostly based on hearsay and the ministry has attempted to explain that many of these views are not based on scientific proof. The Ministry has stated that the air radiation level of Aizu Wakamatsu city in Fukushima Prefecture is the same as that of Seoul and almost the same as that of New York City.

Recent Developments and Foreign Policy

As mentioned above, Prime Minister Yoshihiko Noda announced that the Fukushima Nuclear Power Plant accident was in the second stage of the planned roadmap for decommissioning reactors. Though the full impact of the accident remains unknown, fortunately, it appears that the risk to

21 *Id.* at 2.

human health is low. In any event, Japan must proceed with its planned roadmap for a complete recovery.

While it is highly questionable whether Japan will continue to use nuclear energy, it is noteworthy to mention that in 2011, even after the tragic Fukushima accident, Japan proactively proceeded with the necessary domestic procedures, with the approval of the Diet, to conclude bilateral agreements. These agreements are for cooperation in the peaceful uses of nuclear energy with Jordan,²² Russia,²³ Korea,²⁴ and Vietnam²⁵ which aim towards mutual cooperation in the field of nuclear energy including the exportation of nuclear technologies to partner countries.

The NAIIC Report and the progress of Japan's effort to deal with this severe disaster in 2012 will be analyzed in the forthcoming volume (volume 18) of the Yearbook.

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- 22 Agreement between the Government of Japan and the Government of the Hashemite Kingdom of Jordan for Cooperation in the Peaceful Uses of Nuclear Energy, Japan-Jordan, Sep. 10, 2010, *available at* <http://www.mofa.go.jp/policy/treaty/submit/session179/agree-01.html>.
 - 23 Agreement between the Government of Japan and the Government of the Russian Federation for Cooperation in the Peaceful Uses of Nuclear Energy, Japan-Russia, May 12, 2009, *available at* <http://www.mofa.go.jp/policy/treaty/submit/session179/agree-02.html>.
 - 24 Agreement between the Government of Japan and the Government of the Republic of Korea for Cooperation in the Peaceful Uses of Nuclear Energy, Japan-S. Korea, Dec. 12, 2010, *available at* <http://www.mofa.go.jp/policy/treaty/submit/session179/agree-03.html>.
 - 25 Agreement between the Government of Japan and the Government of the Socialist Republic of Viet Nam for Cooperation in the Development and Peaceful Uses of Nuclear Energy, Japan-Viet Nam, Jan. 20, 2011, *available at* <http://www.mofa.go.jp/policy/treaty/submit/session179/agree-04.html>.

LEGAL MATERIALS

Participation In Multilateral Treaties¹

EDITORIAL INTRODUCTION

This section records the participation of Asian states in open multilateral law-making treaties which mostly aim at world-wide adherence. It updates the treaty sections of earlier Volumes until 31 December 2011. 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://ola.iaea.org/ola/treaties/multi.html>
- 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://www.icao.int/secretariat/legal/pages/treatycollection.aspx>
- Where reference is made to the International Committee of the Red Cross (ICRC), data were derived from <http://www.eda.admin.ch/eda/en/home/topics/intla/intrea.html>
- Where reference is made to the International Labour Organization (ILO), data were derived from <http://www.ilo.org/ilolex/english/convdisp1.htm>
- 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>

1 Compiled by Dr. Karin Arts, Professor of International Law and Development at the International Institute of Social Studies of Erasmus University Rotterdam (ISS), based in The Hague, The Netherlands.

- Where reference is made to the Secretariat of the Antarctic Treaty, data were derived from http://www.ats.aq/devAS/ats_parties.aspx?lang=e
- Where reference is made to the United Nations Educational, Scientific and Cultural Organization (UNESCO), data were derived from http://portal.unesco.org/en/ev.php-URL_ID=12025&URL_DO=DO_TOPIC&URL_SECTION=-471.html
- Where reference is made to WIPO, data were derived from <http://www.wipo.int/treaties/en/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.

TABLE OF HEADINGS

Antarctica	Judicial and administrative
Commercial arbitration	cooperation
Cultural matters	Labour
Cultural property	Narcotic drugs
Development matters	Nationality and statelessness
Dispute settlement	Nuclear material
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Family matters	Privileges and immunities
Finance	Refugees
Health	Road traffic and transport
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International crimes	Telecommunications
International representation	Treaties
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ANTARCTICA

(Status as provided by the Secretariat of the Antarctic Treaty)

Antarctic Treaty, Washington, 1959: see Vol. 6 p. 234.

COMMERCIAL ARBITRATION

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958: see Vol. 12 p. 234.

CULTURAL MATTERS

Agreement for Facilitating the International Circulation of Visual and Auditory Materials of an Educational, Scientific and Cultural Character, 1949: see Vol. 7 pp. 322-323.

Agreement on the Importation of Educational, Scientific and Cultural Materials, 1950: see Vol. 12 p. 234.

Convention concerning the International Exchange of Publications, 1958: see Vol. 6 p. 235.

Convention concerning the Exchange of Official Publications and Government Documents between States, 1958: see Vol. 6 p. 235.

International Agreement for the Establishment of the University for Peace, 1980: see Vol. 16 p. 157.

Regional Convention on the Recognition of Studies, Diploma's and Degrees in Higher Education in Asia and the Pacific, 1983: see Vol. 14 p. 227.

CULTURAL PROPERTY

Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954: see Vol. 13 p. 263.

Protocol for the Protection of Cultural Property in the Event of Armed Conflict, 1954: see Vol. 13 p. 263.

Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 1970: see Vol. 12 p. 235.

Second Protocol for the Protection of Cultural Property in the Event of Armed Conflict, 1999: see Vol. 13 p. 263.

Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 2005: see Vol. 16 pp. 158.

Convention concerning the Protection of the World Cultural and Natural Heritage, 1972

(Continued from Vol. 10 p. 267)

(Status as provided by UNESCO)

<i>State</i>	<i>Sig.</i>	<i>Cons</i>
Brunei		12 Aug 2011

Convention for the Safeguarding of the Intangible Cultural Heritage, 2003

(Continued from Vol. 16 p. 158)

(Status as provided by UNESCO)

<i>State</i>	<i>Sig.</i>	<i>Cons</i>
Brunei		12 Aug 2011
Kazakhstan		28 Dec 2011
Turkmenistan		25 Nov 2011

DEVELOPMENT MATTERS

Charter of the Asian and Pacific Development Centre, 1982: see Vol. 7 pp. 323-324.

Agreement to Establish the South Centre, 1994: see Vol. 7 p. 324.

Amendments to the Charter of the Asian and Pacific Development Centre, 1998: see Vol. 10 p. 267.

**Multilateral Agreement for the Establishment of an International
Think Tank for Landlocked Developing Countries**

New York, 24 September 2010

Entry into force: not yet

<i>State</i>	<i>Sig.</i>	<i>Cons</i>
Afghanistan	19 Oct 2011	
Laos	27 Sep 2011	
Mongolia	25 Apr 2011	8 Nov 2011

DISPUTE SETTLEMENT

Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965: see Vol. 11 p. 245.

Declarations Recognizing as Compulsory the Jurisdiction of the International Court of Justice under Article 36, paragraph 2, of the Statute of the Court: see Vol. 15 p. 159.

ENVIRONMENT, FAUNA AND FLORA

International Convention for the Prevention of Pollution of the Sea by Oil, as amended, 1954: see Vol. 6 p. 238.

International Convention on Civil Liability for Oil Pollution Damage, 1969: see Vol. 15 p. 215.

International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969: see Vol. 9 p. 284.

Convention on Wetlands of International Importance especially as Waterfowl Habitat, 1971: see Vol. 16 p. 160.

International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971: see Vol. 12 p. 237.

Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972, as amended: see Vol. 7 p. 325.

Protocol Relating to Intervention on the High Seas in Cases of Pollution by Substances Other Than Oil, 1973: see Vol. 6 p. 239.

Protocol to the 1969 International Convention on Civil Liability for Oil Pollution Damage, 1976: see Vol. 10 p. 269.

Protocol Relating to the 1973 International Convention for the Prevention of Pollution from Ships 1978, as amended: see Vol. 15 p. 225.

Protocol to amend the 1971 Convention on Wetlands of International Importance especially as Waterfowl Habitat, 1982: see Vol. 13 p. 265.

Convention for the Protection of the Ozone Layer, 1985: see Vol. 15 p. 215.

Protocol on Substances that Deplete the Ozone Layer, 1987: see Vol. 16 p. 161.

Amendments to Articles 6 and 7 of the 1971 Convention on Wetlands of International Importance especially as Waterfowl Habitat, 1987: see Vol. 13 p. 266.

Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1989: see Vol. 16 p. 161.

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.

Convention on Biological Diversity, 1992: see Vol. 14 p. 229.

Protocol to amend the 1969 International Convention on Civil Liability for Oil Pollution Damage, 1992: see Vol. 16 p. 161.

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.

Protocol to the Framework Convention on Climate Change, 1997: see Vol. 16 p. 161.

Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, 1998: see Vol. 16 p. 162.

Amendment to the Montreal Protocol, 1999: see Vol. 16 p. 162.

Cartagena Protocol on Biosafety to the Convention on Biological Diversity, 2000: see Vol. 15 p. 217.

Stockholm Convention on Persistent Organic Pollutants, 2001: see Vol. 15 pp. 217.

Amendment to the Montreal Protocol, 1992

(continued from Vol. 15 p. 216)

<i>State</i>	<i>Cons.</i>
Kazakhstan	28 Jun 2011

Amendment to the Montreal Protocol, 1997

(Continued from Vol. 16 p. 161)

<i>State</i>	<i>Cons.</i>
Kazakhstan	28 Jun 2011

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>
Mongolia	28 Sep 2011	28 Dec 2011

FAMILY MATTERS

Convention on the Recovery Abroad of Maintenance, 1956: see Vol. 11 p. 249.

Convention on the Law Applicable to Maintenance Obligations Towards Children, 1956: see Vol.6 p. 244.

Convention on the Conflicts of Law Relating to the Form of Testamentary Dispositions, 1961: see Vol. 7 p. 327.

Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 1962: see Vol. 8 p. 178.

Convention on the Law Applicable to Maintenance Obligations, 1973: see Vol. 6 p. 244.

**Convention on Protection of Children and Co-operation in
Respect of Intercountry Adoption, 1993**

(Continued from Vol. 16 p. 163)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Vietnam	7 Dec 2010	1 Nov 2011

FINANCE

Agreement Establishing the Asian Development Bank, 1965: see Vol. 7 p. 327.

Convention Establishing the Multilateral Investment Guarantee Agency, 1988: see Vol. 12 p. 240.

HEALTH

Protocol Concerning the Office International d'Hygiène Publique, 1946: see Vol. 6 p. 245.

**World Health Organization Framework Convention on
Tobacco Control, 2003**

(Continued from Vol. 16 p. 163)

<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
Turkmenistan		13 May 2011

HUMAN RIGHTS, INCLUDING WOMEN AND CHILDREN

Convention on the Political Rights of Women, 1953: see Vol. 10 p. 273.

Convention on the Nationality of Married Women, 1957: see Vol. 10 p. 274.

Convention against Discrimination in Education, 1960: see Vol. 16 p. 164.

International Covenant on Economic, Social and Cultural Rights, 1966:
see Vol. 14 p. 231.

International Covenant on Civil and Political Rights, 1966: see Vol. 16
p. 165.

International Convention on the Elimination of All Forms of Racial Dis-
crimination, 1966: see Vol. 8 p. 179.

Optional Protocol to the International Covenant on Civil and Political
Rights, 1966, see: Vol. 15 p. 219.

Convention on the Elimination of All Forms of Discrimination against
Women, 1979: see Vol. 11 p. 250.

Convention Against Torture and Other Cruel, Inhuman or Degrading
Treatment or Punishment, 1984: see Vol. 16 p. 165.

International Convention against Apartheid in Sports, 1985: see Vol. 6
p. 248.

Convention on the Rights of the Child, 1989: see Vol. 11 p. 251.

Second Optional Protocol to the International Covenant on Civil and
Political Rights, Aiming at the Abolition of the Death Penalty, 1989:
see Vol. 16 p. 165.

Amendment to article 8 of the International Convention on the Elimina-
tion of All Forms of Racial Discrimination, 1992, see Vol. 12 p. 242.

Optional Protocol to the Convention on the Rights of the Child on the
Involvement of Children in Armed Conflict, 2000: see Vol. 16 p. 165.

Optional Protocol to the Convention Against Torture and Other Cruel, In-
human or Degrading Treatment or Punishment, 2002: see Vol. 14 p. 232.

Optional Protocol to the Convention on the Rights of Persons with Disabilities, 2008: see Vol. 16 p. 166.

International Convention for the Protection of All Persons from Enforced Disappearance, 2010: see Vol. 16 p. 166.

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990

(Continued from Vol. 11 p. 251)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Bangladesh	7 Oct 1998	24 Aug 2011

Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, 1999

(Continued from Vol. 16 p. 165)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Seychelles	22 Jul 2002	1 Mar 2011

Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 2000

(Continued from Vol. 16 p. 164)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Pakistan	26 Sep 2011	5 Jul 2011

Convention on the Rights of Persons with Disabilities, 2008

(Continued from Vol. 16 p. 166)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Indonesia	30 Mar 2007	30 Nov 2011
Myanmar		7 Dec 2011
Pakistan	25 Sep 2008	7 Jul 2011

HUMANITARIAN LAW IN ARMED CONFLICT

International Conventions for the Protection of Victims of War, I-IV, 1949: see Vol. 11 p. 252.

Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1977, see: Vol. 15 p. 220.

Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1977, see: Vol. 12 p. 244.

**Protocol III Additional to the Geneva Conventions
of 12 August 1949, and Relating to the Adoption of an
Additional Distinctive Emblem, 2005**

(Continued from Vol. 16 p. 167)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Timor Leste		29 Jul 2011

INTELLECTUAL PROPERTY

Convention for the Protection of Industrial Property, 1883 as amended 1979: see Vol. 11 p. 253.

Convention for the Protection of Literary and Artistic Works, 1886 as amended 1979: see Vol. 12 p. 244.

Madrid Union Concerning the International Registration of Marks, including the Madrid Agreement 1891 as amended in 1979, and the Madrid Protocol 1989: see Vol. 16 p. 168.

Universal Copyright Convention, 1952: see Vol. 6 p. 251.

Protocols 1, 2 and 3 annexed to the Universal Copyright Convention, 1952: see Vol. 6 p. 251.

Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, 1957 as amended in 1979: see Vol. 13 p. 271.

International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 1961: see Vol. 15 p. 221.

Convention Establishing the World Intellectual Property Organization, 1967: see Vol. 12 p. 245.

Patent Cooperation Treaty, 1970 as amended in 1979 and modified in 1984 and 2001: see Vol. 15 p. 221.

Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms, 1971: see Vol. 12 p. 245.

Multilateral Convention for the Avoidance of Double Taxation of Copyright Royalties, 1979: see Vol. 6 p. 252.

Trademark Law Treaty, 1994: see Vol. 15 p. 222.

WIPO Copyright Treaty, 1996: see Vol. 15, p. 222.

WIPO Performances and Phonograms Treaty, 1996

(Continued from Vol. 16 p. 168)

(Status as provided by WIPO)

<i>State</i>	<i>Cons.</i>
Tajikistan	24 Aug 2011

Patent Law Treaty, 2000

(Continued from Vol. 16 p. 169)

(Status as provided by WIPO)

<i>State</i>	<i>Cons.</i>
Kazakhstan	19 Oct 2011

Singapore Treaty on the Law of Trademarks, 2006

(Continued from Vol. 16 p. 169)

(Status as provided by WIPO)

<i>State</i>	<i>Cons.</i>
Mongolia	3 Mar 2011

INTERNATIONAL CRIMES

Slavery Convention, 1926 as amended in 1953: see Vol. 15 p. 223.

Convention on the Prevention and Punishment of the Crime of Genocide, 1948: see Vol. 8 p. 182.

Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956: see Vol. 14 p. 236.

Convention on Offences and Certain Other Acts Committed on Board Aircraft, 1963: see Vol. 9 p. 289.

Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 1968: see Vol. 6 p. 254.

Convention for the Suppression of Unlawful Seizure of Aircraft, 1970: see Vol. 8 p. 289.

Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 1971: see Vol. 8 p. 290.

International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973: see Vol. 7 p. 331.

Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons Including Diplomatic Agents, 1973: see Vol. 14 p. 236

International Convention Against the Taking of Hostages, 1979: see Vol. 16 p. 171.

Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988: see Vol. 16 p. 171.

Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, 1988: see Vol. 16 p. 171.

Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 1988, see Vol. 12 p. 247.

International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 1989: see Vol. 11 p. 254.

Convention on the Marking of Plastic Explosives for the Purpose of Detection, 1991: see Vol. 15 p. 224.

Convention on the Safety of United Nations and Associated Personnel, 1994: see Vol. 11 p. 255.

International Convention for the Suppression of Terrorist Bombings, 1997: see Vol. 14 p. 236.

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.

International Convention for the Suppression of Acts of Nuclear Terrorism, 2005: see Vol. 16 p. 172.

Statute of the International Criminal Court, 1998

(Continued from Vol. 16 p. 171)

<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
Maldives		21 Sep 2011
Philippines	28 Dec 2000	30 Aug 2011

International Convention for the Suppression of the Financing of Terrorism, 1999

(Continued from Vol. 15 p. 224)

<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
Nepal		23 Dec 2011

United Nations Convention Against Transnational Organized Crime, 2000

(Continued from Vol. 16 p. 171)

<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
Bangladesh		13 Jul 2011
India	12 Dec 2002	5 May 2011
Nepal	1 Dec 2002	23 Dec 2011

**Protocol to Prevent, Suppress and Punish Trafficking in Persons,
Especially Women and Children, supplementing the United Nations
Convention Against Transnational Organized Crime, 2000**

(Continued from Vol. 16 p. 172)

<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
India	12 Dec 2002	5 May 2011

**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**

(Continued from Vol. 14 p. 238)

<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
India	12 Dec 2002	5 May 2011

United Nations Convention Against Corruption, 2003

(Continued from Vol. 15 p. 224)

<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
India	9 Dec 2005	9 May 2011
Nepal	10 Dec 2003	29 Mar 2011
Thailand	9 Dec 2003	1 Mar 2011

INTERNATIONAL REPRESENTATION

(see also: Privileges and Immunities)

Vienna Convention on the Representation of States in their Relations with
International Organizations of a Universal Character, 1975: see Vol. 6
p. 257.

INTERNATIONAL TRADE

Convention on the Limitation Period in the International Sale of Goods,
1974: see Vol. 6 p. 257.

UN Convention on Contracts for the International Sale of Goods, 1980:
see Vol. 14 p. 239.

UN Convention on the Liability of Operators of Transport Terminals in International Trade, 1991: see Vol. 6 p. 257.

United Nations Convention on the Use of Electronic Communications in International Contracts, 2005: see Vol. 16 p. 173.

Convention on Transit Trade of Land-locked States, 1965

(Continued from Vol. 6 p. 257)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Tajikistan		13 Jul 2011

JUDICIAL AND ADMINISTRATIVE COOPERATION

Convention on Civil Procedure, 1954: see Vol. 6 p. 258.

Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 1965: see Vol. 9 p. 291.

Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 1970: see Vol. 16 p. 173.

Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, 1961

(Continued from Vol. 16 p. 173)

(Status as provided by the HccH)

<i>State</i>	<i>Cons.</i>	<i>E.i.f.</i>
Kyrgyzstan	15 Nov 2010	31 Jul 2011
Uzbekistan	25 Jul 2011	

LABOUR

Forced Labour Convention, 1930 (ILO Conv. 29): see Vol. 15 p. 226.

Freedom of Association and Protection of the Right to Organise Convention, 1948 (ILO Conv. 87): see Vol. 15 p. 226.

Right to Organise and Collective Bargaining Convention, 1949 (ILO Conv. 98): see Vol. 15 p. 226.

Abolition of Forced Labour Convention, 1957 (ILO Conv. 105): see Vol. 12 p. 250.

Equal Remuneration Convention, 1951 (ILO Conv. 100): see Vol. 14 p. 240.

Discrimination (Employment and Occupation) Convention, 1958 (ILO Conv. 111): see Vol. 12 p. 250.

Employment Policy Convention, 1964 (ILO Conv. 122): see Vol. 8 p. 186.

Worst Forms of Child Labour Convention, 1999 (ILO Conv. 182): see Vol. 16 p. 174.

Promotional Framework for Occupational Safety and Health Convention (ILO Conv. 187), 2006: see Vol. 16 p. 175.

Minimum Age Convention, 1973 (ILO Conv. 138)

(Continued from Vol. 16 p. 174)

(Status as provided by the ILO)

<i>State</i>	<i>Rat. Registered</i>	<i>Min. age Spec.</i>
Brunei	17 Jun 2011	16

NARCOTIC DRUGS

Protocol Amending the Agreements, Conventions and Protocols on Narcotic Drugs, concluded at The Hague on 23 January 1912, at Geneva on 11 February 1925 and 19 February 1925 and 13 July 1931, at Bangkok on 27 November 1931 and at Geneva on 26 June 1936, 1946: see Vol. 6 p. 261.

Agreement Concerning the Suppression of the Manufacture of, Internal Trade in, and Use of, Prepared Opium and amended by Protocol, 1925, amended 1946: see Vol. 6 p. 261.

International Opium Convention, 1925, amended by Protocol 1946: see Vol. 7 p. 334.

Agreement Concerning the Suppression of Opium Smoking, 1931, amended by Protocol, 1946: see Vol. 6 p. 261.

Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, 1931, and amended by Protocol, 1946: see Vol. 7 p. 334.

Protocol bringing under International Control Drugs outside the Scope of the Convention of 1931, as amended by the Protocol of 1946: see Vol. 6 p. 262.

Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, 1936, amended 1946: see Vol. 6 p. 262.

Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and Use of Opium, 1953: see Vol. 6 p. 262.

Single Convention on Narcotic Drugs, 1961: see Vol. 13 p. 276.

Convention on Psychotropic Substances, 1971: see Vol. 13 p. 276.

Single Convention on Narcotic Drugs, 1961, as Amended by Protocol 1972: see Vol. 15 p. 227.

Protocol amending the Single Convention on Narcotic Drugs, 1972: see Vol. 15 p. 227.

United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988: see Vol. 13 p. 276.

NATIONALITY AND STATELESSNESS

Optional Protocol to the Vienna Convention on Diplomatic Relations concerning Acquisition of Nationality, 1961: see Vol. 6 p. 265.

Optional Protocol to the Vienna Convention on Consular Relations concerning Acquisition of Nationality, 1963: see Vol. 8 p. 187.

Convention relating to the Status of Stateless Persons, 1954

(Continued from Vol. 6 p. 264)

<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
Philippines	22 Jun 1955	22 Sep 2011
Turkmenistan		7 Dec 2011

NUCLEAR MATERIAL

Convention on the Physical Protection of Nuclear Material, 1980: see Vol. 16 p. 177

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.

Convention on Supplementary Compensation for Nuclear Damage, 1997: see Vol. 16 p. 178.

Convention on Civil Liability for Nuclear Damage, 1963

(Continued from Vol. 6 p. 265)

(Status as provided by IAEA)

<i>State</i>	<i>Sig.</i>	<i>Cons. (deposit)</i>
Kazakhstan		29 Mar 2011

Convention on Early Notification of a Nuclear Accident, 1986

(Continued from Vol. 16 p. 177)

(Status as provided by IAEA)

<i>State</i>	<i>Sig.</i>	<i>Cons. (deposit)</i>
Tajikistan		1 Sep 2011

Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, 1986

(Continued from Vol. 16 p. 177)

(Status as provided by IAEA)

<i>State</i>	<i>Sig.</i>	<i>Cons. (deposit)</i>
Tajikistan		23 Sep 2011

**Joint Convention on the Safety of Spent Fuel Management and on the
Safety of Radioactive Waste Management, 1997**

(Continued from Vol. 16 p. 177)

(Status as provided by IAEA)

<i>State</i>	<i>Sig.</i>	<i>Cons. (deposit)</i>
Indonesia	6 Oct 1997	1 Apr 2011

**Protocol to Amend the 1963 Convention on
Civil Liability for Nuclear Damage, 1997**

(Continued from Vol. 8 p. 188)

(Status as provided by IAEA)

<i>State</i>	<i>Sig.</i>	<i>Cons. (deposit)</i>
Kazakhstan		29 Mar 2011

**Amendment to the 1980 Convention on the
Physical Protection of Nuclear Material, 2005**

(Continued from Vol. 16 p. 178)

(Status as provided by IAEA)

<i>State</i>	<i>Sig.</i>	<i>Cons. (deposit)</i>
Kazakhstan		26 Apr 2011

OUTER SPACE

Treaty on Principles Governing the Activities of the States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, 1967: see Vol. 16 p. 178.

Agreement governing the Activities of States on the Moon and other Celestial Bodies, 1979: see Vol. 10 p. 284.

Convention on Registration of Objects launched into Outer Space, 1974: see Vol. 15 p. 229.

PRIVILEGES AND IMMUNITIES

Convention on the Privileges and Immunities of the United Nations, 1946: see Vol. 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.

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.

United Nations Convention on the Law of the Sea, 1982

(Continued from Vol. 10 p. 285)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Thailand	10 Dec 1982	15 May 2011

Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, 1994

(Continued from Vol. 12 p. 255)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Thailand		15 May 2011

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**
(Continued from Vol. 12 p. 256)

<i>State</i>	<i>Cons. (dep.)</i>	<i>E.i.f.</i>
Malaysia	11 Nov 2011	

**Protocol Relating to the International Convention for the
Safety of Life at Sea, 1988**
(Continued from Vol. 14 p. 231)

<i>State</i>	<i>Cons. (dep.)</i>	<i>E.i.f.</i>
Malaysia		11 Nov 2011

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.

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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.

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Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, 1986: see Vol. 6 p. 280.

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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: see Vol. 12 p. 259.

STATE PRACTICE

State Practice of Asian States in the Field of International Law

EDITORIAL NOTE

The Editorial Board has decided to reorganize the format of this section from Volume 16 (2010) onwards. Since the Yearbook's inception, state practice has always been reported and written up as country reports. While this format has served us well in the intervening years, we felt that it would make a lot more sense if we reported state practice *thematically*, rather than geographically. This way, readers will have an opportunity to zoom in on a particular topic of interest and get a quick overview of developments within the region. Of course, this reorganization cannot address our lack of coverage in some Asian states. We aim to improve on this in forthcoming volumes and thank the contributors to this section for their tireless and conscientious work.

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Aliens

INDIA

**STATEMENT BY INDIA ON AGENDA ITEM 81 – REPORT OF THE
INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS SIXTY-
THIRD SESSION – CHAPTERS I-V – SIXTH COMMITTEE OF THE
66TH SESSION OF THE UNITED NATIONS GENERAL ASSEMBLY ON
OCTOBER 24, 2011**

India supported the general approach taken by the Special Rapporteur in the topic of “Expulsion of Aliens” which provided for the right of a state to expel and the rights and remedies available to the person subject of expulsion, including the legal consequences of unlawful expulsion. Regarding the provision concerning extradition and expulsion, India noted that the legal basis and laws governing the process and the procedure involved were altogether different and one could not be used as an alternate for the other from the legal and technical stand point.

Courts and Tribunals

INDIA

**FOREIGN JUDGMENTS OR DECREES – RECOGNITION – PRINCIPLE
OF COMITY – MEANING OF ‘ORDINARILY RESIDES’ – APPLICATION
OF THE RULES OF PRIVATE INTERNATIONAL LAW**

***Ruchi Majoo v. Sanjeev Majoo* [Civil Appeal No. 4435 of 2011, Criminal Appeal No. 1184 of 2011, May 13, 2011]**

Facts

This case was within realm of private international law concerning legal proceedings between the parties in the United States (US) and India for the custody of their only child. The child was the US citizen by birth. The parents of the child were also American citizens of Indian origin. These legal proceedings included an action filed by the father (respondent in the present case) before the American Court seeking divorce from his wife (appellant in the present case). The order passed by the American Court eventually led to the issue of a red corner notice based on allegations of

child abduction leveled against the mother. The mother had been living with the child in India at that time. The mother approached a District Court in Delhi, India to keep the interim custody of the child under the relevant provisions of the Guardians and Wards Act. Aggrieved by this order of the District court father filed a petition under Article 227 of the Constitution of India before the High Court of Delhi. The High Court allowed this plea of the father and set aside the order of the District Court in Delhi and dismissed the custody case filed by the mother primarily on the ground that the Court in Delhi had no jurisdiction to entertain the same as the minor was not ordinarily residing in Delhi – a condition precedent for the Delhi Court to exercise jurisdiction. The High Court further held that all issues relating to the custody of the child ought to be agitated and decided by the Court in America not only because that Court had already passed an order to that effect in favour of the father, but also because all the three parties, namely, the parents of the minor and the minor himself were American citizens. The High Court decision, as noted by the Supreme Court, was based on the principle of comity of courts and certain decisions taken by it i.e., the Supreme Court. The Supreme Court pointed out that the following three questions needed determination. These were: (i) Whether the High Court was justified in dismissing the petition for custody of the minor on the ground that the court at Delhi had no jurisdiction to entertain the same, (ii) Whether the High Court was right in declining exercise of jurisdiction on the principle of comity of Courts and (iii) Whether the order granting interim custody to the mother of the minor calls for any modification in terms of grant of visitation rights to the father pending disposal of the petition by the trial court.

Judgment

After outlining the facts and circumstances in detail, the Court referred to the Section 9(1) of the Guardians and Wards Act, 1890 which made reference to the jurisdiction of the District Court to entertain a claim for grant of custody of a minor if the minor “ordinarily resides” within the jurisdiction of that court. According to the court “The expression used is “Where the minor ordinarily resides.” Now whether the minor is ordinarily residing at a given place is primarily a question of intention which in turn is a question of fact. It may at best be a mixed question of law and fact, but unless the jurisdictional facts are admitted it can never

be a pure question of law, capable of being answered without an enquiry into the factual aspects of the controversy. The factual aspects relevant to the question of jurisdiction are not admitted in the instant case. There are serious disputes on those aspects to which we shall presently refer. We may before doing so examine the true purpose of the expression 'ordinarily resident' appearing in Section 9(1) (*supra*). This expression has been used in different contexts and statutes and has often come up for interpretation." The Court after examining the facts and various cases decided by it on the phrase "ordinarily resides" held that the High Court was not justified in dismissing the petition with regard to the custody of the minor child granted by the District Court.

On the issue of exercising of jurisdiction on the basis of the principle of comity of courts, the Court noted that:

Recognition of decrees and orders passed by foreign courts remains an eternal dilemma in as much as whenever called upon to do so, Courts in this country are bound to determine the validity of such decrees and orders keeping in view the provisions of Section 13 of the Code of Criminal Procedure 1908 as amended by the Amendment Act of 1999 and 2002. The duty of a Court exercising its *Parens Patriae* jurisdiction as in cases involving custody of minor children is all the more onerous. Welfare of the minor in such cases being the paramount consideration; the court has to approach the issue regarding the validity and enforcement of a foreign decree or order carefully. Simply because a foreign court has taken a particular view on any aspect concerning the welfare of the minor is not enough for the courts in this country to shut out an independent consideration of the matter. Objectivity and not abject surrender is the mantra in such cases. That does not, however, mean that the order passed by a foreign court is not even a factor to be kept in view. But it is one thing to consider the foreign judgment to be conclusive and another to treat it as a factor or consideration that would go into the making of a final decision. Judicial pronouncements on the subject are not on virgin ground. A long line of decisions of the court has settled the approach to be adopted in such matters. The plentitude of pronouncements also leaves cleavage in the opinions on certain aspects that need to be settled authoritatively in an appropriate case.

The Court, after referring to its own jurisprudence on the principle of comity of courts, concluded,

What needs to be examined is whether the High Court was right in relying upon the principle of comity of courts and dismissing the application. Our answer is in the negative. The reasons are not far to seek. The first and foremost of them being that ‘comity of courts’ principle ensures that foreign judgments and orders are unconditionally conclusive of the matter in controversy. This is all the more so where the courts in this country deal with matters concerning the interest and welfare of minors including their custody. Interest and welfare of the minor being paramount, a competent court in this country is entitled and indeed duty bound to examine the matter independently, taking the foreign judgment, if any, only as an input for its final adjudication.

MALAYSIA

FOREIGN JUDGMENTS OR DECREES – RECOGNITION – CONFLICT OF LAWS – FOREIGN JURISDICTION – DOMICILE OF CHOICE AND ORIGIN – CHANGE OF DOMICILE

Gurcharan Singh a/l Karnal Singh v. Mninder Kaur a/p Piara Singh [2010] 6 MLJ 405

The issue of whether and when a Malaysian court would recognize a foreign decree of divorce was extensively discussed in this case.

Facts

The parties were married under Malaysia’s Law Reform (Marriage and Divorce) Act 1976 [LRA 1976] at the Registry of Civil Marriages in Seremban, Negeri Sembilan. They had two children together. The husband claimed that the wife and children had deserted him, after which he left for the United States to be with his other family members, including siblings, nephews, and nieces. The husband then obtained a decree from the Superior Court of Arizona dissolving the marriage. The Superior Court took jurisdiction on the basis that the husband is a permanent resident of the USA, having resided in the state of Arizona for at least 90 days prior to the filing of the said petition for dissolution of marriage. He then filed a petition seeking a declaration that the Arizona court’s decree of dissolution was valid.

Judgment

[The High Court of Kuala Lumpur dismissed the husband's petition. It declined to recognize the decree of dissolution of marriage granted by the Superior Court of Arizona, and its registration under the LRA 1976.]

The law applicable for this court to declare a foreign decree as valid is found in s 107 of the LRA 1976. Section 107 provides:

Maintenance of register of divorces and annulments

....

(3) Where a marriage which is solemnized in Malaysia is dissolved or annulled by a decree of a court of competent jurisdiction outside Malaysia, either of the parties may apply to the Registrar-General for the registration of such decree and the Registrar-General, on being satisfied that the decree is one which should be recognized as valid for the purposes of the law of Malaysia, shall register that decree.

It is an established practice that registrar general will require a party to obtain a court order declaring the foreign decree as valid before the registrar general will register the foreign decree. In this premise, Malaysian courts have full discretion and power whether to recognise or not recognise the foreign decree concerned.

As far as recognition is concerned, it must be noted that Malaysia do [sic] not have any specific section in LRA 1976 or any legislation on recognition of foreign divorce. Therefore the Malaysian Court should refer to the common law position [as per section 3 of the Civil Law Act 1956]. ...

In deciding whether to declare the decree of dissolution of a marriage dated November 3, 2008 as valid or invalid, this court is guided by the case of *Le Mesurier v Le Mesurier and others* [1895–99] All ER Rep 836, where Lord Watson delivering the decision of the board held that according to international law, the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve a marriage. In that case the court stated:

Their Lordships have in these circumstances, and upon these considerations, come to the conclusion that, according to international law, the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve the marriage. They concur without reservation, in the view expressed by Lord

Penzance in *Wilson v Wilson*, which were obviously meant to refer, not to question arising in regard to the mutual rights of married persons, but to jurisdiction in the matter of divorce (see (1872) LR 2 P & D at p 442):

It is the strong inclination of my own opinion that the only fair and satisfactory rule to adopt on this matter of jurisdiction is to insist upon the parties on all cases referring their matrimonial differences to the courts of the country in which they are domicile. Different communities have different views and laws respecting moral obligations, and a different estimate of the causes which should justify divorce. It is both just and reasonable, therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer those laws. An honest adherence to this principle, moreover, will preclude the scandal which arises when a man and woman are held to be a man and wife in one country, and stranger in another.

Based on the decision aforesaid, the law on the recognition of foreign decrees of divorce by the English court is that a divorce granted by a court of another country would not be recognised as valid in England unless the parties were domiciled in that country.

....

Clear evidence is required to establish a change of domicile. In particular, to displace the domicile of origin in favour of the domicile of choice, the standard of proof goes beyond a mere balance of probabilities. This principle was established by Sir Jocelyn Simon P in the case of *Henderson v Henderson* [1965] 1 All ER 179:

In order to help resolve such difficulties the law has evolved further rules. First, clear evidence is required to establish a change of domicile. In particular, to displace the domicile of origin in favour of the domicile of choice, the standard of proof goes beyond a mere balance of probabilities.

The petitioner has stated in his affidavit that he left Malaysia to settle down in the USA and therefore he had acquired a domicile of choice in the USA. Case authorities has held that the oath of a person whose domicile is in question as to his intention to change his domicile is not conclusive. The question for this court is whether upon a review of all the circumstances it

gives credit to his evidence. In this regard, the court in the case of *Joseph Wong Phui Lun v Yeoh Loon Goit* [1978] 1 MLJ 236 held that:

The oath of the person whose domicile is in question as to his intention to change his domicile is not conclusive. The question for the court is whether upon a review of all the circumstances it gives credit to his evidence.

Reverting back to this present case, this court is unable to find any clear evidence in support of the fact that the petitioner has abandoned his Malaysian domicile. It is this court's finding that the petitioner in his affidavit has not confirmed or affirmed that he has given up his Malaysian citizenship, or that he intends to reside permanently in the USA, or that he has secured investment, employment or a residence there. Upon a review of all the circumstances, it is clear that the petitioner has failed to rebut the presumption that he continues to retain his Malaysian domicile or that he has displaced his domicile of origin (Malaysia) in favour of his domicile of choice (USA).

....

It must be noted, a Malaysian court in applying the common law position would only recognise a foreign decree of divorce (which purports to dissolve a Malaysian marriage) if it was granted by the court of the parties' domicile or if was granted by a foreign court which assumed jurisdiction on the same grounds as the Malaysian court would have assumed jurisdiction.

The Malaysian court will assume jurisdiction if the marriage was registered in Malaysia and the parties are domiciled in Malaysia at the time of the commencement of the proceedings [section 48, LRA 1976] or where the wife has been resident here in Malaysia for at least two years immediately preceding the commencement of filing for divorce in the case where the husband has deserted her (s 49).

Criminal Law

CHINA

INTERNATIONAL CRIMINAL COURT – STATUTE OF ROME – INVITATION OF SUDANESE PRESIDENT

On June 21, 2011, Foreign Ministry Spokesperson Hong Lei made remarks on his regular press conference with regard to the criticism of some human

rights organizations on China's invitation of Sudanese President Bashir to visit China:

China is not a party to the Rome Statute and has reservations about the International Criminal Court's prosecution of President Bashir. Over recent years, President Bashir has been accorded a warm and friendly reception by the relevant countries on his many trips overseas. It is above criticism that we invite the head of state of a country having normal diplomatic relations with China.

**INTERNATIONAL TRIBUNALS – UNITED NATIONS
INTERNATIONAL CRIMINAL TRIBUNAL FOR
THE FORMER YUGOSLAVIA**

On December 20, 2011, Judge Liu Daqun of the UN ICTY was elected as Judge of the Mechanism for International Criminal Tribunals by the 66th UN General Assembly for a term of office of four years.

PHILIPPINES

**INTERNATIONAL CRIMINAL COURT – ROME STATUTE OF THE
INTERNATIONAL CRIMINAL COURT – ACCESSION**

Philippine Senate Resolution No. 57, August 23, 2011

The Philippines became the 117th State Party to the Rome Statute of the International Criminal Court. The Statute consists of 128 articles and provides for the establishment of the International Criminal Court.

The Senate Resolution states that the permanent institution has the power to exercise jurisdiction over persons for the most serious crimes of international concerns, and it is complementary to national criminal jurisdiction. Aside from this, the Court is the first permanent institution with the power to exercise jurisdiction over persons relative to the most serious crimes of international concern, i.e., genocide, crimes against humanity, war crimes, and crimes of aggression. The Statute adopts the principle of complementarity, the general principles of criminal law (for example, *nullum crimen sine lege*).

The Resolution notes that the ratification signifies the Philippines' commitment to human rights. It is the State's contribution to an effective criminal justice system. It complements domestic law Republic Act No. 9851 or the "Philippine Act on Crimes Against International Humanitar-

ian Law, Genocide, and Other Crimes Against Humanity,” which enables the State to prosecute international crimes on its own and strengthens human rights enforcement.

Diplomatic and Consular

CHINA

RECOGNITION – REPUBLIC OF SOUTH SUDAN

On July 9, 2011, Foreign Ministry Spokesperson Hong Lei made remarks on the Chinese Government’s Recognition of the Republic of South Sudan and the Establishment of China-South Sudan Diplomatic Ties as follows:

July 9 marks the founding of the Republic of South Sudan. Upon this day, the Government of the People’s Republic of China declared its recognition of the Republic of South Sudan as well as the establishment of ambassadorial diplomatic relations between the two countries. China stands ready to develop friendly cooperative relations across the board with South Sudan on the basis of the Five Principles of Peaceful Co-existence.

On the same day, Jiang Weixin, President Hu Jintao’s special envoy and Minister of Housing and Urban-Rural Construction, led a delegation to attend the independence celebration of the Republic of South Sudan at the invitation of President Salva Kiir. Jiang Weixin, representing the Chinese government, signed a diplomatic communiqué with Foreign Minister Deng Alor Kuol of South Sudan. He, together with South Sudan’s Parliamentary Speaker, James Wani Igga, unveiled the board of China’s Embassy in the Republic of South Sudan.

RECOGNITION - LIBYAN NATIONAL TRANSITIONAL COUNCIL

On September 12, 2011, Foreign Ministry Spokesperson, Ma Zhaoxu made remarks on China’s recognition of the Libyan National Transitional Council.

On September 12, China notified the Libyan National Transitional Council (NTC) of China’s decision to recognize it. China stated that the Chinese side respects the choice of the Libyan people, values the important status and role of the NTC, and has maintained close contact with it. China recognizes the NTC as the ruling authority of Libya and the representative

of the Libyan people and would like to work with it to push for the smooth transition and development of China-Libya relations. China hopes that the previously signed treaties and agreements between the two sides will remain valid and be earnestly implemented.

The NTC said that the Libyan people and the NTC are pleased with China's recognition and has long been looking forward to it. Attaching great importance to China's status and role, the NTC will honor faithfully all treaties and agreements signed between the two sides, stick to the one-China policy, welcome China's participation in Libya's reconstruction and jointly advance with China the stable and sustained development of bilateral relations.

Singapore

DIPLOMATIC IMMUNITY – STATEMENT ON BOMBING OF UNITED KINGDOM'S EMBASSY IN TEHRAN ON 29 NOVEMBER 2011

The Ministry of Foreign Affairs Spokesman's Comments in response to media queries on the attacks against the United Kingdom's Embassy in Tehran, Iran on 29 November 2011

This is unacceptable behaviour for any state that desires an honourable place in the community of nations. The international obligations for all states as set out in the Vienna Convention on Diplomatic Relations on the protection of diplomatic property and personnel are clear. To flout them undermines the very foundations of international relations and thus threatens all of us, particularly small states for whom the rule of international law is a vital national interest. Singapore condemns the attacks against the United Kingdom's Embassy in Tehran, Iran on 29 November 2011. We strongly urge Iran, a country with an ancient and proud civilization, to live up to its own traditions, respect international law, restore order and prevent repeat of the attacks against diplomatic missions in Tehran in compliance with its international obligations.

Environmental Law

INDIA

CONSERVATION – LAW OF TRANSBOUNDARY AQUIFERS

Statement by India on The Law Of Transboundary Aquifers, Sixth Committee of UNGA 66th Session, October 18, 2011

Referring to the resolution 63/124 of the UN General Assembly which encouraged States to make appropriate bilateral or regional arrangements for the proper management of their trans-boundary aquifers taking into account the draft articles on the subject, India noted the importance of the aquifers as life-supporting groundwater resources for mankind. India noted that the draft articles on Transboundary Aquifers sought to balance the equitable and reasonable utilization of aquifer systems with the obligation to prevent causing significant harm to other aquifer States and in cases where harm had been caused, to take measures to eliminate or mitigate such harm. India also noted that draft articles contained a number of useful provisions such as the factors relevant to equitable and reasonable utilization, the obligation to cooperate, regular exchange of data as well as the obligation of protection, preservation and management of aquifer system.

India, referring to debates within the Sixth Committee and the ILC, pointed out that there was lack of adequate scientific knowledge in the field of management and protection of aquifers and that there was further need to study these aspects before coming to a firm conclusion on the nature of the outcome of the draft articles. India also pointed out that considering the complex nature of the subject, and the lack of State practice, it would be necessary that States were provided with further scientific and technical assistance in understanding the issues.

JAPAN

NATURAL DISASTER – GREAT EAST JAPAN EARTHQUAKE – RECONSTRUCTION

Basic Act on Reconstruction in Response to the Great East Japan Earthquake (Law No. 76 of June 24, 2011)

The Basic Act on Reconstruction in Response to the Great East Japan Earthquake (Law 76) was enacted on June 24, 2011. The purpose of the Act is to promote a “smooth and prompt reconstruction from the Great East Japan Earthquake and revitalization of a vibrant Japan,” on the basis that “the Great East Japan Earthquake was an unprecedented national crisis due to its extensive damage affecting vast area and its characteristics as a compound disaster consisting of an earthquake, tsunami, and nuclear accident.” To achieve this purpose, the Act identifies several approaches including: securing “financial resources for the reconstruction”; creating the “System of Special Zone for Reconstruction”; “deciding on other fundamental issues to create an economy and society where current and future generations can lead safe and prosperous lives; and deciding on the basic guidelines regarding the establishment of the Reconstruction Headquarters in response to the Great East Japan Earthquake and the Reconstruction Agency,” an administrative organ that will replace the temporary Reconstruction Headquarters. In order to implement and realize the purpose of this Act, the Act on the Establishment of the Reconstruction Agency was subsequently enacted as described below.

**NATURAL DISASTER – GREAT EAST JAPAN EARTHQUAKE –
RECONSTRUCTION AGENCY**

The Act on the Establishment of the Reconstruction Agency (Law No. 125 of December 9, 2011)

The Act on the Establishment of Reconstruction Agency (Law No. 125) was enacted on December 16, 2011. According to the Basic Act on Reconstruction in response to the Great East Japan Earthquake (Law No. 76), the Reconstruction Agency is expected to function as a “headquarters” for the purpose of long-term recovery from such enormous disasters. Practically, the Agency’s main role is “to accelerate structural reconstruction and revitalization in the affected areas, by supporting the implementation of government policies and managing the coordination of reconstruction strategy and initiatives between various branches of government at a national level and with local municipalities.”

One of the most important functions of the Agency is to promptly coordinate various issues necessary for recovery policies beyond the competence of other existing ministries. This means that the Minister of

the Reconstruction Agency has a rather strong and unique competence; the Agency may request other ministries to submit relevant documents if necessary, make recommendations to the other ministries to take action, and receive reports related to measures taken by relevant ministries based on requests by the Agency. The Agency may even offer an opinion for the Prime Minister to take action on the Cabinet Act, concerning the relevant necessary measures to be recommended based on article 8.5. This is presumed or expected to act as a “safeguard” if the relevant ministries do not take any measures despite receiving requests or recommendations from the Agency.

MALAYSIA

CONSERVATION – LEGISLATION – PROHIBITION OF CRUELTY TO WILDLIFE – SALE OF PROTECTED WILDLIFE – LICENSING AND PERMIT

Wildlife Conservation Act

In 2010, the Malaysian parliament passed a new Wildlife Conservation Act to introduce licensing/permit requirements to hunt, take, keep, deal, carry on a taxidermy business, import and export any protected wildlife, and to collect bird’s nest in Malaysia. It also prohibits cruelty to wildlife, including captive wildlife, and establishes basic conditions for zoo management. In 2011, a man who attempted to sell two ivory statues online became the first person to be charged under the Act. Under section 68 of the Act, which makes it an offence to hunt, take, or keep any part or derivative of a totally protected wildlife, the man faces upon conviction a fine not exceeding RM100,000 and/or a jail term of less than three years. The new tougher laws were welcomed as important step in wildlife conservation efforts in Malaysia, although concerns about effective enforcement remain.

PHILIPPINES

POLLUTION – ASEAN AGREEMENT ON TRANSBOUNDARY HAZE POLLUTION – HANOI PLAN OF ACTION

Agreements Concurred by the Philippine Senate in 2010

In 2010, the Senate of the Philippines concurred with three important agreements that involve international law.

Philippine Senate Resolution No. 218, February 1, 2010

The ASEAN Agreement on Transboundary Haze Pollution was signed on June 10, 2002 in Kuala Lumpur, Malaysia. In essence, the Agreement aims to prevent and monitor transboundary haze pollution as a result of land and/or forest fires through national efforts and regional and international cooperation. The Agreement contains principles that guide states parties in its implementation, and obligations in preventing and monitoring haze pollution, including mutual assistance.

An ASEAN Center is envisaged to facilitate cooperation and coordination in managing the impact of haze pollution arising from fires. The resolution states that in ratifying the Agreement, the Philippines reaffirms its commitment to the 1990 Kuala Lumpur Accord on Environment, the 1995 ASEAN Cooperation Plan on Transboundary Pollution, and the Hanoi Plan of Action.

**NATURAL DISASTER – RISK REDUCTION AND MANAGEMENT –
INTERNATIONAL HUMANITARIAN ASSISTANCE – ACCEPTANCE OF
INTERNATIONAL NORMS OR PRINCIPLES**

An Act Strengthening the Philippine Disaster Risk Reduction and Management System, Providing for the National Disaster Risk Reduction and Management Framework and Institutionalizing the National Disaster Risk Reduction and Management Plan, Appropriating Funds therefor and for Other Purposes

The President of the Philippines approved Republic Act No. 10121, otherwise known as the Philippine Disaster Risk Reduction and Management Act (PDRRM) Act of 2010, on May 27, 2010. The PDRRM Act of 2010 contains substantive provisions that modify the approach of the state to disasters and contributes to several major paradigm shifts in Philippine disaster management. It is the solidification of external commitments, grounded on soft law and speech acts, of the Philippines to reform its main disaster law. These include the Hyogo Framework for Action 2005-2015: Building the Resilience of Nations and Communities to Disasters, which was adopted in the course of the World Conference on Disaster Reduction and endorsed by the UN General Assembly.

The PDRRM Act of 2010 provides for the development of policies and plans, and the implementation of actions and measures pertaining to all

aspects of disaster risk reduction and management. The law declares the policies of the State on disaster risk reduction. Several policies are notable, such as the adherence to and adoption of universal or internationally accepted norms or principles in humanitarian assistance and disaster risk reduction; explicit mention of ‘disaster risk reduction and management’ as an approach, including the desire to develop, promote and implement a plan at all levels of government; and mainstreaming disaster risk reduction and climate change in development and peace processes.

Further, the law defines certain terms which are intrinsically or necessarily connected to disaster risk reduction as manifested in the Hyogo Framework. The definition of disaster is not limited or equated to the traditional notion of environmental or natural disasters. Climate change and sustainable development are defined; so is the concept of ‘vulnerable and marginalized groups.’

Primordially, the law designates actors responsible for disaster risk reduction and management, and provides for their powers and functions. Mainly, it abolishes the National Disaster Coordinating Council and constitutes the National Disaster Risk Reduction Management Council (NDRRMC). The NDRRMC becomes the highest policy-making body on disasters, advising the President on the status of disaster preparedness, prevention, mitigation, response and rehabilitation. Also, the law tasks the Office of Civil Defense with the primary mission of administering a comprehensive national civil defense and disaster risk reduction and management program, thus expanding its role as an agency within government. The NDRRMC has regional and local counterparts.

Lastly, the law sets up a mechanism for international humanitarian assistance. The integration of this provision in the legal system is crucial in light of several recent relevant regional and international initiatives to address disasters. For instance, the ASEAN has affirmed adherence to the Hyogo Framework through the Agreement on Disaster Management and Emergency Response which the Philippines ratified in September 2009.

This law penalizes certain acts, provides penalties for violations of the law, resolves funding issues for the implementation of the law, and incorporates a mechanism on monitoring and evaluation.

**MARINE ENVIRONMENT AND RESOURCES – MARITIME
JURISDICTION AND BOUNDARY**

An Act Establishing the Philippines Coast Guard as an Armed and Uniformed Service Attached to the Department of Transportation and Communications, Thereby Repealing Republic Act No. 5173, as Amended, and for Other Purposes

Signed into law on February 12, 2010, the Philippines Coast Guard Law of 2009 establishes the Philippine Coast Guard (PCG) as an armed and uniformed service attached to the Department of Transportation and Communications. However, in times of war, as declared by Congress, the PCG or parts thereof shall be attached to the Department of National Defense.

The PCG's powers and functions include the enforcement of regulations in accordance with all relevant maritime international conventions, treaties or instruments and national laws for the promotion of safety of life property at sea within the maritime jurisdiction of the Philippines, and the conduct of port state control implementation. It may also detain, stop or prevent a ship or vessel which does not comply with safety standards, rules and regulations from sailing or leaving port.

Aside from the power to issue permits for the salvage of vessels, it could render aid to persons and vessels in distress and conduct search and rescue in marine accidents within the maritime jurisdiction of the Philippines, including the high seas, in accordance with applicable international conventions. The PCG now enforces laws and rules for the protection of marine environment and resources from offshore sources or pollution within the maritime jurisdiction of the Philippines.

Extradition

INDIA

**PERSONS SUBJECT TO EXTRADITION – ‘OBLIGATION TO
EXTRADITE OR PROSECUTE’**

Statement on Report of the International Law Commission on its Sixty-Third Session, Chapters I-V, Sixth Committee, UNGA 66th Session, October 24, 2011

Regarding the topic “the obligation to extradite or prosecute” while appreciating the work of the Special Rapporteur on the topic, India noted that under its extradition laws it clearly incorporated the principle of either extradite or prosecute. It also noted that in all its bilateral extradition treaties this principle was included.

Hijacking

CHINA

LAW ENFORCEMENT – COOPERATION ALONG THE MEKONG RIVER AMONG CHINA, LAOS, MYANMAR AND THAILAND

On October 5, 2011, Chinese cargo ships were hijacked and 13 Chinese crewmen were killed on the Mekong River. On October 13, 2011, Foreign Ministry Spokesperson Liu Weimin at the Regular Press Conference introduced the fact that in the summon of the diplomatic envoys of Thailand, Laos and Myanmar to China to lodge representations on the incident of Chinese crewmen being attacked on the Mekong River, Chinese vice Foreign Minister Song Tao urged the three countries to provide active assistance in the following areas:

First, step up investigation to find out the truth as soon as possible and inform China in a timely fashion, hunt down and punish the culprits in accordance with law. Second, provide assistance and protection for Chinese vessels and crew stranded in Chiang Saen Port, Thailand on their way home so as to ensure their safety, facilitate and assist the Chinese patrol ship's escort. Third, take effective measures to enhance protection of Chinese vessels and crewmen plying on the Mekong River so as to prevent recurrence of similar crimes. China will discuss with other related parties ways of enhancing the safety of the Mekong waterway and expects active support and coordination to jointly safeguard the safety of this important international waterway.

On October 31, 2011, China, Laos, Myanmar and Thailand made the Joint Statement on Law Enforcement Cooperation along the Mekong River. In the joint statement, the four States agree to take further strong measures and enhance the extent of joint investigation so as to thoroughly find the truth of the October 5 case and bring the perpetrators to justice as soon as possible; and agree to formally establish a law enforcement cooperation

mechanism for the Mekong River basin among China, Laos, Myanmar and Thailand in order to deal with the new situations of security in Mekong River basin.

On November 26, 2011, the four States adopted a Joint Statement of Ministerial Meeting on Cooperation in Patrol and Law Enforcement along the Mekong River. The full text reads as follows:

To implement the Joint Statement on Law Enforcement Cooperation along the Mekong River among the People's Republic of China, the Lao People's Democratic Republic, the Republic of the Union of Myanmar, the Kingdom of Thailand adopted on October 31, 2011, the law enforcement and security authorities of the People's Republic of China, the Lao People's Democratic Republic, the Republic of the Union of Myanmar and the Kingdom of Thailand held the Ministerial Meeting on Cooperation in Patrol and Law Enforcement along the Mekong River on November 25 and 26, 2011 in Beijing, China. H.E. Meng Hongwei, Vice Minister of Public Security of China, H.E. Bouasieng Champaphan, Deputy Chief of General Staff of Lao People's Army, H.E. Police Brigadier General Zaw Win, Deputy Chief of Myanmar Police Force and H.E. Wichean Potephosree, Secretary General of the National Security Council of Thailand attended the Meeting with their delegations. The Meeting was held in an atmosphere of mutual understanding and trust.

The Participants shared the view that the law enforcement and security authorities of China, Laos, Myanmar and Thailand have the common responsibility to safeguard peace and stability along the Mekong River within their own jurisdiction and on the basis of mutual respect for sovereignty, equality, and mutual benefits, and therefore should strengthen and grow friendly relations, deepen cooperation, solidify unity, pursue friendly consultation and enhance strategic partnership and mutual trust.

The Participants noted that each side shall enhance domestic law enforcement in its own territory water, and find an effective solution towards the serious security challenges along the Mekong River which necessitates innovative mechanisms and models for cooperation to concentrate efforts of the four countries.

To solidify and strengthen practical cooperation among the law enforcement and security authorities of the four countries, combat transnational crime and safeguard international shipping security along the Mekong River and in accordance with the spirit of solidarity, friendship

and cooperation, the Participants agreed to conduct cooperation in patrol and law enforcement along the Mekong River as early as possible, in accordance with the Joint Statement on Law Enforcement Cooperation along the Mekong River among the four countries adopted on October 31, 2011, and reached consensus on the following matters:

- I. The Participants agreed to further strengthen the cooperation on international shipping security and transnational crime, in particular, on drug trafficking and human trafficking along the Mekong River on the basis of equality and mutual benefit, and to resolve problems and differences through consultations.
- II. The Participants agreed on cooperation in law enforcement along the Mekong River to maintain and guarantee security and stability, and promote economic and social development and friendly people-to-people exchanges along the River from mid December 2011.
- III. The Participants agreed to hold the ceremony of the inaugural voyage for cooperation in patrol and law enforcement at China's Guanlei dock before December 15, 2011.
- IV. The Participants agreed to establish a combined operation center for cooperation in patrol and law enforcement at China's Guanlei dock. The four countries will send officers and liaison officers to coordinate, share intelligence and information subject to its own jurisdiction and domestic laws, and jointly consult and coordinate matters relating to vessels and personnel for cooperation in patrol and law enforcement.
- V. The Participants agreed that the Chinese side will send expert teams to Laos and Myanmar to assist law enforcement vessel driving and extend ship operating training upon request.
- VI. The Participants from Laos and Myanmar agreed to ensure the security of the vessels, personnel of cooperation in patrol and law enforcement and liaison teams and facilitate the provision of logistic support for them.

The Participants from Thailand agreed to provide above assistance as requested and as necessary on a case by case basis, in accordance with relevant domestic laws.

- VII. The Participants agreed to organize cooperative cooperation to eradicate transnational crimes endangering the security along the Mekong River, after the four countries reach consensus.

- VIII. The Participants agreed, in principle, to establish a working team on safeguarding the security along the Mekong River to further carry out field study on major crimes, and consult and formulate suggestions for improving security condition along the river which could be handed over to law enforcement and security authorities of the four countries for approval and implementation.
- IX. The Participants agreed to develop ways and means to foster social economy development along the Mekong River with a view to promote sustainable development and well-beings of the peoples along the Mekong River.
- X. The Participants agreed to take efforts under the coordination of the combined operation center, to improve cooperation mechanism and facilitate the consultations on the early signing of the Agreement on Law Enforcement Cooperation along the Mekong River on the ground of practice.
- XI. With a view to bringing to fruition this Joint Statement, the Participants from Thailand shall strive to complete its internal procedures.

This Joint Statement was adopted in Beijing on November 26, 2011.

Human Rights

BANGLADESH

TREATIES AND CONVENTIONS – CONVENTION ON THE RIGHTS OF THE CHILD – RIGHTS OF CHILD DOMESTIC WORKERS

***Bangladesh National Women Lawyers Association v. The Cabinet Division, represented by the Cabinet Secretary, Bangladesh Secretariat, Dhaka and others*, [40 CLC (HCD) 2011; Supreme Court of Bangladesh, High Court Division (Special Original Jurisdiction) (February 9 and 15, 2011)]**

The Bangladesh National Women Lawyers Association (BNWLA), a women lawyers' association that works 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 as reported in the daily national

newspaper on May 3, 2010. The report stated that the lady of the house tied up the child, pushed her to the floor and inserted the handle of a hot stirrer/paddle into her anus for breaking a flower vase. The report also gave details of how the girl was routinely tortured on the slightest of pretexts. The girl was admitted to the hospital on the third day following the incident when her condition turned critical. The lady of the house was arrested when the doctors informed the police.

A Rule Nisi was issued upon the concerned respondents from the government asking them to report within 24 hours what actions they have taken in lieu of the newspaper report and why the victim should not be sent for immediate treatment to the nearest One Stop Crisis Centre at the Dhaka Medical College Hospital. The Court further asked why the respondents from the government should not be directed to monitor the employment of children as domestic workers.

While recognising that poverty was an overriding factor that compelled poor parents from rural areas to send children of all ages to work as household help in towns and cities, the Court expressed concern over the horrendous treatment children were subjected to by their employers that often led to “injury, death and sometimes suicide, not to mention the often invisible mental and psychological harm” and reiterated Bangladesh’s obligation under the International Labour Organisation (ILO) Convention No.182 on Worst Forms of Child Labour which it has ratified. The significance of having a universal age threshold for defining children was also underscored as the Court observed:

So far as the recent actions taken by the government in connection with children are 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.

The Court came up with a set of comprehensive directives for the Government which included necessary steps for prohibiting employment of children below the age of 12 years, amending the definition of “worker” in the labour law to include domestic workers, ensuring basic education for children under the age of 12 years and vocational training for domestic workers between 13-18 years of age, monitoring violence against domestic workers and effectively prosecuting the perpetrators, preventing child trafficking, registering domestic workers with local government units,

and strengthening the legal framework to ensure that domestic workers are accorded workplace rights and benefits.

**TREATIES AND CONVENTIONS – INTERNATIONAL CONVENTION
ON THE PROTECTION OF RIGHTS OF ALL MIGRANT WORKERS AND
MEMBERS OF THEIR FAMILIES – RATIFICATION**

Instrument of Ratification

WHEREAS the ‘International Convention on the Protection of Rights of all Migrant Workers and Members of their Families’ was adopted by the United Nations on 18 December 1990 which came into force on 01 July 2003.

AND WHEREAS said ‘International Convention on the Protection of Rights of all Migrant Workers and Members of their Families’ has been signed on behalf of the Government of People’s Republic of Bangladesh on the 07 October 1998,

NOW THEREFORE I, DR. DIPU MONI, MP, Minister of Foreign Affairs, declare that the Government of People’s Republic of Bangladesh, having considered the provisions as stated in Article 86 of the said Convention ratifies the same and undertakes faithfully to perform and carry out the stipulations contained therein.

IN WITNESS THEREOF I have signed this instrument of ratification at Dhaka on the Twenty Third day of August in the year Two Thousand Eleven of the Christian Era.”

MALAYSIA

**TREATIES AND CONVENTIONS – CEDAW – CONSTITUTIONAL
GUARANTEE OF GENDER EQUALITY –STATUS AND APPLICABILITY
OF INTERNATIONAL LAW IN INTERPRETATION OF THE
CONSTITUTION – GENDER DISCRIMINATION IN EMPLOYMENT –
PERMANENT MISSION OF MALAYSIA TO THE UNITED NATIONS**

***Noorfadilla bt Ahmad Saikin v. Chayed bin Basirun & Or* [2011] 1 MLJ 832**

This case addressed the issue of the legal status of CEDAW under Malaysia’s domestic law. The High Court accepted that CEDAW could have direct effect insofar as it influences constitutional interpretation.

Facts

The applicant challenged the validity of a decision made by a local education office to cancel her appointment as a relief teacher. The applicant had applied for and obtained employment as a relief teacher. After receiving her placement memo informing her of her posting, she was asked to attend a briefing on the terms of her service of employment. At this briefing, the applicant was asked whether she was pregnant. When she informed the education officer that she was three months pregnant, her placement memo was withdrawn. The applicant sought a declaration that the Ministry's refusal to employ women as relief teachers on the basis of their pregnancy, as well as their revocation of her appointment was unconstitutional for violating article 8(2) of the Federal Constitution. Article 8(2) prohibits gender discrimination in the appointment of any office or employment by a public authority. The Ministry of Education and the local district education office claimed that they were entitled under an official circular dated February 27, 2007 not to employ any pregnant woman as a relief teacher. The Ministry claimed that the purpose of employing relief teachers is to help overcome the shortage of teachers and not to add to the problem. It argued that it is justified in not hiring pregnant relief teachers because "(a) the period between the time of delivery to full health is too long (2 months); (b) a pregnant woman [as a relief teacher] may not frequently be able to attend to her job due to various health reasons; (c) when she gives birth she needs to be replaced by [a] new teacher who will require further briefings; and (d) a [relief teacher] post cannot be filled with 'replacement' teachers."

Judgment

[The High Court decided in the applicant's favor, declaring that the withdrawal of her appointment on the basis of her pregnancy was unconstitutional. It also opined that in interpreting the prohibited scope of gender discrimination under article 8(2) it was appropriate to take into account Malaysia's obligations under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). The government appealed to the Court of Appeal but the appeal was subsequently withdrawn.]

[A]rt 8(2) of the Federal Constitution provides, *inter alia*, that there shall be no discrimination on the ground only of gender in the appointment of any office or employment under a public authority. The word 'gender' was

added to art 8(2) by the Constitution (Amendment) (No 2) Act 2001 (Act A 1130), which came into force on September 28, 2001; to comply with Malaysia's obligation under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). This is clearly illustrated in the Minister's speech in the Hansard for second and third Reading of the Bill to amend the Constitution on August 1, 2001...

... It is to reflect the view that women are not [to be] discriminated. Article 1 of CEDAW defines 'discrimination against women' as any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field'.

Further, article 11(1)(b) of CEDAW provides that state parties shall take all appropriate measure to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular the right to the same employment opportunity, including the application of the same criteria for selection in matters of employment. In article 11(2)(a) of CEDAW, it provides that State parties shall take appropriate measure to prohibit, subject to the imposition of sanctions, dismissal on the grounds, *inter alia*, of pregnancy.

... CEDAW is not a mere declaration. It is a convention. Hence, following the decision of the Federal Court in [Mohd Ezam Mohd Noor v Ketua Polis Negara and other appeal [2002] 4 MLJ 449], it has the force of law and binding on members states, including Malaysia. More so that Malaysia has pledged its continued commitments to ensure that Malaysian practices are compatible with the provision and principles of CEDAW as evidenced in the letter from the Permanent Mission of Malaysia to the Permanent Missions of the Members States of the United Nations dated March 9, 2010.

.... To me, in interpreting art 8(2) of the Federal Constitution, it is the court's duty to take into account the government commitment and obligation at international level especially under an international convention, like CEDAW, to which Malaysia is a party. The court has no choice but to refer to CEDAW in clarifying the term 'equality' and gender discrimination under art 8(2) of the Federal Constitution.

**TREATIES AND CONVENTIONS – UN CONVENTION AGAINST
TRANSNATIONAL ORGANIZED CRIME – APPLICATION OF
INTERNATIONAL LAW IN IMPLEMENTING NATIONAL LAW –
COMPLIANCE WITH INTERNATIONAL STANDARDS**

Anti-Trafficking in Persons And Anti-Smuggling Migrants (Amendment) Act of 2010 (Act 670)

Malaysia ratified the United Nations Convention against Transnational Organized Crime (UNTOC) in 2004, and in 2009, its Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (UNTOC Trafficking Protocol). This Protocol has been one of the main sources of reference for Malaysia's Anti-Trafficking in Persons Act 2007 ("Anti-Trafficking Act"). Although it did not also sign the UNTOC Protocol Against the Smuggling of Migrants by Land, Sea, and Air, Malaysia's National Plan on Trafficking in Persons 2010 use that Protocol as another source of reference in implementing its anti-trafficking in persons laws.

In 2010, the Anti-Trafficking Act was amended and renamed the Anti-Trafficking in Persons And Anti-Smuggling of Migrants Act, thus emphasising a distinction between trafficking and people smuggling. The Amendment to the Anti-Trafficking in Persons Act, DR 22/2010 also revised the definition of trafficking to include all actions involved in acquiring or maintaining the labour or services of a person through coercion. Enforcement and prosecution of offenders, and protection of victims remain serious issues. Since it was placed on Tier 3 of the US State Department's Trafficking in Persons Report (TIP Report) in 2009, Malaysia has stepped up efforts to keep itself at the Tier 2 Watch List in the last four years of the TIP Reports (2010-2013). Tier 2 Watch List countries are those whose governments do not fully comply with the United States' Trafficking Victims Protection Act's minimum standards, but are making significant efforts to bring themselves into compliance with those standards. These countries are on the Watch List (as opposed to being on Tier 2) because a) the absolute number of victims of severe forms of trafficking is very significant or is significantly increasing; or b) there is a failure to provide evidence of increasing efforts to combat severe forms of trafficking in persons from the previous year; or c) the determination that a country is making significant efforts to bring itself into compliance with minimum standards was based on commitments by the country to take additional future steps

over the next year. Tier 3 countries are those whose governments do not fully comply with the minimum standards and are not making significant efforts to do so.

**PRIVACY – PERSONAL DATA PROTECTION ACT –
USE OF PERSONAL DATA – STATE SOVEREIGNTY**

Ministry Of Finance, Economic Report 2013/2014 (October 25, 2013)

In 2010, Malaysia passed the Personal Data Protection Act (PDPA) to regulate the processing of personal data in commercial transactions, and to protect the interests of data subjects. The PDPA makes it an offence for data users to reveal person data to third parties without the consent of the data owner. Data owners are to be informed by written notice if their personal data is being processed. According to the Ministry of Finance's Economic Report 2013/2014, federal and state governments are excluded in order for them to continue to use basic personal data for legal administrative purposes. Personal data processed entirely outside Malaysia are also excluded from the ambit of the PDPA. The Economic Report also stated that the PDPA represents recognition of information privacy as one of the fundamental human rights and protection of invaluable data that has the potential of being commoditized. PDPA policies are also aimed at enhancing regional cooperation.

**TREATIES AND CONVENTIONS – MALAYSIA-AUSTRALIA REFUGEE
SWAP – ASYLUM SEEKERS**

Agreement Between Malaysia and Australia Relating to Transfer and Resettlement of Refugees and Asylum Seekers, 2011

In 2011, Malaysia signed an agreement with Australia on the transfer and resettlement of refugees and asylum seekers. Under the arrangement, Australia would send 800 unprocessed asylum seekers who land on its shores to Malaysia for processing by the United Nations. In turn, Australia would accept 4,000 United Nations-certified refugees from Malaysia. Australia had hoped that immediate rerouting to Malaysia would deter asylum seekers from trying to come to Australia by boat as they would not be processed in Australia. The agreement is currently in abeyance and largely abandoned after the Australian High Court struck it down on the basis that Malaysia was not an appropriate country to which to send

asylum seekers since it is not party to the 1951 United Nations Convention Relating to the Status of Refugees.

PHILIPPINES

LABOUR RIGHTS – NIGHT WORKERS – LABOUR CODE

An Act Allowing the Employment of Night Workers, Thereby Repealing Articles 130 and 131 of Presidential Decree Number Four Hundred Forty-Two, as Amended, otherwise known as the Labor Code of the Philippines

On June 21, 2011, Philippine President Benigno Simeon C. Aquino III signed Republic Act No. 10151 into law. It repealed Article 130 of the Labor Code which prohibited the employment of women for night work (Art. 1) and Article 131 of the said Code (Art. 2). Previously, Article 130 of the Labor Code prohibited the employment of women in industrial undertakings between 10 p.m. to 6 a.m. of the following day, and in commercial or non-industrial undertakings between 12 midnight to 6 a.m. In agriculture, a woman was not allowed to work at night time, unless she has had a period of rest of at least 9 consecutive hours. Article 131 provided certain exceptions to the general prohibition, such as emergencies, situations in which the woman worker holds a managerial or technical position, or the nature of the work requires a woman's manual skill and dexterity.

Historically, the night work provisions were adopted in light of International Labor Organization ("ILO") Convention No. 89 of 1934 or the Women Night Work Convention. The Philippines is a State Party to Convention No. 89. The repeal implements the obligations of the Philippines under the Convention on the Elimination of all Forms of Discrimination Against Women ("CEDAW") as the provisions were largely seen as discriminatory against women. Notably, the Philippines is a signatory to the new ILO Night Work Convention No. 171 of 1990, which provides equal work opportunity for men and women, and takes into account health and safety concerns. However, it has not yet ratified the said treaty.

Apart from repealing the night work provisions, Republic Act No. 10151 introduced novel provisions (Sec. 4), such as the limitation of night work to eight hours a day; rights to undergo health assessment without charge, suitable first aid facilities, sleeping quarters, transfers for night workers who are certified to be unfit for night work due to health reasons

and protection for those who are certified to be temporarily unfit for night work, and social services. Significantly, the law requires the employer to take measures to ensure that an alternative to night work is available to pregnant woman before and after childbirth for a period of at least 16 weeks, and for additional periods as necessary. The Act includes a penal clause for any violation of its provisions and rules and regulations issued pursuant to it (Sec. 8).

**MINORITY RIGHTS – DISCRIMINATION OF LESBIANS GAYS,
BISEXUALS AND TRANSGENDERS IN PARTY-LIST ACCREDITATION**

***Ang Ladlad v. Commission on Elections* [GR No. 190582. April 8, 2010]**

The Commission on Elections (Comelec) refused to accredit Ang Ladlad as a party-list organization under the Party-List System Act. Ang Ladlad is an organization of men and women who identify themselves as lesbians, gays, bisexuals or transgender (LGBT) individuals. It first applied for registration with the Comelec in 2006, but it was denied on the ground that it had no substantial membership base. An application for registration was once again filed in 2009.

Ang Ladlad argued before the Comelec that the LGBT community is a marginalized and underrepresented sector which is particularly disadvantaged because of sexual orientation and gender identity; that the community has been a victim of exclusions, discrimination, and violence; that because of negative societal attitudes, LGBTs are constrained to hide their sexual orientation; and that Ang Ladlad complied with the eight-point guidelines enunciated by the Supreme Court in jurisprudence for party-list accreditation.

The Comelec dismissed the petition for accreditation on moral grounds, citing that the ‘definition of the LGBT sector’ made it clear that Ang Ladlad tolerates immorality that offends religious beliefs. It referred, *inter alia*, to the Holy Bible and the Koran, while quoting several domestic civil and penal laws relating to decency, immorality and good customs. Further, it stated that the accreditation would expose the youth to an environment that does not conform to the teachings of faith.

Ang Ladlad sought the reconsideration of the resolution. In upholding the resolution, the Comelec noted that the party-list system is a tool for the realization of aspirations of marginalized individuals whose interests

are also the nation's. Hence, until the time comes when Ladlad is able to justify that having mixed sexual orientations and transgender identities is beneficial to the nation, its application for accreditation would not be approved. The Comelec added that the principle of equal protection is not violated as members of Ang Ladlad remain either male or female who are protected by the same Bill of Rights that applies to all citizens alike. Likewise, the Philippines cannot ignore its more than 500 years of Muslim and Christian upbringing, such that some moral precepts espoused by said religions are now part of society.

Before the Supreme Court, Ang Ladlad contended that the resolution justified Ang Ladlad's exclusion by using religious dogma; and this violated the constitutional guarantees against the establishment of religion. It also contravened the constitutional rights to privacy, freedom of speech and assembly, and equal protection of laws, as well as constituted violations of the Philippines' international obligations against discrimination based on sexual orientation.

The Supreme Court ruled in favor of Ang Ladlad and ordered the Comelec to grant the application for party-list accreditation. The Court stated that the party-list satisfied the exacting standards of the law. Foremost, the LGBT sector has experienced past subordination or discrimination; possesses an immutable or distinguishing characteristic, attribute, or experience that defines it as a discrete group; and is at present politically and/or economically powerless.

**TREATIES AND CONVENANTS – TREATY OF PEACE BETWEEN JAPAN
AND THE PHILIPPINES – CLAIMS FOR MONETARY REPARATION
AGAINST JAPAN**

***Isabelita C. Vinuya, et al v. Executive Secretary Alberto G. Romulo* [GR No. 162230. April 28, 2010]**

MALAYA LOLAS is a non-stock, non-profit organization registered with the Securities and Exchange Commission (SEC) of the Philippines. Primarily, the aim of the organization is to provide aid to the victims of rape by Japanese military forces in the Philippines during the Second World War. Members of the organization claim to be "comfort women" to the Japanese forces and suffered greatly because of that.

In 1998, the organization approached the executive branch of government through the Department of Justice, Department of Foreign Affairs,

and Office of the Solicitor General, to request assistance in filing a claim against Japanese officials and military officers responsible for the establishment of “comfort women” stations in the country. The officials of the executive branch of government declined the request since the individual claims had been allegedly satisfied by Japan’s compliance with the San Francisco Peace Treaty of 1951 and the Reparations Agreement of 1956 between Japan and the Philippines.

MALAYA LOLAS filed a petition before the Supreme Court to compel the executive officials to espouse their claims for official apology and other forms of reparations against Japan before the International Court of Justice and other international tribunals.

MALAYA LOLAS argued that the general waiver of claims executed by the Philippine government in relation to the Treaty of Peace between Japan and the Philippines is void. The “comfort women” system constitutes a crime against humanity, sexual slavery, and torture. It is also prohibited by *jus cogens* norms from which derogations are not permitted. The waiver amounts to a breach of the government’s obligation and fosters an environment of impunity. Government’s acceptance of the apologies made by Japan and the funds from the Asian Women’s Fund is contrary to international law.

According to the Supreme Court, stripped down to its essentials, the issue in the case is whether the executive branch of government committed grave abuse of discretion in not espousing MALAYA LOLAS’s claims for official apology and other forms of reparations against Japan. The Supreme Court held that there was no such abuse on the part of the government.

First, from a domestic law perspective, the executive has the exclusive prerogative to determine whether to espouse petitioners’ claims against Japan. The matter is a political question and a foreign relations matter, the authority for which is demonstrably committed by the Philippine Constitution not to the courts but to the political branches of government. The Executive Department has already decided that it was to the best interest of the country to waive all the claims of its nationals for reparations against Japan in the Treaty of Peace of 1951. The wisdom of such decision is not for the courts to question.

Second, the Philippines is not under any international obligation to espouse the claim. Under international law, the only means available for individuals to bring a claim within the international legal system has been

when the individual is able to persuade a government to bring a claim on the individual's behalf. In the eyes of the international tribunal, the State is the claimant. The State is the sole judge to decide whether its protection in favor of MALAYA LOLAS will be granted, to what extent, and when it will cease. At present, there is no sufficient evidence to establish a general international obligation for States to exercise diplomatic protection of their own nationals abroad. Neither state practice nor *opinio juris* has evolved in such a direction.

The Court agreed that rape, sexual slavery, torture, and sexual violence are morally reprehensible as well as legally prohibited under contemporary international law. However, these proscriptions do not automatically imply that the Philippines is under a non-derogable obligation to prosecute international crimes, particularly since petitioners do not demand the imputation of individual criminal liability, but seek to recover monetary reparations from Japan. Absent the consent of states, an applicable treaty regime, or a directive by the Security Council, there is no non-derogable duty to institute proceedings against Japan.

Further, the Court opined that precisely because of states' reluctance to directly prosecute claims against another state, recent developments support the modern trend to empower individuals to directly participate in suits against perpetrators of international crimes. Notwithstanding General Assembly resolutions calling for the prosecution of crimes against humanity and the strong policy arguments for it, the practice of states does not yet support the present existence of an obligation to prosecute international crimes. A customary duty of prosecution would be ideal, but there is not enough evidence to reasonably assert its existence. It is in the practice of granting amnesties, immunity, selective prosecution, or *de facto* impunity to those who commit crimes against humanity, that state practice in this area is widespread.

Finally, the Court stated that even if it sidesteps the question of whether *jus cogens* norms existed in 1951, MALAYA LOLAS has not deigned to show that the crimes committed by the Japanese army violated *jus cogens* prohibitions at the time the Treaty of Peace was signed, or that the duty to prosecute perpetrators of international crimes is an *erga omnes* obligation or has attained the status of *jus cogens*.

**TREATIES AND CONVENTIONS – CEDAW AND CRC – WOMEN’S
RIGHTS – CHILDREN’S RIGHTS – BEST INTEREST OF THE CHILD –
HEALTH AND NUTRITION – BREASTFEEDING POLICIES**

An Act Expanding the Promotion of Breastfeeding, Amending for the Purpose Republic Act No. 7600, otherwise known as “An Act Providing Incentives to All Government and Private Health Institutions with Rooming-In and Breastfeeding Practices and for Other Purposes”

This law is widely known as the Expanded Breastfeeding Promotion Act of 2009, signed into law on March 16, 2010. It amends the salient points of an earlier law on the same subject matter. For instance, it prescribes the provision of facilities for breast milk collection and storage for health institutions; the establishment of lactation stations and lactation periods; and a system of incentives and penalties. A list of ‘mother-baby-friendly’ establishments available to the public is mandated to be kept by the Department of Health.

Some of these points which are relevant to state practice are outlined here:

One, the law declares as policy that the State shall protect working women consistent with international treaties and conventions to which the Philippines is a signatory such as (1) the Convention on the Elimination of all forms of Discrimination against Women, which emphasizes provision of necessary supporting social services to enable parents to combine family obligations with work responsibilities; (2) the Beijing Platform for Action and Strategic Objective, which promotes harmonization of work and family responsibilities for women and men; and (3) the Convention on the Rights of the Child, which recognizes a child’s inherent right to life and the State’s obligations to ensure the child’s survival and development.

Two, in defining lactation management as the general care of a mother-infant nursing couple during the mother’s prenatal, immediate postpartum and postnatal periods, the law mentions the monitoring of breastfeeding mothers by health workers and breastfeeding peer counselors for service patients to ensure compliance with the government’s Department of Health, the World Health Organization (WHO) and the United Nations Children’s Fund (UNICEF) on the implementation of breastfeeding policies, the physiology of lactation, the establishment and maintenance of lactation, the proper care of the breasts and nipples, and such other matters that would contribute to successful breastfeeding.

**MIGRANT WORKERS – OVERSEAS WORKERS – PUBLIC WELFARE –
CLARIFICATION OF CONCEPT OF “ILLEGAL RECRUITMENT”**

An Act Amending Republic Act No. 8042, otherwise known as the Migrant Workers and Overseas Filipinos Act of 1995, as Amended, Further Improving the Standard of Protection and Promotion of the Welfare of Migrant Workers, Their Families and Overseas Filipinos in Distress, and for Other Purposes

This Act, which amends the Migrant Workers and Overseas Filipinos Act of 1995, lapsed into law on March 8, 2010. The following policies guide the amendatory provisions found in first section of the law:

In the pursuit of an independent foreign policy and while considering national sovereignty, territorial integrity, national interest and the right to self-determination paramount in its relations with other states, the State shall, at all times, uphold the dignity of its citizens whether in country or overseas, in general, and Filipino migrant workers, in particular, continuously monitor international conventions, adopt/be signatory to and ratify those that guarantee protection to our migrant workers, and endeavor to enter into bilateral agreements with countries hosting overseas Filipino workers.

Free access to the courts and quasi-judicial bodies and adequate legal assistance shall not be denied to any person by reason of poverty. In this regard, it is imperative that an effective mechanism be instituted to ensure that the rights and interest of distressed overseas Filipinos, in general, and Filipino migrant workers, in particular, whether regular/documented or irregular/undocumented, are adequately protected and safeguarded.

The State recognizes that the most effective tool for empowerment is the possession of skills by migrant workers. The government shall provide them free and accessible skills development and enhancement programs. Pursuant to this and as soon as practicable, the government shall deploy and/or allow the deployment only of skilled Filipino workers.

The State recognizes non-governmental organizations, trade unions, workers associations, stakeholders and their similar entities duly recognized as legitimate, are partners of the State in the protection of Filipino migrant workers and in the promotion of their welfare. The State shall cooperate with them in a spirit of trust

and mutual respect. The significant contribution of recruitment and manning agencies shall form part this partnership.

The law articulates a more inclusive new definition of who is considered an overseas Filipino worker, which makes no reference to the regularity or irregularity of presence in a foreign state. The deployment of overseas Filipino workers is allowed only in countries where the rights of Filipino migrant workers are protected. However, in pursuit of the national interest or when public welfare so requires, the governing board of the government's Philippine Overseas Employment Administration, after consultation with the Department of Foreign Affairs, may, at any time, terminate or impose a ban on the deployment of migrant workers.

Additionally, the law clarifies the concept of illegal recruitment and provides stiffer penalties therefor. Jurisdiction as to money claims is recalibrated and a system for free legal assistance to victims is established. Likewise, upon discovery or being informed of the presence of migrant workers whose ages fall below the minimum age requirement for overseas deployment, the law states that the responsible officers in the foreign service should without delay repatriate said workers and advise the Department of Foreign Affairs through the fastest means of communication available of such discovery and other relevant information. There are other important provisions in the law, including those on insurance, the creation of an assistance fund, and the role of the different government agencies in migrant protection.

SRI LANKA

RIGHTS OF ELDERLY – UNITED NATIONS PRINCIPLES FOR OLDER PERSONS – PROTECTION – LEGISLATIVE AMENDMENT

Protection of the Rights of Elders (Amendment) Act No 05 of 2011

The Amendment introduced three clauses to the Preamble of the principal Act of which one notes that Sri Lanka has ratified the United Nations Principles for Older Persons, G.A. Res.46/91, U.N (Dec. 1991). That clause notes that the state has a responsibility to assist elders to live a fulfilling life. Among other things, this Amendment introduces the issuance of 'Elder's Identity Cards', the establishment of 'Elders Committees' at the lowest level of administrative divisions. It included prohibitions on dis-

crimination on the basis of age in accessing any building or any facility, benefit or advantage.

**TREATIES AND CONVENTIONS – ICCPR – PREVENTION OF
TERRORISM ACT – RIGHT TO BE FREE FROM TORTURE – RIGHT TO
EQUALITY – ARBITRARY ARREST AND DETENTION**

***Centre for Policy Alternatives v. Gotabaya Rajapaksa SC*, [2011] S.C.R 453 (Sri Lanka)**

A non-governmental Organization whose mandate included advocacy and litigation for human rights, filed a petition before the Supreme Court claiming that the new regulations introduced to the Prevention of Terrorism Act led to the infringement and imminent infringement of several fundamental rights including the right to be free from torture, the right to equality and the right to be free from arbitrary arrest and detention. The petitioner also claimed that the regulations were beyond the scope of the PTA and that it amounted to an unlawful derogation from human rights in violation of Sri Lanka's obligations under the International Covenant on Civil and Political Rights.

The Supreme Court dismissed the petition at 'the leave to proceed' stage stating that the Court saw no basis on which 'leave to proceed' with the application could be granted.

**TORTURE AND ILL-TREATMENT – ENFORCED DISAPPEARANCES
– REFUGEES – ANTI-TERRORISM MEASURES – PREVENTION OF
TERRORISM ACT**

Concluding Observations – Committee Against Torture

The Committee against Torture considered the joint third and fourth periodic reports submitted by Sri Lanka at its Forty Seventh Session in 2011. The following observations were made by the Committee.

Allegations of widespread use of torture and ill-treatment: The Committee raised concerns about the continued and consistent allegations of widespread use of torture and other cruel, inhuman or degrading treatment of suspects in police custody; especially to extract confessions or information to be used in criminal proceedings. The Committee noted that torture and ill-treatment perpetrated by State actors, both the military and the police, have continued in many parts of the country after the conflict ended

in May 2009 and is still occurring in 2011, in contravention of Articles 2, 4, 11 and 15 of the Convention.

Enforced disappearances: While welcoming the State party's Supreme Court judgment in *Kanapathipillai Machchavallavan v. Officer in Charge, Army Camp Plantain Point, Trincomalee and Three Others*, [2005] S.C.R. 341 (Sri Lanka), according to which enforced disappearance could constitute a violation of the freedom from punishment except according to law, Constitution, art. 13(4), the Committee noted with concern that enforced disappearance is not a separate offence under Sri Lankan criminal law and that such acts are charged under other crimes in the Penal Code, including kidnapping, abduction and wrongful confinement.

Anti-terrorism measures: While noting the State party's decision to lift the long-standing state of emergency on August 31, 2011, the Committee expressed concern over the new regulations decreed under the Prevention of Terrorism Act No. 48 of 1979 (PTA) which restrict legal safeguards for persons suspected or charged with a terrorist or related crime.

The Committee noted that the President continued to invoke Section 12 of the Public Security Ordinance (Chapter 40) to allow the armed forces to retain policing powers in all 25 districts (Presidential Order of August 6, 2011). It was noted that with the lapsing of the state of emergency, the limited safeguards contained in Emergency (Miscellaneous Provisions and Powers) Regulation, No. 1 of 2005, which applied when arrests were made by armed forces, were apparently are no longer in effect under the new PTA regulations (e.g. a person arrested by a member of the armed forces had to be handed over to the police within 24 hours) in contravention of Articles 2 and 16 of the Convention.

Coerced Confessions: The Committee expressed its concern about the fact that the PTA allows all confessions obtained by police at or above the rank of Assistant Superintendent of Police (ASP) to be admissible (sect. 16) placing the burden of proof on the accused that a confession was obtained under duress (sect. 17(2)). The Committee was also concerned at reports that in most cases filed under the PTA the sole evidence relied upon were confessions obtained by an ASP or an officer above that rank, in contravention of Articles 2, 11, 15 and 16 of the Convention.

Human Rights Commission of Sri Lanka (HRCSL): The Committee noted with concern that the new appointment process to public office set out by the 18th Amendment to the Sri Lankan Constitution (September 2010),

which ends Parliament's role in approving appointments, undermines the independence of the HRCSL. The Committee was also concerned about the difficulties the HRCSL has had in carrying out its function owing in part to the lack of cooperation from other State party institutions, limited human and financial resources, which has reduced its ability to investigate specific incidents and make recommendations for redress, and failure to publish the reports of its investigations.

Witness and victim protection: The Committee reiterated its concern at the absence of an effective mechanism to ensure the protection of and assistance to witnesses and victims of human rights violations and abuses, which has a negative impact on the willingness and ability of witnesses and victims to participate in investigations or to testify in proceedings.

Refugees, non-refoulement: The Committee noted with concern the absence of domestic legislation or national policy that guarantees the protection of refugees and asylum-seekers in the State party and persons who require international protection.

**DISCRIMINATION – VIOLENCE AGAINST WOMEN – TRAFFICKING
AND EXPLOITATION OF WOMEN –
PREVENTION OF DOMESTIC VIOLENCE ACT**

Concluding Observations - Committee on the Elimination of Discrimination against Women

The Committee considered the combined fifth, sixth and seventh periodic reports of Sri Lanka in 2011 and made the following recommendations.

Prohibition of discrimination against women: The Committee was concerned that legislation in the State party does not prohibit discrimination against women in line with Article 1 of the Convention covering both direct and indirect discrimination, or extending to acts of both public and private actors in accordance with Article 2. In this regard, the Committee observed that the Women's Rights Bill being elaborated by the State party is not in line with the Convention.

Discriminatory laws: While noting that there is an ongoing reform of the Muslim Personal Law, the Committee raised its concern about the persistence of discriminatory provisions in the law, including in the Penal Code, the Land Development Ordinance which gives preference to male heirs over females, the general personal laws, the Muslim Personal Law, the Kandyan Law and the Tesawalamai Law. The Committee was also

concerned about the plurality of legal systems composed of the general, customary and religious laws and the lack of choice for women between the different legal systems.

Violence against women: The Committee was concerned that, despite the adoption of the Prevention of Domestic Violence Act, significant delays took place before cases were processed under this Act. The Committee was further concerned that marital rape is recognized only if a judge has previously acknowledged the separation of the spouses. The Committee was concerned that the criminalization of same sex relationship results in women being completely excluded from legal protection.

Trafficking and exploitation of prostitution: The Committee commended the efforts undertaken by the State party to combat trafficking, including the introduction of a new definition of the offence of trafficking in persons in the Penal Code, the organization of awareness-raising activities and the establishment of an Anti-Human Trafficking Task Force.

The Committee was, however, concerned at the low number of convictions and punishment of those convicted of trafficking and at the lack of protective measures and safe homes for victims of trafficking. It was also concerned that the State party has not ratified the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.

Employment: The Committee expressed its concern at the lack of protection of women working in the informal sector and the lack of specific law on sexual harassment. It was further concerned that, despite the State party's ratification of the ILO Convention No. 100 on Equal Remuneration, the principle of equal remuneration for men and women for work of equal value has not been reflected in national legislation.

Abortion: The Committee was also concerned that abortion is a punishable offence under the law, unless the purpose is to save the life of the mother. It noted that about 10 percent of maternal mortality is reported as the direct result of clandestine abortion.

Marriage and family relations: The Committee raised its concern about the preservation of a combination of general, customary and religious marital laws that contain discriminatory elements against women. The Committee was concerned that polygamy is not prohibited, that there is no minimum age of marriage recognized under Muslim personal law,

and that Tamil women need their husband's consent to appear in court or undertake any transaction under the Tesawalamai law. The Committee was further concerned about the lack of progress in recognizing no-fault divorce and women's economic rights upon divorce.

ABUSES – NATIONAL RECONCILIATION – RECOMMENDATIONS

Recommendations of the Lessons Learnt and Reconciliation Commission

The Lessons Learnt and Reconciliation Commission (LLRC) was appointed by the Sri Lankan President in May 2010. The commission was mandated to investigate inter alia the facts and circumstances which led to the failure of the ceasefire agreement of February 27, 2002 and the sequence of events thereafter up to May 2009, whether any person, group or institution bear responsibility in this regard, the lessons that should be learnt from those events and the institutional, administrative and legislative measures which need to be taken in order to prevent any recurrence of such concerns in the future, and to promote further national unity and reconciliation among all communities. After an 18 month inquiry, the commission submitted its report to the President on November 15, 2011. The report was made public on December 16, 2011, after being tabled in parliament.

The framework of reference of the Commission was Sri Lanka's international and Constitutional obligations in the sphere of human rights.

Allegations concerning missing persons, disappearances and abductions:

The Commission stated that Government is duty bound to direct the law enforcement authorities to take immediate steps to ensure that the widespread allegations concerning missing persons are properly investigated into and perpetrators brought to justice. The Commission emphasized that it is the responsibility of the State to ensure the security and safety of any person who is taken into custody by governmental authorities through surrender or an arrest.

The Commission remarked that the issuance of death certificates and monetary recompense where necessary should be addressed as a matter of priority, taking into account applicable international standards. In this regard, the Commission noted the recent amendment to the Registration of Deaths Act, which provides for the next of kin to apply for a Certificate of Death in respect for a person who

is reported missing and not been heard of for a period exceeding one year by those who would naturally have heard of him/her, and his/her disappearance is attributable to any terrorist or subversive activity or civil commotion which has taken place in Sri Lanka.

The Commission recommended that a Special Commissioner of Investigation be appointed to investigate alleged disappearances and provide material to the Attorney General to initiate criminal proceedings as appropriate.

Treatment of Detainees: The Commission stressed that the next of kin of the detainees have the fundamental right to know the whereabouts of their family members who are in detention. Therefore there was a need for a centralized comprehensive database containing a list of detainees, which should be made available to the next of kin with names, place of detention as well as record of transfers so that families have access to such information.

It was further observed that all places of detention should be those, which are formally designated as authorized places of detention and no person should be detained in any place other than such authorized places of detention. Strict legal provisions should be followed by the law enforcement authorities in taking persons into custody, such as issuing of a formal receipt of arrest and providing details of the place of detention.

Illegal armed groups: The Commission was of the view that proper investigations should be conducted in respect of the allegations against the illegal armed groups with a view to ascertain the truth and the institution of criminal proceedings against offenders in cases where sufficient evidence can be found.

Conscription of Children: The Commission report emphasized that rehabilitation of the ex - child combatants should be the utmost priority of the Government in the immediate post-conflict phase. The Commission was pleased to note the rehabilitation programme of the Government, which has resulted in the rehabilitation, and reintegration of hundreds of former child combatants, and in particular the approach of the community based correctional programme of the Commissioner General of Childcare and Probation. The Commission recommends that the same community based approach be adopted for the rehabilitation of the former child combatants in cooperation with NGOs and civil society organizations.

It was further stated that in instances where there is *prima facie* evidence of conscription of children as combatants, any such alleged cases

should be investigated and offenders must be brought to justice. In this regard, the complaints of alleged recruitment of children by illegal armed groups/groups affiliated with the LTTE or any political party should be investigated with a view to prosecuting the offenders to ensure that the practice would not occur in the future.

The Commission called for the full implementation of the Action Plan between the TMVP (The former Eastern wing of the LTTE), Commissioner General of Rehabilitation, and the UNICEF with immediate effect so that the practice of child recruitment by the TMVP ceases, children recruited are released and reintegrated with their families and communities after rehabilitation

Disabled persons: The Commission recommended that necessary national legislation be put in place to realize the rights of persons with disabilities in line with the UN Convention on Rights of Persons with Disabilities. Such action would have a positive impact, including obtaining international assistance, on matters affecting a large number of disabled persons, especially in the conflict affected areas.

Internally displaced persons: The Commission highlighted the need to respect a person's freedom of movement to re-settle in their places of origin, in accordance with internationally accepted principles governing voluntary return.

It was also recommended that a formal bilateral consultation process, take place between Sri Lanka and India to enable the displaced persons to take considered decisions with regard to their return to Sri Lanka

Muslim community in the North and East: The Commission took heed of the long standing IDP issue of the Muslims from the North and particularly the East of the Country as a result of the ethnic conflict. Durable solutions needed to be found to address the plight of the Muslim Community.

The Commission recommended that a special committee be appointed to examine durable solutions and to formulate a comprehensive State policy on the issue, after having extensive consultations with the IDPs and the host communities.

Freedom of expression and the right to information: The Commission stressed that Freedom of expression and right to information, which are universally regarded as basic human rights play a pivotal role in any reconciliation process. It was therefore essential that media freedom be

enhanced in keeping with democratic principles and relevant fundamental rights obligations, since any restrictions placed on media freedom would only contribute to an environment of distrust and fear within and among ethnic groups.

This would only prevent a constructive exchange of information and opinion placing severe constraints on the ongoing reconciliation process.

The Commission strongly recommended that:

- a. All steps should be taken to prevent harassment and attacks on media personnel and institutions.
- b. Action must be taken to impose deterrent punishment on such offences, and also priority should be given to the investigation, prosecution and disposal of such cases to build up public confidence in the criminal justice system.
- c. Past incidents of such illegal action should be properly investigated. The Commission observed with concern that a number of journalists and media institutions had been attacked in the recent past.
- d. The Government should ensure the freedom of movement of media personnel in the North and East, as it would help in the exchange of information contributing to the process of reconciliation.
- e. Legislation be enacted to ensure the right to information.

Freedom of religion, association and movement: The report contended that any credible and sustainable process of reconciliation requires the creation of an environment, which respects, promotes and protects people's right to freely engage in observing their religion, and other freedoms such as freedom of association and movement.

The commission observed that the Government should take immediate steps to remove any remaining restrictions on visiting places of worship with the only exception being made in respect of the restrictions necessitated by mine clearance activities. This should also include access to places of religious worship within the High Security Zones.

Follow up action on the Reports of Past Commissions of Inquiry Observations and Recommendations: The Commission made particular reference to the implementation of the recommendations of the Report of the Presidential Commission of Inquiry Appointed to Investigate and Inquire into Alleged Serious Violations of Human Rights Arising Since August 2005, particularly those relating to further investigation and pros-

ecution of offenders involved in the incidents of the death of 5 students in Trincomalee in January 2006 and 17 aid workers of the ACF in August 2006. Such action would send a strong signal in ensuring respect for the Rule of Law, which in turn tends to contribute to the healing process.

**TREATIES AND CONVENTIONS – ICCPR – VIOLATION –
INTIMIDATION, ASSAULT AND ALLEGED MURDER BY POLICE –
HUMAN RIGHTS COMMITTEE**

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (103rd session) concerning Communication No. 1862/2009

The alleged victims were Annakkarage Suranjini Sadamali Pathmini Peiris (the author, represented by counsel, Asian Legal Resource Centre Ltd.), her deceased husband Mr. Siyaguna Kosgodage Anton Sugath Nishantha Fernando and their two minor children, Siyaguana Kosgodage Kalpani Danushi Fernando (born in 1992) and Siyagana Kosgodage Sinesh Antony Fernando (born in 1997).

The author claimed that she and her family were the victims of violations of Article 6, read in conjunction with Article 2, paragraph 3; article 7, read in conjunction with Article 2, paragraph 3; Article 9, paragraph 1, read in conjunction with Article 2, paragraph 3; Article 17 and Article 23, paragraph 1, of the International Covenant on Civil and Political Rights by the Democratic People's Republic of Sri Lanka, through a series of acts of intimidation including assault and allegedly, murder, by Police officers.

The Committee regretted the State party's failure to provide any information with regard to admissibility or the substance of the author's claims recalling the obligation under Article 4, paragraph 2, of the Optional Protocol obliging States parties to examine in good faith all allegations brought against them, and to make available to the Committee all information at their disposal. The Committee further noted with regret that the State party has failed to respond to its request, made pursuant to rule 92 of its rules of procedure, to take measures to ensure the protection of the author and her family while her case is under consideration by the Committee.

In the absence of any submission by Sri Lanka on the admissibility of the communication, and noting the author's statement that domestic remedies have proven to be ineffective, the Committee declared the communication admissible.

Due in particular to the failure of the State party to challenge the evidence of assault, intimidation and murder by agents of the state submitted by the author and the lack of cooperation in the investigation of the said allegations, the Committee was of the view that the facts as found by the Committee reveal violations by Sri Lanka of Article 6, read alone and in conjunction with Article 23, paragraph 1, vis-à-vis the author's husband; Article 2, paragraph 3, read in conjunction with Article 6 and Article 7, vis-à-vis the author herself, her husband, and their two children; Article 7, read alone and in conjunction with Article 23, paragraph 1, vis-à-vis the author, her husband and their two children; Article 9, paragraph 1, vis-à-vis the author, her husband and their two children; and Article 17, read alone and in conjunction with Article 23, paragraph 1, of the Covenant vis-à-vis the author, her husband and their two children.

The Committee noted that in accordance with Article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, which includes ensuring that perpetrators are brought to justice, that the author and her two children can return to their domicile in safety, and ensure reparation, including payment of adequate compensation and an apology to the family. The State party should also take measures to ensure that such violations do not recur in the future.

Humanitarian law

PHILIPPINES

COMMAND RESPONSIBILITY – AMPARO

Lt. Col. Rogelio Boac, et al. v. Erlinda T. Cadapan and Concepcion E. Empeño [GR Nos. 184461-62. May 31, 2011]

Erlinda T. Cadapan and Concepcion E. Empeño v. Gen. Hermogenes Esperon, et al. [GR No. 184495. May 31, 2011]

Erlinda T. Cadapan and Concepcion E. Empeño v. Gloria Macapagal-Arroyo, et al. [GR No. 187109. May 31, 2011]

In these consolidated habeas corpus and amparo cases on appeal, the Court ordered military officials to immediately release University of the Philippines students Sherlyn Cadapan and Karen Empeño as well as

farmer Manuel Merino from detention. Relative to international law, the Court discussed the concept of command responsibility and its application insofar as amparo (enforced disappearance) cases are concerned. The issue is whether a military commander may be held liable for the acts of subordinates in an amparo proceeding.

Citing jurisprudence, the Court noted that the evolution of the command responsibility doctrine finds its context in the development of laws of war and armed combats. "Command responsibility," in its simplest terms, means the responsibility of commanders for crimes committed by subordinate members of the armed forces or other persons subject to their control in international wars or domestic conflict. It is a form of criminal complicity. The Hague Conventions of 1907 adopted the doctrine. Then, it was an omission mode of individual criminal liability. As a general rule, the doctrine of command responsibility does not apply in amparo cases to determine criminal liability. However, command responsibility may be loosely applied in amparo cases in order to identify those accountable individuals that have the power to effectively implement whatever processes an amparo court would issue. In such application, the amparo court does not impute criminal responsibility but merely pinpoint the superiors it considers to be in the best position to protect the rights of the aggrieved party.

The Court noted that such identification of the responsible and accountable superiors may well be a preliminary determination of criminal liability which, of course, is still subject to further investigation by the appropriate government agency. Republic Act No. 9851 includes command responsibility as a form of criminal complicity in crimes against international humanitarian law, genocide and other crimes. Thus, the Court ruled that the appellate court erred when it did not specifically name the respondents that it found to be responsible for the abduction and continued detention of Sherlyn, Karen and Merino. It appeared from the records that the responsible and accountable individuals are Lt. Col. Anotado, Lt. Mirabelle, Gen. Palparan, Lt. Col. Boac, Arnel Enriquez and Donald Caigas. Therefore, they should be made to comply with the decision of the appellate court to immediately release the detained persons.

COMMAND RESPONSIBILITY – AMPARO – IMMUNITY FROM SUIT

In the Matter of the Petition for the Writ of the Petition for the Writ of Amparo and Habeas Data in Favor of Noriel H. Rodriguez, Noriel H. Rodriguez v. Gloria Macapagal-Arroyo, et al. [GR No. 191805. November 15, 2011]

In the Matter of the Petition for the Writ of the Petition for the Writ of Amparo and Habeas Data in Favor of Noriel H. Rodriguez, Police Dir. Gen. Jesus A. Versoza v. Noriel H. Rodriguez, et al. [GR No. 193160. November 15, 2011]

Noriel Rodriguez is a member of a peasant organization affiliated with the Kilusang Magbubukid ng Pilipinas (“KMP”). He claimed that the military, under “Oplan Bantay Laya,” made members of KMP targets of extrajudicial killings and enforced disappearances. Rodriguez was abducted and tortured by the military. He was forced to confess membership with the communist group New People’s Army. After his release, he filed a Petition for the Writ of Amparo and Petition for the Writ of Habeas Data with Prayers for Protection Orders, Inspection of Place, and Production of Documents and Personal Properties. Former President Gloria Macapagal-Arroyo is among the accused in the case. The Court of Appeals issued the writs. However, the President was dropped as a party, arguing that she may not be sued during her actual incumbency.

Related to international law, the Court ruled that a non-sitting President does not enjoy immunity from suit, even for acts committed during the latter’s tenure. Courts should look with disfavor upon the presidential privilege of immunity, especially when it impedes the search for truth or impairs the vindication of a right. The Court recapitulated relevant doctrines of command responsibility. It stressed that although originally used for ascertaining criminal complicity, the command responsibility doctrine has also found application in civil cases for human rights abuses. For instance, in the United States, responsibility was used in *Ford v. Garcia* and *Romagoza v. Garcia* – civil actions filed under the Alien Tort Claims Act and the Torture Victim Protection Act. The application of this doctrine has been liberally extended even to cases not criminal in nature. Command responsibility may likewise find application in proceedings seeking the privilege of the writ of amparo. It cited jurisprudence stating that the command responsibility doctrine now constitutes a principle of international

law or customary international law in accordance with the incorporation clause of the Constitution.

The Court ruled that the president, as commander-in-chief of the military, can be held responsible or accountable for extrajudicial killings and enforced disappearances. In order to hold someone liable under the doctrine of command responsibility, the following elements must be present: (a) the existence of a superior-subordinate relationship between the accused as superior and the perpetrator of the crime as his subordinate; (b) the superior knew or had reason to know that the crime was about to be or had been committed; and (c) the superior failed to take the necessary and reasonable measures to prevent the criminal acts or punish the perpetrators thereof. As commander-in-chief of all the armed forces, the President necessarily possesses control over the military that qualifies him as a superior within the purview of the command responsibility doctrine. The President also has the power to effectively command and discipline the military. The Court stated that, on the issue of knowledge, although international tribunals apply a strict standard of knowledge, i.e., actual knowledge, such may nonetheless be established through circumstantial evidence. A more liberal view is adopted in the Philippines, and superiors may be charged with constructive knowledge.

However, the Court ruled that Rodriguez was not able to prove through substantial evidence that former President Arroyo is responsible or accountable for his abduction. He anchors his argument on a general allegation that on the basis of the "Melo Commission" and the "Alston Report," that the President already had knowledge of and information on, and should have known that a climate of enforced disappearances had been perpetrated. The Court reasoned that it does not automatically impute responsibility to former President Arroyo for each and every count of forcible disappearance, although the Alston Report states that there is a policy allowing enforced disappearances and pins the blame on the President. Aside from general averments, there is no piece of evidence that could establish former President Arroyo's responsibility or accountability for Rodriguez's abduction. There was also no clear attempt to show that she should have known about the violation of his right to life, liberty or security, or that she had failed to investigate, punish or prevent it.

**GENEVA CONVENTIONS OF 1949 – APPLICABILITY OF
INTERNATIONAL LAW – ICRC – PRIVILEGES OF PHILIPPINE RED
CROSS – RESERVATION OF RED GREEK CROSS SYMBOL**

An Act Recognizing the Philippine National Red Cross as an Independent, Autonomous, Nongovernmental Organization Auxiliary to the Authorities of the Republic of the Philippines in the Humanitarian Field, to be known as the Philippine Red Cross

The Philippine Red Cross Act of 2009 declares the principle and policy that the Philippines shall at all times act in conformity with the Geneva Conventions of 1949 and their additional protocols, and the Statutes of the International Red Cross and Red Crescent Movement. It should also establish and promote the development of a duly recognized independent and autonomous nongovernmental Red Cross Society, which shall provide humanitarian relief and assistance in times of peace and armed conflict. Remarkably, the law declares that the State shall at all times respect the adherence by the Red Cross Society to the fundamental principles of humanity, impartiality, neutrality, independence, voluntary service, unity, and universality.

The law recognizes the Philippine Red Cross as the “voluntary, independent and autonomous nongovernmental society auxiliary to the authorities of the Republic of the Philippines in the humanitarian field, to assist said authorities in discharging the obligations set forth in the Geneva Conventions and the Statutes of the International Red Cross and Red Crescent Movement.” There should only be one national society of the Red Cross in the Philippines pursuant to the principle of unity. A central body directs the society, and the society should perform the duties inherent upon such status over the entire Philippine territory.

Under the law, the following are the purposes of the Philippine Red Cross:

- (a) To cooperate with public authorities in the prevention of disease, the promotion of health and the mitigation of human suffering by their own programs in such fields as education, health and social welfare, for the benefit of the community;
- (b) To organize, in liaison with public authorities, emergency relief operations and other services to assist the sick and wounded of armed forces in time of armed conflict, in accordance with the

spirit of and under the conditions prescribed by the Geneva Conventions to which the Republic of the Philippines proclaimed its adherence;

- (c) For the purposes mentioned in the preceding paragraphs, to perform all duties devolving upon the Philippine Red Cross as a result of the adherence of the Republic of the Philippines to the said Convention;
- (d) To act in matters of voluntary relief and of communication between the people of the Republic of the Philippines and their Armed Forces, in time of peace and in time of armed conflict, and to act in such matters between similar national societies of other countries and the Governments and people and the Armed Forces of the Republic of the Philippines;
- (e) To establish and maintain a system of national and international relief in time of peace and in time of armed conflict and apply the same in meeting emergency needs caused by typhoons, floods, fires, earthquakes, and other natural or man-made disasters, and to devise and carry on measures for alleviating the suffering caused by such disasters;
- (f) To devise and promote such other services in time of peace and in time of armed conflict as may be found desirable in improving the health, safety and welfare of the Filipino people, and of all peoples in general; and
- (g) To devise such means as to make every citizen and/or resident of the Philippines a member of the Philippine Red Cross.

In order to fully realize its mandate under the Geneva Conventions, the Statutes of the International Red Cross and Red Crescent Movement, and the Philippine Red Cross Act of 2009, the latter gives the Philippine Red Cross certain privileges such as the capacity to enter into agreements with public authorities, owning and holding real and personal properties, and some levels of tax exemption. Membership is open to the entire population in the Philippines regardless of citizenship.

Additionally, the law exclusively reserves the use of the name “Red Cross” and the emblem of the Red Greek Cross on a white ground to the Philippine Red Cross. Medical services of the Armed Forces of the Philippines and such other medical facilities, or other institutions as may be authorized by the Philippine Red Cross, as provided under Article 44 of the Geneva Conventions, may also use the Red Greek Cross as an emblem.

It is unlawful for any other person or entity to use the words “Red Cross” or “Geneva Cross” or to use the emblem of the Red Greek Cross on a white ground or any designation, sign or insignia constituting an imitation thereof for any purpose whatsoever. Likewise, it is unlawful for any person to solicit, collect or receive money, materials or property of any kind by falsely representing himself or herself to be a member, agent or representative of the Philippine Red Cross. The law is also penal in nature since the violation of any of its provisions makes one liable for imprisonment and/or fine.

SRI LANKA

VIOLATIONS – ACCOUNTABILITY – KILLING OF CIVILIANS – LAST STAGES OF CIVIL WAR

Report of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka (March 2011)

In June 2010, a panel of experts (Marzuki Darusman, Steven Ratner and Yasmin Sooka) was appointed by the UN Secretary General to ‘advise...regarding the modalities, applicable international standards and comparative experience relevant to the accountability process...during the final stages of the armed conflict in Sri Lanka.’ Applying the rules of international humanitarian law and international human rights law, the Panel considered allegations regarding violations of those rules by parties to the conflict.

The Panel issued its report in March 2011 in which it concluded in that from September 2008 to May 2009, several of the allegations regarding violations of IHL and IHRL by both the Government of Sri Lanka (GoSL) and the Liberation Tigers of Tamil Ealam (LTTE) were credible.

The Panel identified the following credible allegations against the LTTE: use of civilians ‘as a buffer’; the killing of civilians who were attempting to escape from LTTE control; the use of military equipment in the proximity of civilians’; forcible recruitment of child soldiers; forced labour; and the killing of civilians through suicide attacks.

The following allegations against the GoSL were concluded to be credible by the Panel: killing of civilians through ‘widespread shelling’; the shelling of hospitals and other humanitarian objects; the ‘denial of humanitarian assistance’; violations of the human rights of victims and

survivors of the conflict; violations of human rights ‘outside the conflict zone.’

Accordingly, the Panel recommended that:

- 1) The Government should carry out investigations into the alleged violations of IHRL and IHL by both parties to the conflict.
- 2) The UN Secretary-General should institute an international mechanism to monitor the investigations by the GoSL, if any, to advise the UN SG through its independent investigations and to ensure that relevant information is preserved.
- 3) Several ‘immediate measures’ were recommended to the GoSL including, provision of death certificates for those dead and missing due to the conflict, provision of psychosocial support to survivors, the resettlement of internally displaced persons (IDPs) and the repeal of Emergency Regulations.
- 4) The GoSL should adopt measures to ensure full accountability for the war including an examination of the causes of the conflict, a formal and public acknowledgement of the role of the GoSL in the conflict and the establishment of a reparations programme.
- 5) The UN Human Rights Council should reconsider its previous resolution (A/HRC/S-11/Rev 2) in light of the Panel report and that the UN SG should review the actions of the UN during and in the aftermath of the war in Sri Lanka.

International Economic Law

INDIA

‘MOST-FAVOURED NATION’ – MEANING AND IMPLICATIONS

Statement on Report of the International Law Commission on the Work of its Sixty-Third Session, Chapters I-V, Sixth Committee, UNGA, 66th Session, October 24, 2011

On the topic of “Most-Favoured Nation Clause,” while commending the work, India felt it would be important to study the different formulations of MFN clauses that could be included in the investment treaties and precise implications of their inclusion.

PHILIPPINES

PROMOTION OF INTERNATIONAL TRADE – UNIVERSAL SYSTEM OF SIMPLIFIED AND HARMONIZED CUSTOMS PROCEDURES – REVISED KYOTO CONVENTION

In 2010, the Senate of the Philippines has concurred with the ratification of the International Convention in the Simplification and Harmonization of Customs Procedures.

TRADE PROMOTION THROUGH CUSTOMS PROCEDURES – INTERNATIONAL CONVENTION IN THE SIMPLIFICATION AND HARMONIZATION OF CUSTOMS PROCEDURES (AS AMENDED)

Philippine Senate Resolution No. 220, February 1, 2010

The Philippine Senate concurred with the ratification of the International Convention in the Simplification and Harmonization of Customs Procedures (Kyoto Convention) which was adopted in Kyoto on May 18, 1973 and entered into force on September 25, 1974. The resolution notes that in the 94th Session of the World Customs Organization last June 1999, some 114 customs administrations including the Philippines, adopted the treaty (as amended), otherwise known as the Revised Kyoto Convention, which entered into force on February 3, 2006. The Revised Kyoto Convention aims, among others, to promote international trade by establishing a universal system of simplified and harmonized customs procedures.

In a revised instrument of accession dated March 16, 2009, the President of the Philippines accepted, acceded to and agreed to the body of the treaty, as amended, and its general and specific annexes. Reservations were registered on the recommended practices in several specific annexes on the arrival of goods in customs territory, importation, processing, temporary admission, and special procedures.

TREATIES AND CONVENTIONS – INTELLECTUAL PROPERTY – PHILIPPINE TRANSFER OF TECHNOLOGY ACT OF 2009 – APPLICABILITY OF INTERNATIONAL LAW IN DOMESTIC LEGISLATION

An Act Providing the Framework and Support System for the Ownership, Management, Use, and Commercialization of Intellectual Property

Generated from Research and Development Funded by Government and for Other Purposes

Signed into law by the President of the Philippines on March 23, 2010, the Philippine Transfer of Technology Act of 2009 mainly aims to promote and facilitate the transfer, dissemination, and effective use, management, and commercialization of intellectual property, technology and knowledge resulting from research and development funded by the government for the benefit of national economy and taxpayers. Relevant to international law, in defining what is a “research and development institute or institution” within the coverage of the law, the Act states that this term does not include those covered by international bilateral or multilateral agreements.

**TAXATION – COMPLIANCE WITH INTERNATIONAL STANDARDS –
CONFIDENTIALITY UNDER THE RULE****An Act to Allow the Exchange of Information by the Bureau of Internal Revenue of Tax Matters Pursuant to Internationally-Agreed Tax Standards, Amending Sections 6(F), 71 and 270 of the National Internal Revenue Code of 1997, as amended, and for Other Purposes**

The Exchange of Information on Tax Matters Act of 2009 was signed into law on March 8, 2010. It declares the policy to promote and pursue a tax environment that contributes in sustaining a favorable international investment climate and instills confidence in the adequacy and capacity of the country’s tax administration to comply with its commitments under existing international conventions or agreements on tax matters.

Pursuant to this, the law requires the government to comply with or commit to the internationally-agreed tax standards required for the exchange of tax information with its tax treaty partners to help combat international tax evasion and avoidance, and to help address tax concerns that affect international trade and investment. Further, it should adopt measures and procedures to enhance cooperation with other countries in the efficient collection of taxes, consistent with the international understanding to ensure the payment of taxes due the respective taxing jurisdictions of the treaty partners. The Commissioner of Internal Revenue was given authority to inquire into bank deposit accounts and related information held by financial institutions. Importantly, for our purposes, the Commissioner may inquire into those relating to a specific taxpayer or taxpayers

subject of a request for the supply of tax information from a foreign tax authority pursuant to an international convention or agreement on tax matters to which the Philippines is a signatory or a party of. The exchange of information shall be done in a secure manner to ensure confidentiality under rules and regulations as may be promulgated by the Secretary of Finance, upon the recommendation of the Commissioner.

The information received by a foreign tax authority pursuant to an international convention or agreement should be treated as absolutely confidential. It should be disclosed only to persons or authorities involved in the assessment or collection of taxes, enforcement or prosecution in respect of taxes, or the determination of appeals in relation to taxes covered by such conventions or agreements. The concerned taxpayer should be duly notified in writing of the request for exchange of information.

INTELLECTUAL PROPERTY – LEGISLATION – INTELLECTUAL PROPERTY CODE – ANTI-CAMCORDING ACT OF 2010

An Act to Prohibit and Penalize the Unauthorized Use, Possession and/ or Control of Audiovisual Recording Devices for the Unauthorized Recording of Cinematographic Films and Other Audiovisual Works and/or their Soundtracks in an Exhibition Facility, Providing Penalties therefor and for Other Purposes

The President approved the Anti-Camcording Act of 2010 on May 13, 2010. The law defines and penalizes acts constituting the unauthorized possession, use and/or control of audiovisual recording devices. It refers to treaty law in defining terms. For instance, copyright owner means anyone who has the exclusive rights comprised in a copyright as provided under the Intellectual Property Code of the Philippines and related international treaties, conventions or agreements to which the Republic of the Philippines is a party.

Singapore

FREE TRADE AGREEMENT – SINGAPORE AND AUSTRALIA – AMENDMENTS FOLLOWING SECOND REVIEW

Singapore signed a Free Trade Agreement with Australia on 17 February 2003. It came into force on 28 July 2003. The first review of the Agreement

took place in March 2009 and after a second review, several amendments were made to the agreement to give Singapore investors and companies in greater certainty in their investments and protection of their intellectual property rights.

Jurisdiction

CHINA

IMMUNITY – ACT OF STATE

***Democratic Republic of Congo v. FG Hemisphere Associates LLC* [FACV Nos. 5, 6 & 7 (2010)]**

On June 8, 2011, the Hong Kong Court of Final Appeal made first use of the procedure in Article 158(3) of the Basic Law of Hong Kong Special Administrative Region to refer Basic Law provisions to the Standing Committee of the National People's Congress for interpretation in its decision in *Democratic Republic of Congo v. FG Hemisphere Associates LLC* (the Congo case, Final Appeal Nos. 5, 6 & 7 of 2010 (civil), on appeal from CACV Nos. 373 of 2008 and 43 of 2009).

Facts

In the 1980s, Energoinvest DD (“Energoinvest”), a company headquartered in Sarajevo, in what was then Yugoslavia, was engaged in constructing a hydro-electric facility and high-tension electric transmission lines in the Congo. In order to finance the project, the Congo had entered into credit agreements with Energoinvest. Under these agreements, credit was extended by Energoinvest to the Congo and a Congolese state-owned electricity company, Société Nationale Electricité (“SND’E”). Despite revision and rescheduling, the Congo and SND’E defaulted on their repayment obligations. Each credit agreement contained an International Chamber of Commerce (“ICC”) arbitration clause. In 2001, Energoinvest referred its claims against the Congo and SND’E to arbitration. In the result, each arbitral tribunal made a substantial award of principal and interest in favour of Energoinvest against the Congo and SND’E jointly and severally.

On November 16, 2004 the entire benefit of the principal and interest payable by the Congo and SND’E under the two awards was assigned by

Energoinvest to FG Hemisphere Associates LLC ("FG"). FG is an American company formed under the laws of Delaware and managed by a New York company which invests in emerging markets including by acquiring and recovering distressed debts, particularly those of defaulting states. The benefit of the awards constitute FG's sole asset of any substance. So far FG has managed to recover only US \$3,336,757.75 under the awards. Such recovery was through enforcement proceedings in Belgium, Bermuda and South Africa. In FG's printed case dated November 8, 2010, it is said that as at the 1st of that month, the Congo was indebted to it in the sum of US \$125,924,407.72 by way of principal and interest under the awards as unsatisfied. It is also said that interest on that indebtedness is currently accruing at the rate of approximately US \$30,000.00 per day.

On April 22, 2008, China Railway Group Ltd. and its subsidiaries, had entered into a joint venture agreement with the Congo. Under the joint venture agreement, which would come into effect upon the satisfaction of certain conditions precedent, the Congo would be paid US \$221 million by the CR subsidiaries as part of the entry fees for a mining project in the Congo. Having learned of the April 22, 2008 announcement to the Stock Exchange, FG made an application to the High Court for equitable execution to receive the entry fees towards satisfaction of sums due under the awards. The case then went through procedures of the High Court, the Court of Appeal and Court of Final Appeal.

(2) The Full Text of the Standing Committee's Interpretation

The Standing Committee of the Eleventh National People's Congress examined at its Twenty-second Session the motion regarding the request for examination of The Draft Interpretation of Paragraph 1, Article 13 and Article 19 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China by the Standing Committee of the National People's Congress submitted by the Council of Chairmen. The motion of the Council of Chairmen was submitted upon the report by the Court of Final Appeal of the Hong Kong Special Administrative Region requesting the Standing Committee of the National People's Congress to interpret the relevant provisions of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, in accordance with the provisions of Paragraph 3, Article 158 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China.

The Court of Final Appeal of the Hong Kong Special Administrative Region needs to ascertain, in adjudicating a case involving the Democratic Republic of the Congo, whether the Hong Kong Special Administrative Region should apply the rules or policies on state immunity as determined by the Central People's Government. For this purpose, in accordance with the provisions of Paragraph 3, Article 158 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, the Court of Final Appeal of the Hong Kong Special Administrative Region, seeks an interpretation from the Standing Committee of the National People's Congress on the following questions: "(1) whether on the true interpretation of Paragraph 1, Article 13, the Central People's Government has the power to determine the rule or policy of the People's Republic of China on state immunity; (2) if so, whether, on the true interpretation of Paragraph 1, Article 13 and Article 19, the Hong Kong Special Administrative Region (HKSAR), including the courts of the HKSAR, is bound to apply or give effect to the rule or policy on state immunity determined by the Central People's Government under Paragraph 1, Article 13; or on the other hand, is at liberty to depart from the rule or policy on state immunity determined by the Central People's Government under Paragraph 1, Article 13 and to adopt a different rule; (3) whether the determination by the Central People's Government as to the rule or policy on state immunity falls within 'acts of state such as defence and foreign affairs' in the first sentence of Paragraph 3, Article 19 of the Basic Law; and (4) whether, upon the establishment of the HKSAR, the effect of Paragraph 1, Article 13, Article 19 and the status of Hong Kong as a Special Administrative Region of the People's Republic of China upon the common law on state immunity previously in force in Hong Kong (that is, before July 1, 1997), to the extent that such common law was inconsistent with the rule or policy on state immunity as determined by the Central People's Government pursuant to Paragraph 1, Article 13, was to require such common law to be applied subject to such modifications, adaptations, limitations or exceptions as were necessary to ensure that such common law is consistent with the rule or policy on state immunity as determined by the Central People's Government, in accordance with Articles 8 and 160 of the Basic Law and the Decision of the Standing Committee of the National People's Congress dated February 23, 1997 made pursuant to Article 160." The above request for interpretation by the Court of Final Appeal of the Hong Kong

Special Administrative Region complies with the provisions of Paragraph 3, Article 158 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China.

In accordance with Subparagraph (4), Article 67 of the Constitution of the People's Republic of China and Article 158 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, and after consulting the Committee for the Basic Law of the Hong Kong Special Administrative Region under the Standing Committee of the National People's Congress, the Standing Committee of the National People's Congress, in relation to the request for interpretation by the Court of Final Appeal of the Hong Kong Special Administrative Region, hereby makes the following interpretation of the provisions of Paragraph 1, Article 13 and Article 19 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China and related issues:

1. On question (1) on which an interpretation is sought by the Court of Final Appeal of the Hong Kong Special Administrative Region. According to Subparagraph (9), Article 89 of the Constitution of the People's Republic of China, the State Council as the Central People's Government exercises the function and power to conduct the foreign affairs of the State; as the rules or policies on state immunity fall within diplomatic affairs in the realm of the foreign affairs of the state, the Central People's Government has the power to determine the rules or policies of the People's Republic of China on state immunity to be given effect to uniformly in the territory of the People's Republic of China. Based on the above, in accordance with the provisions of Paragraph 1, Article 13 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China that "[t]he Central People's Government shall be responsible for the foreign affairs relating to the Hong Kong Special Administrative Region", the conduct of the foreign affairs relating to the Hong Kong Special Administrative Region falls within the power of the Central People's Government. The Central People's Government has the power to determine the rules or policies on state immunity to be applied in the Hong Kong Special Administrative Region.
2. On question (2) on which an interpretation is sought by the Court of Final Appeal of the Hong Kong Special Administrative Region. Ac-

According to the provisions of Paragraph 1, Article 13 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China and Article 1 of this Interpretation, the Central People's Government has the power to determine the rules or policies on state immunity to be applied in the Hong Kong Special Administrative Region. According to the provisions of Article 19 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China and Article 3 of this Interpretation, the courts of the Hong Kong Special Administrative Region have no jurisdiction over the act of the Central People's Government in determining the rules or policies on state immunity. Therefore, when questions of immunity from jurisdiction and immunity from execution of foreign states and their properties arise in the adjudication of cases, the courts of the Hong Kong Special Administrative Region must apply and give effect to the rules or policies on state immunity determined by the Central People's Government as being applicable to the Hong Kong Special Administrative Region. Based on the above, in accordance with the provisions of Paragraph 1, Article 13 and Article 19 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, the Hong Kong Special Administrative Region, including the courts of the Hong Kong Special Administrative Region, is under a duty to apply or give effect to the rules or policies on state immunity that the Central People's Government has determined, and must not depart from the abovementioned rules or policies nor adopt a rule that is inconsistent with the abovementioned rules or policies.

3. On question (3) on which an interpretation is sought by the Court of Final Appeal of the Hong Kong Special Administrative Region. State immunity concerns whether the courts of a state have jurisdiction over foreign states and their properties and whether foreign states and their properties enjoy immunity in the courts of a state. It directly relates to the state's foreign relations and international rights and obligations. Therefore, the determination as to the rules or policies on state immunity is an act of state involving foreign affairs. Based on the above, "acts of state such as defence and foreign affairs" as stipulated in Paragraph 3, Article 19 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China includes the act of determina-

tion by the Central People's Government as to the rules or policies on state immunity.

4. On question (4) on which an interpretation is sought by the Court of Final Appeal of the Hong Kong Special Administrative Region. According to the provisions of Articles 8 and 160 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, the laws previously in force in Hong Kong shall be maintained only if there is no contravention of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China. In accordance with the provisions of Paragraph 4 of the Decision of the Standing Committee of the National People's Congress on Treatment of the Laws Previously in Force in Hong Kong in accordance with Article 160 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, such of the laws previously in force in Hong Kong which have been adopted as the laws of the Hong Kong Special Administrative Region shall, as from July 1, 1997, be applied subject to such modifications, adaptations, limitations or exceptions as are necessary so as to bring them into conformity with the status of Hong Kong after resumption by the People's Republic of China of the exercise of sovereignty over Hong Kong as well as to be in conformity with the relevant provisions of the Basic Law. The Hong Kong Special Administrative Region, as a local administrative region of the People's Republic of China that enjoys a high degree of autonomy and comes directly under the Central People's Government, must give effect to the rules or policies on state immunity as determined by the Central People's Government. The laws previously in force in Hong Kong relating to the rules on state immunity may continue to be applied after July 1, 1997 only if they comply with the above requirements. Based on the above, in accordance with the provisions of Paragraph 1, Article 13 and Article 19 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, such of the laws previously in force in Hong Kong concerning the rules on state immunity which have been adopted as the laws of the Hong Kong Special Administrative Region according to the Decision of the Standing Committee of the National People's Congress on Treatment of the Laws Previously in Force in Hong Kong in accordance with Article 160 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic

of China, when applied as from July 1, 1997, must be subject to such modifications, adaptations, limitations or exceptions as are necessary so as to be consistent with the rules or policies on state immunity that the Central People's Government has determined.

The Interpretation is hereby announced.

INDIA

EXTRA-TERRITORIALITY – LIMITS ON PARLIAMENT IN APPLYING EXTRA-TERRITORIAL LAWS – INDIAN CONSTITUTION

Gvk Industries Limited And Another v. The Income-Tax Officer And Another [Civil Appeal No. 7796 Of 1997, March 1, 2011]

Facts

The factual matrix of the case related to the applicability of certain provisions of the Indian Income-Tax Act to foreign companies. Appellant, an Indian company, in the present case withheld a certain portion of the amount to be paid to a foreign company as per the provisions of the Income-Tax Act. The Court was dealing with two substantive issues in this case. These were: (1) Is the Parliament constitutionally restricted from enacting legislation with respect to extra-territorial aspects or causes that do not have, nor expected to have any, direct or indirect, tangible or intangible impact(s) on, or effect(s) in, or consequences for: (a) the territory of India, or any part of India; or (b) the interests of, welfare of, wellbeing of, or security of inhabitants of India, and Indians? (2) Does the Parliament have the powers to legislate “for” any territory, other than the territory of India or any part of it?

The Court, referring to an earlier case, noted that: The issue under consideration in ECIL was whether Section 9(1) (vii)(b) of the Income-Tax Act (1961) was unconstitutional on the ground that it constitutes a law with respect to objects or provocations outside the territory of India, thereby being ultra vires the powers granted by Clause (1) of Article 245. In drawing the distinction as described above, the decision in ECIL considered two analytically separable, albeit related, issues. They relate to the potential conflict between the fact that, in the international context, the “principle of Sovereignty of States” (i.e., nation-states) would normally be “that the

laws made by one State can have no operation in another State” (i.e., they may not be enforceable), and the prohibition in Clause (2) of Article 245 that laws made by the Parliament may not be invalidated on the ground that they may need to be or are being operated extra-territorially.

Judgment

After examining the scope and application of Article 245 of the Indian Constitution, the Court referred to its application under international law. It noted that “within international law the principles of strict territorial jurisdiction has been relaxed in light of greater interdependencies and acknowledgement of the necessity of taking cognizance and acting upon extra-territorial aspects or causes, by principles such as subjective territorial principle, objective territorial principle, the effects doctrine that the United States uses, active personality principle, protective principle etc.” According to the Court, “To claim the power to legislate with respect to extra-territorial aspects or causes, that have no nexus with the territory for which the national legislature is responsible for, would be to claim dominion over such a foreign territory, and negation of the principle of self-determination of the people who are nationals of such foreign territory, peaceful co-existence of nations, and co-equal sovereignty of nation-states. Such claims have, and invariably lead to, shattering of international peace, and consequently detrimental to the interests, welfare and security of the very nation-state, and its people, that the national legislature is charged with the responsibility for.”

The Court stated that it would derive interpretational support for its conclusion that Parliament might not legislate for territories beyond India from Article 51, a Directive Principle of State Policy, though not enforceable, nevertheless fundamental in the governance of the country. According to the Court to enact legislation with respect to extra-territorial aspects or causes, without any nexus to India would in many measures be an abdication of the responsibility that had been cast upon Parliament. The Court further observed:

International peace and security has been recognised as being vital for the interests of India. This is to be achieved by India maintaining just and honourable relations, by fostering respect for international and treaty obligations etc., as recognized in Article 51. It is one matter to say that because certain extra-territorial aspects or causes have an impact on or

nexus with India, Parliament may enact laws with respect to such aspects or causes. That is clearly a role that has been set forth in the Constitution, and a power that the people of India can claim. How those laws are to be effectuated, and with what degree of force or diplomacy, may very well lie in the domain of pragmatic, and indeed ethical, statecraft that may, though not necessarily always, be left to the discretion of the Executive by Parliament. Nevertheless, that position is very different from claiming that India has the power to interfere in matters that have no nexus with India at all. To claim such powers, would be to make such powers available. Invariably available powers are used, and in this case with a direct impact on the moral force of India, and its interests, welfare and security, by shattering the very concepts that under-gird peace between nations. By recognizing international peace to be *sine qua non* for India's welfare and security, the framers have charged the State, and all of its organs, with responsibility to endeavour to achieve the goals set forth in Article 51. To claim the power to legislate for some other territories, even though aspects or causes arising, occurring or existing there have no connection, to India would be to demolish the very basis on which international peace and security can be premised.

The Court, besides examining Article 245 in greater detail, also outlined the scope and application of Articles 246 and 260. The Court noted that Article 260 provided the source for extra-territorial application of laws. It noted the following on Article 260 :

Nevertheless, the fact even in the sole instance, in the Constitution, where it is conceived that India may exercise full jurisdiction – i.e., executive, legislative and judicial – over a foreign territory, that such a jurisdiction can be exercised only upon an agreement with the foreign government (thereby comporting with international laws and principles such as “comity of nations” and respect for “territorial sovereignty” of other nation-states), and the manner of entering into such agreements, and the manner of effectuating such an agreement has to be in conformity with a law specifically enacted by the Parliament (whereby the control of the people of India over the actions of the Government of India, even extra-territorially is retained), implies that it is only “for” India that Parliament may make laws. The Parliament still remains ours, and exclusively ours. Though the Government of India, pursuant to Article 260, acts on behalf of a foreign territory, there is always the Parliament to make sure that

the Government of India does not act in a manner that is contrary to the interests of, welfare of, well-being of, or the security of India.

On the question of 'territory' the Court sought to link Articles 1 and 2 of the Constitution with Article 245. The Court noted that Article 1 (3) (c) provided that territories that were not part of India could be acquired. Referring also to the advisory opinion in *Re Berubari Union and Exchange of Enclaves* (AIR 1960 SC 845), the Court stated that such acquired territory automatically became a part of India. The Court stated, thus:

It was held in *Berubari*, that the mode of acquisition of such territory, and the specific time when such acquired territory becomes a part of the territory of India, are determined in accordance with international law. It is only upon such acquired territory becoming a part of the territory of India would the Parliament have the power, under Article 2, to admit such acquired territory in the Union or establish a new state. The crucial aspect is that it is only when the foreign territory becomes a part of the territory of India, by acquisition in terms of relevant international laws, is the Parliament empowered to make laws for such a hitherto foreign territory.

The Court further clarified that Parliament "may make laws for the whole or any part of the territory of India" has to be understood as meaning that unless a territory is a part of the territory of India, Parliament may not exercise its legislative powers in respect of such a territory. In the constitutional schema it is clear that the Parliament may not make laws for a territory, as a first order condition, unless that territory is a part of India.

The Court answered the two questions that it set in the beginning (1) Is the Parliament constitutionally restricted from enacting legislation with respect to extra-territorial aspects or causes that do not have, nor expected to have any, direct or indirect, tangible or intangible impact(s) on or effect(s) in or consequences for: (a) the territory of India, or any part of India; or (b) the interests of, welfare of, wellbeing of, or security of inhabitants of India, and Indians? According to the Court answer to the above would be in the affirmative. The Court further noted that "However, the Parliament may exercise its legislative powers with respect to extra-territorial aspects only when such extra-territorial aspects or causes have, or are expected to have, some impact on, or effect in, or consequences for: (a) the territory of India, or any part of India; or (b) the interests of, welfare of, wellbeing of, or security of inhabitants of India, and Indians." (2) Does the Parliament have the powers to legislate "for" any territory, other than the territory of India

or any part of it? According to the Court the answer to the above would be no and it was obvious that Parliament was empowered to make laws with respect to aspects or causes that occur, arise or exist, or may be expected to do so, within the territory of India, and also with respect to extra-territorial aspects or causes that had an impact on or nexus with India.

Statement on Report of the International Law Commission on the Work of its Sixty-Third Session, Chapters I-Vm Sixth Committee, UNGA 66th Session, October 24, 2011

Commending the work of the Special Rapporteur on the topic “Immunity of State officials from foreign criminal jurisdiction,” India pointed out that the questions concerning the timing of consideration of immunity, its invocation and waiver deserved appreciation in particular.

India agreed in principle with the view of the Special Rapporteur that the immunity of a State official from foreign criminal jurisdiction was a generally accepted norm and that any exceptions to that needed to be proved or established. India also agreed with the Special Rapporteur that the timing for raising immunity in criminal proceedings should be considered either at the initial stage or at the pre-trial stage of the court proceedings.

On the topic of “Most-Favoured Nation Clause,” while commending the work, India felt it would be important to study the different formulations of MFN clauses that could be included in the investment treaties and precise implications of their inclusion.

Regarding the topic “The Obligation to extradite or prosecute” while appreciating the work of the Special Rapporteur on the topic, India noted that under its extradition laws it clearly incorporated the principle of either extradite or prosecute. It also noted that in all its bilateral extradition treaties this principle was included.

Law of the Sea

CHINA

TERRITORIAL BOUNDARY – DISPUTE – DIAOYU ISLAND AND ITS AFFILIATED ISLANDS

On March 31, 2011, Foreign Ministry Spokesperson Jiang Yu made remarks on the issue of Diaoyu Islands regarding social studies textbooks published by seven publishing houses describing the Diaoyu Islands as Japanese territory.

The Diaoyu Island and its affiliated islands have been China's inherent territory since ancient times. China has indisputable sovereignty over them. Any attempt to change that fact by word or deed is futile. China's Foreign Ministry has lodged solemn representations with Japan.

TERRITORIAL BOUNDARY – DISPUTE – NANSHA ISLANDS

On May 10, 2011, Foreign Ministry Spokesperson Jiang Yu made remarks on Vietnam holding so-called "National Assembly Deputies" elections on China's Nansha Islands:

China has indisputable sovereignty over the Nansha Islands and their adjacent waters. Any unilateral action taken by any country on the Nansha Islands is an infringement on China's territorial sovereignty, thus illegal, invalid and not in line with the spirit of the Declaration on the Conduct of Parties in the South China Sea.

On June 9, 2011, Foreign Ministry Spokesperson Hong Lei made remarks on Vietnamese Ships chasing away Chinese fishing boats in the waters off the Nansha Islands:

The Vietnamese remarks do not tally with the facts. As is known to all, China has indisputable sovereignty over the Nansha Islands and the adjacent waters. Chinese fishing boats have been operating in the waters off Wan'an Bank for generations. While conducting normal operation in the above waters on the morning of June 9, the Chinese fishing boats were illegally chased away by armed Vietnamese ships. Amid the chase, the fishing net of one of the Chinese fishing boats tangled with the cables of a Vietnamese oil and gas exploration vessel which was operating illegally in the same waters. Regardless of the safety of the Chinese fishermen,

the Vietnamese vessel dragged the Chinese fishing boat for more than one hour, with the latter's tail facing the front. The Chinese fishermen were forced to take the initiative to cut off the fishing net so as to separate the two vessels. The behaviour of the Vietnamese vessel seriously endangered the Chinese fishermen's lives. It needs to be pointed out that Vietnam grossly infringed China's sovereignty as well as maritime rights and interests by exploring oil and gas illegally in the Wan'an Bank waters and chasing away Chinese fishing boats. China urges Vietnam to stop all actions that violate China's sovereignty, endanger Chinese fishermen's life and property safety, and complicate and expand disputes. China hopes that the Vietnamese side makes due efforts to safeguard peace and stability of the South China Sea.

TERRITORIAL BOUNDARY – DISPUTE – SOUTH CHINA SEA

On March 24, 2011, Foreign Ministry Spokesperson Jiang Yu made remarks at the Regular Press Conference with regard to the report that a Philippine company recently completed oil exploration of disputed waters between China and the Philippines:

China owns indisputable sovereignty over the Nansha Islands and their adjacent waters. Oil and gas exploration activities by any country or company in the waters under China's jurisdiction without permission of the Chinese Government constitutes violation of China's sovereignty, rights and interests, and thus are illegal and invalid. China's position is consistent and clear-cut. We hope the relevant countries will earnestly follow the spirit of the Declaration on the Conduct of Parties in the South China Sea and avoid taking any actions that can complicate the dispute.

TREATIES AND CONVENTIONS – CHINA-VIETNAM AGREEMENT ON BASIC PRINCIPLES GUIDING SETTLEMENT OF SEA ISSUES

On October 11, 2011, China and Vietnam signed an Agreement on basic principles guiding the settlement of sea-related issues in Beijing. The following is the full text of the agreement.

The delegation of the Government of the Socialist Republic of Vietnam and the delegation of the Government of the People's Republic of China agree that the satisfactory settlement of sea-related issues between Vietnam and China is suitable for the basic interests and common aspirations of the two countries' people and helpful for regional peace, stability, co-

operation and development. The two sides agree, on the basis of common perceptions of the Vietnamese and Chinese leaders reached on sea-related issues and “The 1993 Agreement on Basic Principles for the Settlement of Border Territory Issues between the Socialist Republic of Vietnam and the People’s Republic of China,” to solve sea-related issues pursuant to the following principles:

1. Taking the general situation of the two countries’ relationship as the key, originating from a strategic and overall attitude under the guidance of the motto, “Friendly neighbourliness, comprehensive co-operation, long-term stability and looking towards the future” and the spirit of “Good neighbours, good friends, good comrades and good partners,” and persistently pursuing friendly talks and negotiations to properly settle sea-related issues, thus making the East Sea a territory of peace, friendship and co-operation and contributing to the development of the Vietnam-China comprehensive strategic cooperative partnership, as well as to regional peace and stability.
2. In the spirit of fully respecting legal evidence regarding other relevant factors such as history, and at the same time taking into account each other’s reasonable concerns with a constructive attitude and an attempt to expand common perceptions, narrow differences and continuously accelerate negotiations. Based on a legal regime and principles defined by international law, including the 1982 UN Convention on the Law of the Sea, making efforts to seek basic and long-term solutions acceptable to both sides for sea-related disputes.
3. In negotiations on sea-related issues, the two sides seriously abide by agreements and common perceptions reached by their high-ranking leaders and seriously implement the principles and spirit of the “Declaration on the Conduct of Parties in the East Sea.”

For sea-related disputes between Vietnam and China, the two sides shall solve them through friendly talks and negotiations. Disputes relating to other countries shall be settled through negotiations with other concerned parties.
4. In the process of seeking basic and long-term solutions for sea-related issues, in the spirit of mutual respect, equal and mutually beneficial treatment, the two sides actively discuss transitional and temporary measures that do not affect the stances and policies of the two sides, including studies and discussions on cooperation

for mutual development based on principles described in Article 2 of this Agreement.

5. Addressing sea-related issues in succession and progress with easy issues first and difficult issues later. Firmly speeding up the demarcation of territorial waters off the Tonkin Gulf and actively discussing co-operation for mutual development on these waters. Actively boosting co-operation in less sensitive fields, such as sea-related environment protection, sea-related science research, search and rescue at sea, and prevention and minimisation of damage caused by natural disasters. Attempting to enhance mutual trust to facilitate the settlement of more difficult issues.
6. The two sides in turn conduct periodical meetings between heads of government-level border negotiation delegations twice a year and extraordinary meetings if necessary. The two sides agree to set up a hotline mechanism between the government-level delegations to exchange and properly deal with sea-related issues in a timely manner.

JAPAN

TERRITORIAL SEA – CONTIGUOUS ZONE – SENKAKU ISLANDS – INCURSION BY CHINESE VESSELS

Chinese fishery patrol boats navigated near the Senkaku Islands at least nine times on January 27, March 5, March 9-12, July 3, July 30, August 24, September 26-27, and October 24 of 2011. During one of the aforementioned incidents, on August 24, 2011, two Chinese fishery patrol boats intruded into Japanese territorial waters surrounding the Senkaku Islands and were ordered to leave the territorial waters by Japanese coastguard vessels.

It was reported that around 6:16 a.m. on August 24, 2011, two Chinese fishery patrol boats, the Gyosei 201 and Gyosei 31001, were spotted off Kubajima Island, one of the islands of Senkaku. A Japanese coast guard patrol vessel warned the two vessels not to trespass Japanese waters. However, the two boats intruded into Japanese territorial waters for a brief period of time around 6:40 a.m., at which point the Japanese coast guard vessel ordered the boats to leave. The two Chinese vessels sailed out and navigated within the Japanese contiguous zone along the outer edge of the territorial waters and then sailed westward. At approximately 8:15 a.m., the two Chinese boats crossed the geographical median line between China and Japan.

The Japanese Government's position is that "the Senkaku Islands are an inherent part of the territory of Japan in light of historical facts and based upon international law. Indeed, the Senkaku Islands are under the valid control of Japan," and thus, Japan cannot permit "any attempts by China to change the status quo through force or coercion."

A leisure fishing boat from Taiwan, Daihatsu 268, was found by a Japanese coast guard patrol airplane in the region west of Uotsuri Island of the Senkaku Islands on the morning of June 29, 2011 at approximately 6:43 a.m. The Taiwanese boat was sailing inside the Japanese contiguous zone of Uotsuri Island. The Japanese coast guard vessel warned the Taiwanese boat not to intrude into Japanese waters. The boat navigated and stopped several times inside the Japanese contiguous zone, but eventually left the zone at approximately 11:07 a.m. and sailed towards Taiwan.

PHILIPPINES

TERRITORIAL BOUNDARY – BASELINES – REGIME OF ISLANDS

Professor Merlin M. Magallona, et al. v. Honorable Eduardo Ermita, in his capacity as Executive Secretary, et al. [GR No. 187167. August 16, 2011]

This case involves the constitutionality of Republic Act No. 9255 or "An Act to Amend Certain Provisions of Republic Act No. 3046, as amended by Republic Act No. 5446, to Define the Archipelagic Baseline of the Philippines and for Other Purposes." The law adjusted the country's archipelagic baselines and classified the baseline regime of nearby territories.

The Court recalled the antecedents to the passage of the law. In 1961, Republic Act No. 3046 demarcated the maritime baselines of the Philippines as an archipelagic State. This law has followed the framing of the Convention on the Territorial Sea and the Contiguous Zone in 1958 ("UNCLOS I"). In 1968, Republic Act No. 5446 corrected typographical errors and reserved the drawing of baselines around Sabah in North Borneo. In 2009, Republic Act No. 9522 amended Republic Act No. 3046. The Court stated that the change was prompted by the need to make Republic Act No. 3046 compliant with the terms of the United Nations Convention on the Law of the Sea ("UNCLOS III"), which the Philippines ratified on February 27, 1984.

In sum, the Court states that Republic Act No. 9255 “shortened one baseline, optimized the location of some basepoints around the Philippine archipelago and classified adjacent territories, namely, the Kalayaan Island Group (“KIG”) and the Scarborough Shoal, as ‘regimes of islands’ whose islands generate their own applicable maritime zones.” The petitioners assail the law for reducing Philippine maritime territory (including the reach of Philippine sovereign power), and opening the country’s waters landward of the baselines to maritime passage by all vessels and aircrafts. The first one violates the description of the national territory in Article 1 of the Philippine Constitution, embodying the terms of the Treaty of Paris and ancillary treaties. The second one is said to undermine Philippine sovereignty and national security, to contravene the country’s nuclear-free policy, and to damage marine resources, in violation of relevant constitutional provisions. Additionally, it was contended that the treatment of the KIG as “regime of islands” causes the loss of a large maritime area and prejudices the livelihood of subsistence fishermen. The law fails to refer to the Treaty of Paris or Sabah and uses UNCLOS III’s framework of regime of islands to determine the maritime zones of the KIG and the Scarborough Shoal.

The Philippine Government defended the law as the State’s compliance with the terms of UNCLOS III, preserving Philippine territory over the KIG or Scarborough Shoal. Also, it does not undermine the country’s security, environment and economic interests or relinquish Philippine claim over Sabah. That what Spain ceded to the United States under the Treaty of Paris were the islands and all the waters found within the boundaries of the rectangular area drawn under the Treaty of Paris, was questioned as to normative force.

With regard to threshold issues, the Court held, among others, that the petitioners possess locus standi to bring this suit as citizens. On the merits, it found no basis to declare the law unconstitutional. First, the law is not unconstitutional. It is a statutory tool to demarcate the country’s maritime zones and continental shelf under UNCLOS III, and it does not delineate Philippine territory. The Court rationed that UNCLOS III has nothing to do with the acquisition (or loss) of territory since it is a multilateral treaty regulating, among others, sea-use rights over maritime zones (i.e., the territorial waters, contiguous zone, exclusive economic zone), and continental shelves. The law is a baseline law enacted by UNCLOS III States parties to mark-out specific basepoints along their coasts from which baselines are

drawn, either straight or contoured, to serve as geographic starting points to measure the breadth of the maritime zones and continental shelf. For this purpose, Article 48 of UNCLOS III was cited. The law gives notice to the rest of the international community of the scope of the maritime space and submarine areas within which States parties exercise treaty-based rights. The baselines of the Philippines would still have to be drawn in accordance with the law as this is the only way to draw the baselines in conformity with UNCLOS III. It cannot be drawn from the boundaries or other portions of the rectangular area delineated in the Treaty of Paris. The Court states:

UNCLOS III and its ancillary baselines laws play no role in the acquisition, enlargement or, as petitioners claim, diminution of territory. Under traditional international law typology, States acquire (or conversely, lose) territory through occupation, accretion, cession and prescription, not by executing multilateral treaties on the regulations of sea-use rights or enacting statutes to comply with the treaty's terms to delimit maritime zones and continental shelves. Territorial claims to land features are outside UNCLOS III, and are instead governed by the rules on general international law.

Second, the law's use of the framework of regime of islands to determine the maritime zones of the KIG and the Scarborough Shoal is not inconsistent with the Philippine claim of sovereignty over these areas. The Court compared the configuration of the baselines drawn under Republic Act Nos. 3046 and 9255 and the extent of maritime space encompassed by each law, coupled with a reading of the text of the baseline law and its congressional deliberations, vis-à-vis the Philippines' obligations under UNCLOS III. It concluded that a comparison belies an alleged loss of about 15,000 square nautical miles of territorial waters. The configuration shows that the amendatory law merely followed the basepoints mapped by the former one, except for at least nine basepoints that the later one skipped to optimize the location of basepoints, and adjusted the length of one baseline to comply with UNCLOS III's limit on the maximum length of baselines. Under both laws, the KIG and the Scarborough Shoal lie outside of the baselines drawn around the Philippine archipelago. The new baseline law increased the Philippines' total maritime space (covering the internal waters, territorial sea, and exclusive economic zone) by 145,216 square nautical miles.

Fundamentally, Section 2 of the new baseline law commits to text the Philippines' continued claim of sovereignty and jurisdiction over the

KIG and the Scarborough Shoal. That the KIG and the shoal lie outside the Philippine territory, because the baselines do not enclose the KIG, is incorrect. The Court stated that the Philippines would have committed a breach of two provisions of UNCLOS III if it included the KIG. Article 47(3) requires that the drawing of baselines shall not depart to any appreciable extent from the general configuration of the archipelago. Under Article 47(2), the length of the baselines shall not exceed 100 nautical miles, except save for three per cent of the total number of baselines which can reach up to 125 nautical miles. Including the KIG inside would mean appreciably departing from the general configuration of the Philippine archipelago. For the length of one baseline that Republic Act No. 3046 drew exceeded UNCLOS III's limits, there was a need to shorten the baseline, and optimize the location of basepoints using current maps.

Third, the statutory claim over Sabah under Republic Act No. 5446 is retained. Section 2 of Republic Act No. 5446, which Republic Act No. 9522 did not repeal, keeps open the door for drawing the baselines of Sabah.

Fourth, UNCLOS III and Republic Act No. 9522 are not incompatible with the Philippine Constitution's delineation of internal waters. The law does not unconstitutionally "converts" internal waters into archipelagic waters, therefore subjecting these waters to the right of innocent and sea lanes passage under UNCLOS III, including overflight. According to the Court, whether referred to as Philippine "internal waters" under Article I of the Constitution or as "archipelagic waters" under Article 49(1) of UNCLOS III, the Philippines exercises sovereignty over the body of water lying landward of the baselines, including the air space over it and the submarine areas underneath. Article 49 of UNCLOS III was cited as basis for this conclusion.

The following pronouncements of the Court are worth mentioning:

The fact of sovereignty, however, does not preclude the operation of municipal and international law norms subjecting the territorial sea or archipelagic waters to necessary, if not marginal, burdens in the interest of maintaining unimpeded, expeditious international navigation, consistent with the international law principle of freedom of navigation. Thus, domestically, the political branches of the Philippine government, in the competent discharge of their constitutional powers, may pass legislation designating routes within the archipelagic waters to regulate innocent and sea lanes

passage. Indeed, bills drawing nautical highways for sea lanes passage are now pending in Congress.

In the absence of municipal legislation, international law norms, now codified in UNCLOS III, operate to grant innocent passage rights over the territorial sea or archipelagic waters, subject to the treaty's limitations and conditions for their exercise. Significantly, the right of innocent passage is a customary international law, thus automatically incorporated in the corpus of Philippine law. No modern State can validly invoke its sovereignty to absolutely forbid innocent passage that is exercised in accordance with customary international law without risking retaliatory measures from the international community.

The fact that for archipelagic States, their archipelagic waters are subject to both the right of innocent passage and sea lanes passage does not place them in lesser footing vis-à-vis continental coastal States which are subject, in their territorial sea, to the right of innocent passage and the right of transit passage through international straits.

Based on the permissive text of UNCLOS III, the Philippine Congress was not bound to pass the new baseline law. However, the prerogative of choosing this option belongs to Congress, not to the Court. Without an UNCLOS III compliant baselines law, an archipelagic State like the Philippines will find itself devoid of internationally acceptable baselines from where the breadth of its maritime zones and continental shelf is measured. The Court regards this as an open invitation to the seafaring powers to freely enter and exploit the resources in the waters and submarine areas around our archipelago; and it weakens the country's case in any international dispute over Philippine maritime space.

Municipal Law

MALAYSIA

STATUS OF INTERNATIONAL LAW – CEDAW – UDHR – APPLICABILITY OF NORMS OF INTERNATIONAL LAW

***SIS Forum (Malaysia) v. Dato' Seri Syed Hamid bin Syed Jaafar Albar (Menteri Dalam Negeri)* [2 MLJ 378. January 25, 2010]**

In this case the High Court affirmed a strict dualist approach according to which international law is not part of domestic law until directly incor-

porated by the legislature. This was followed in the 2011 case of *Sepakat Efektif Sdn Bhd v Menteri Dalam Negeri Malaysia & Anor* and other applications [2012] 9 MLJ 550.

Facts

This case concerned a challenge to the decision by the Minister of Home Affairs to ban a book published by the Sisters in Islam (SIS) Forum entitled *Muslim Women and the Challenges of Islamic Extremism*. The book was a compilation of essays from an international meeting entitled ‘International Roundtable on Muslim Women and the Challenge of Religious Extremism: Building Bridges between Southeast Asia and the Middle East’. It was published and made available for sale in Malaysia and elsewhere in 2005. The book was in circulation in Malaysia for over two years before it was banned by the Minister by issuing an order under s 7(1) of the Printing Presses and Publications Act 1984 on the grounds of being “prejudicial to public order.” In a subsequent letter communicating the ban it was stated that the book was banned because the Department of Islamic Development (Jabatan Kemajuan Islam Malaysia) had determined that the book has the tendency to confuse Muslims, particularly Muslim women.

An argument made by the applicants was that they had a legitimate expectation that “they will not be discriminated against on the basis of gender or religion, and that their freedom of expression will only be curtailed by the Malaysian government in accordance with international human rights norms.” Reference was made to Malaysia’s ratification of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and its affirmation of the Universal Declaration of Human Rights (UDHR).

Judgment

[The High Court invalidated the Minister’s decision, opining that even if the book had a tendency to confuse Muslims, this did not amount to being prejudicial to ‘public order’. It however determined the case solely on the basis of domestic law, and rejected the arguments made on the basis of international law.]

[I]n relation to the applicability of international norms and the approach as exemplified in the Australian case of *[Ministry for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273]*, the position adopted by the

Malaysian courts has been not to directly accept norms of international law unless they are incorporated as part of our municipal law: See *Merdeka University Berhad v Government of Malaysia* [1981] 2 MLJ 356, for example. I do not believe this position has changed even with the passing of s 4(4) of the Human Rights Commission Act 1999, and its exhortation that ‘regard’ shall be had to the Universal Declaration of Human Rights ‘to the extent that it is not inconsistent with the Federal Constitution’.

PHILIPPINES

INTERNATIONAL STANDARDS OF ROAD SAFETY – UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE PROTOCOLS – MANDATORY USE OF HELMETS

An Act Mandating All Motorcycle Riders to Wear Standard Protective Motorcycle Helmets While Driving and Providing Penalties Therefor

The Motorcycle Helmet Act of 2009 was signed into law on March 23, 2010. It provides the mandatory use of motorcycle helmets by all riders at all times while driving, whether long or short distances, in any type of road and highway. The government’s Department of Trade and Industry should issue guidelines which include specifications on standard protective motorcycle helmets. In its implementation, the law mandates that the department should utilize the United Nations Economic Commission for Europe (UNECE) Protocols with regard to standards applicable to the approval or disapproval of helmets that will be sold in the Philippines.

SINGAPORE

INTERPRETATION OF MUNICIPAL LAW – USE OF INTERNATIONAL LAW – INTERPRETATION ACT

***The Sahand* and other applications** [2011] 2 SLR 1093; [2011] SGHC 27

In this case, the High Court of Singapore had occasion to consider the relationship between international law and municipal law.

Facts

The defendants are wholly-owned subsidiaries of the Islamic Republic of Iran Shipping Lines (“IRISL”) and owners of a number vessels including

the *Sahand*. They took a syndicate from the plaintiff, Société Générale, and The Export-Import Bank of Korea (“KEXIM”) for the construction of the Vessels. The defendants defaulted and the plaintiffs arrested the Vessels in Singapore waters in September 2010. Subsequently, the plaintiffs obtained an order to sell the vessels.

The defendants applied to postpone the sale but this was denied on the grounds that there were no reasons to suppose that the defendants would be able to overcome the difficulties created by the European Union and United Nation sanctions against Iran.

In the course of the application, the court asked the parties as well as the Attorney-General to make written submissions on the relevance and impact of the United Nations Security Council Resolutions 1737, 1747, 1803 and 1929 (“the Iran Resolutions”) and the relevant implementing legislation, viz, the Monetary Authority of Singapore (Sanctions and Freezing of Assets of Persons - Iran) Regulations 2007 (S 104/2007) (“the MAS Regulations”) and the United Nations (Sanctions - Iran) Regulations 2007 (S 105/2007) (“the UN Regulations”). After consideration, the court was concerned that the Vessels, which were arrested and held by the Sheriff in Singapore waters, might be subject to the assets freeze.

Quentin Loh J:

...

23 Given the way which the facts of the case turned out, it is not necessary for me to, and I will not, express a concluded view on all the legal issues on which I invited submissions. But given the general importance of the issues, and in deference to counsel’s extensive submissions which were made at my direction, I will refer to them appropriately in these grounds.

THE SECURITY COUNCIL RESOLUTIONS: OVERVIEW

24 The sanctions under consideration arise from the international community’s concern over the nuclear activities of Iran. On 27 December 2006, the Security Council adopted Resolution 1737. In the preamble of Resolution 1737, the Security Council expressed, among other things, its concern with Iran’s nuclear programme. Against this background, the Security Council acted to impose a number of sanctions against Iran pursuant to Art 41 of ch VII of the UN Charter, which provides that:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

The Security Council also established a committee (“the Sanctions Committee”) to perform certain specified functions relating to the measures taken.

25 The measures taken in Resolution 1737 were expanded in three further resolutions of the Security Council: Resolution 1747, adopted on 24 March 2007; Resolution 1803, adopted on 3 March 2008; and Resolution 1929, adopted on 9 June 2010. For convenience, I will refer to the four resolutions - Resolutions 1737, 1747, 1803 and 1929 - collectively as the “Iran Resolutions”.

26 As a Member of the United Nations, Singapore acted to implement the Iran Resolutions. Of the various measures taken by Singapore, two pieces of subsidiary legislation are relevant for present purposes. The first is the Monetary Authority of Singapore (Sanctions and Freezing of Assets of Persons - Iran) Regulations 2007 (S 104/2007) (“the MAS Regulations”), made by the Managing Director of the Monetary Authority of Singapore (“MAS”) pursuant to s 27A(1)(b) of the Monetary Authority of Singapore Act (Cap 186, 1999 Rev Ed) (“the MAS Act”), which confers upon MAS power to make such regulations concerning financial institutions as MAS considers necessary to discharge or facilitate the discharge of any obligation binding on Singapore by virtue of a decision of the Security Council. The second is the United Nations (Sanctions - Iran) Regulations 2007 (S 105/2007) (“the UN Regulations”) made by the Minister of Law pursuant to s 2(1) of the United Nations Act (Cap 339, 2002 Rev Ed) (“the UN Act”), which empowers the Minister to make regulations to give effect to Art 41 of the UN Charter.

27 The UN Regulations were made on 28 February 2007, and the MAS Regulations on 1 March 2007 - just over two months after the adoption of

Resolution 1737. Both regulations were later updated to reflect the rest of the Iran Resolutions as they were adopted.

28 Other implementing measures were taken under the Immigration Act (Cap 133, 2008 Rev Ed), the Merchant Shipping Act (Cap 179, 1996 Rev Ed), the Regulation of Imports and Exports Act (Cap 272A, 1996 Rev Ed), and the Strategic Goods (Control) Act (Cap 300, 2003 Rev Ed) (see, in this regard, Singapore's reports to the Sanctions Committee of 6 March 2007 (UN Doc No S/AC 50/2007/45), and of 27 August 2010 (UN Doc No S/AC 50/2010/28)).

29 I should also record here the unequivocal submission by Mr Shawn Ho for the Attorney-General that Singapore will strive to give full effect to the Iran Resolutions.

INTERNATIONAL LAW AND DOMESTIC LAW

30 Before considering the relevant implementing legislation, it would be necessary for me to consider three aspects of the relationship, in Singapore, between international law and domestic or municipal law.

31 The first aspect relates to whether international law can, of itself, be an independent source of rights and obligations, and powers and duties, in Singapore. In this regard, the Court of Appeal has recently affirmed that a rule of customary international law 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: *Yong Vui Kong v PP* [2010] 3 SLR 489 at [91]. However, the position with regard to treaty obligations, such as Singapore's obligation under the UN Charter to implement the Iran Resolutions, has not been subject to judicial consideration in Singapore. Mr Ho for the Attorney-General submitted, in the context of funds paid into court, that:

[b]oth the court and the executive need to take into consideration and give effect to Singapore's domestic legislation and international obligations. If the funds are required to be frozen under the UNSC Resolutions, the Court may direct that these funds be frozen.

32 The position in the United Kingdom ("UK") is stated by Lord Oliver of Aylmerton in *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418 at 500 as follows:

[A]s a matter of the constitutional law of the United Kingdom, the Royal Prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament. Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation. So far as individuals are concerned, it is *res inter alios acta* from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations; and it is outside the purview of the court not only because it is made in the conduct of foreign relations, which are a prerogative of the Crown, but also because, as a source of rights and obligations, it is irrelevant.

The English position appears to be founded on a constitutional objection against the Crown being able, through its treaty-making prerogative, to affect domestic law without the authority of Parliament: see *The Parlement Belge* (1879) 4 PD 129 at 154-155.

33 While our constitutional arrangements are not identical to those of the UK, the principle underlying the English position is equally applicable here. By virtue of Art 38 of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint), the legislative power of Singapore is vested in the Legislature. It would be contrary to Art 38 to hold that treaties concluded by the Executive on behalf of Singapore are directly incorporated into Singapore law, because this would, in effect, confer upon the Executive the power to legislate through its power to make treaties. Accordingly, in order for a treaty to be implemented in Singapore law, its provisions must be enacted by the Legislature or by the Executive pursuant to authority delegated by the Legislature. In so far as a treaty is not implemented by primary or subsidiary legislation, it does not create independent rights, obligations, powers, or duties. I must therefore reject Mr Ho's submission, in so far as he meant to say that the court can directly give effect to Singapore's treaty obligations without them being implemented through legislation, as being inconsistent with the Constitution. That said, I should state unequivocally that the courts will always strive to give effect to Singapore's international obligations within the strictures of our Constitution and laws.

34 The second aspect is the use of international law in interpreting primary and subsidiary legislation. The English courts apply a rebuttable

presumption that Parliament intends to legislate consistently with international law and specifically treaty obligations. In Singapore, s 9A(2) of the Interpretation Act (Cap 1, 2002 Rev Ed) permits consideration to be given to extrinsic materials in interpreting a provision of a written law, if such materials are capable of assisting in the ascertainment of the meaning of the provision. This is wide enough to encompass international law in appropriate cases, such as the present, where the MAS Regulations and the UN Regulations were expressly made to give effect to Singapore's international obligations. Further, s 9A(3)(e) specifically permits reference to any treaty or other international agreement that is referred to in the written law. The Singapore position does not appear to be precisely the same as the English position, but for present purposes it is not necessary to examine this further.

35 The third aspect is the consideration by the Executive of Singapore's international obligations when exercising discretionary powers conferred by law. For present purposes, I am content to confine myself to the truism that such consideration is permissible if it is not *ultra vires* the empowering law or the Constitution.

IMPLEMENTING THE ASSETS FREEZE IMPOSED BY THE IRAN RESOLUTIONS

36 I now turn to consider the assets freeze imposed by the Iran Resolutions and how it has been implemented in Singapore.

37 The framework for the assets freeze is found in operative paras 12-15 of Resolution 1737, where the Security Council:

12. Decide[d] that all States shall freeze the funds, other financial assets and economic resources which are on their territories at the date of adoption of this resolution or at any time thereafter, that are owned or controlled by the persons or entities designated in the Annex, as well as those of additional persons or entities designated by the Security Council or by the Committee as being engaged in, directly associated with or providing support for Iran's proliferation sensitive nuclear activities or the development of nuclear weapon delivery systems, or by persons or entities acting on their behalf or at their direction, or by entities owned or controlled by them, including through illicit means, and that the measures in this paragraph shall cease to apply in respect of such persons or entities if, and at such time as, the Security Council or the Committee removes them from the Annex, and decide[d] further that all States

shall ensure that any funds, financial assets or economic resources are prevented from being made available by their nationals or by any persons or entities within their territories, to or for the benefit of these persons and entities;

13. Decide[d] that the measures imposed by paragraph 12 above do not apply to funds, other financial assets or economic resources that have been determined by relevant States:

(a) to be necessary for basic expenses, including payment for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges or exclusively for payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services, or fees or service charges, in accordance with national laws, for routine holding or maintenance of frozen funds, other financial assets and economic resources, after notification by the relevant States to the Committee of the intention to authorize, where appropriate, access to such funds, other financial assets or economic resources and in the absence of a negative decision by the Committee within five working days of such notification;

(b) to be necessary for extraordinary expenses, provided that such determination has been notified by the relevant States to the Committee and has been approved by the Committee;

(c) to be the subject of a judicial, administrative or arbitral lien or judgement, in which case the funds, other financial assets and economic resources may be used to satisfy that lien or judgement provided that the lien or judgement was entered into prior to the date of the present resolution, is not for the benefit of a person or entity designated pursuant to paragraphs 10 and 12 above, and has been notified by the relevant States to the Committee;

(d) to be necessary for activities directly related to the items specified in subparagraphs 3 (b) (i) and (ii) and have been notified by the relevant States to the Committee;

14. Decide[d] that States may permit the addition to the accounts frozen pursuant to the provisions of paragraph 12 above of interests or other earnings due on those accounts or payments due under contracts, agreements or obligations that arose prior to the date on which those accounts became subject to the provisions of this

resolution, provided that any such interest, other earnings and payments continue to be subject to these provisions and are frozen;

15. Decide[d] that the measures in paragraph 12 above shall not prevent a designated person or entity from making payment due under a contract entered into prior to the listing of such a person or entity, provided that the relevant States have determined that:

(a) the contract is not related to any of the prohibited items, materials, equipment, goods, technologies, assistance, training, financial assistance, investment, brokering or services referred to in paragraphs 3, 4 and 6 above;

(b) the payment is not directly or indirectly received by a person or entity designated pursuant to paragraph 12 above; and after notification by the relevant States to the Committee of the intention to make or receive such payments or to authorize, where appropriate, the unfreezing of funds, other financial assets or economic resources for this purpose, ten working days prior to such authorization;

...

[emphasis in original]

Under this scheme, operative para 12 imposes the obligation on Member States to implement the assets freeze, while operative paras 13-15 set out permissible derogations thereto. The “extraordinary expenses” referred to in operative para 13(b) is not defined. The “activities” referred to in operative para 13(d) relate to nuclear activities which are not likely to be relevant in Singapore’s context.

38 Using the framework established by operative paras 12-15, subsequent resolutions expanded the assets freeze to other designated persons: see operative para 4 of Resolution 1747; operative para 7 of Resolution 1803; and operative paras 11, 12 and 19 of Resolution 1929.

THE UN REGULATIONS AND PRIVATE PERSONS

39 The UN Regulations applies to persons in Singapore and citizens of Singapore, with the exception of financial institutions subject to the directions of MAS under s 27A of the MAS Act: see s 2(2) of the UN Act. Its stated object is to assist in giving effect to the Iran Resolutions: reg 2. By virtue of s 5(1) of the UN Act, violations of the UN Regulations are

punishable by a fine not exceeding \$100,000 or to imprisonment for a term not exceeding five years or to both.

40 Operative para 12 of Resolution 1737 appears to be implemented through regs 8 and 9 of the UN Regulations, which provide as follows:

Prohibition against dealing with property of designated person

8. No person in Singapore and no citizen of Singapore outside Singapore shall deal, directly or indirectly, in any property (including funds derived or generated from such property) that is owned or controlled, directly or indirectly, by or on behalf of -

- (a) a designated person;
- (b) any entity or individual who acts on behalf of or under the direction of a designated person; or
- (c) any entity owned or controlled by a designated person.

Prohibition against provision of funds, financial assets and economic resources to or for benefit of designated person, etc.

9. No person in Singapore and no citizen of Singapore outside Singapore shall make available any funds or other financial assets or economic resources, directly or indirectly, to or for the benefit of -

- (a) a designated person;
- (b) any entity or individual who acts on behalf of or under the direction of a designated person; or
- (c) any entity owned or controlled by a designated person.

Under s 2(1) of the Interpretation Act, a “person” to whom the UN Regulations apply would include any company or association or body of persons, corporate or unincorporate.

41 Operative paras 13-15 of Resolution 1737 are not individually implemented in the UN Regulations. However, they can be given effect to via the general power of exemption in reg 14:

Exemption

14. The Minister or a person designated by the Minister may, if he considers that it is appropriate to do so in the circumstances of the case and that it is consistent with the intention of the Security Council of the United Nations under Resolution 1737 (2006), 1747

(2007) or 1803 (2008), by notice in writing exempt, subject to such conditions as he may specify -

- (a) any person or class of persons; or
- (b) any activity or class of activities,

from any or all of the provisions of these Regulations.

Significantly, the exceptions in reg 14 are conditional only upon the Minister's consideration and notice in writing. Therefore, as far as the domestic sphere is concerned, such consideration and notice would be sufficient. Here, I would stress that the determination is to be made by the Minister or the person he designates and not the court. As for the international sphere, Singapore may need to take further action, such as notifying the Sanctions Committee and/or seeking its approval, but that is outside the purview of the court.

THE MAS REGULATIONS AND FINANCIAL INSTITUTIONS

42 The MAS Regulations apply to all financial institutions in Singapore: reg 3. Its stated object is to assist in giving effect to the Iran Resolutions: reg 2. By virtue of s 27A(5)(b) of the MAS Act, any financial institution which contravenes the MAS Regulations shall be guilty of an offence and shall be liable on conviction to a fine not exceeding \$1m.

43 In the MAS Regulations, operative para 12 is implemented in regs 5(1) and 5(2), which provide as follows:

Assets of certain persons to be frozen

5.—(1) Subject to paragraph (3), any financial institution that, on or after 7th March 2007, has in its possession, custody or control in Singapore, any funds, financial assets or economic resources owned or controlled, directly or indirectly, by any designated person shall -

- (a) immediately freeze all such funds, financial assets or economic resources, as the case may be; and
- (b) ensure that such funds, financial assets or economic resources are not made available, whether directly or indirectly, to or for the benefit of the designated person.

(2) For the purposes of paragraph (1), any funds, financial assets or economic resources that are held by -

- (a) any entity owned or controlled, directly or indirectly, by any designated person; or
- (b) any individual or entity who acts on behalf of or under the direction of any designated person,

shall be treated as funds, financial assets or economic resources owned or controlled by the designated person.

44 Operative para 13 is implemented in reg 5(3) of the MAS Regulations:

- (3) The requirement in paragraph (1) shall not apply to any funds, financial assets or economic resources that have been determined by the Authority -
 - (a) to be necessary -
 - (i) for the payment of basic expenses, including any payment for foodstuff, rent, the discharge of a mortgage, medicine, medical treatment, taxes, insurance premiums and public utility charges; or
 - (ii) exclusively for -
 - (A) the payment of reasonable professional fees and the reimbursement of any expenses in connection with the provision of legal services; or
 - (B) the payment of fees or service charges imposed for the routine holding or maintenance of frozen funds, financial assets or economic resources;
 - (b) to be necessary for the payment of any extraordinary expenses;
 - (c) to be the subject of any judicial, administrative or arbitral lien or judgment, in which case the funds, financial assets or economic resources may be used to satisfy such lien or judgment, provided that the lien or judgment -
 - (i) arose or was entered before 23rd December 2006; and
 - (ii) is not for the benefit of a designated person; or
 - (d) to be necessary for any activity directly related to a non-prohibited item.

Once again, I would note that the exceptions in reg 5(3) are conditional only upon the relevant determination of the MAS, which would be sufficient in the domestic sphere.

45 As for operative paras 14 and 15, I observed that they have not been expressly enacted in the MAS Regulations, which unlike the UN Regulations do not provide for a general power of exemption. I therefore invited submissions on this point. From Mr Ho's submissions, it does not appear that this was a deliberate attempt to disallow the exceptions permitted under those operative paragraphs. Rather, Mr Ho submitted that operative para 14 is merely "clarificatory" in nature and need not be enacted.

46 As for operative para 15, Mr Ho submitted that it had been enacted via reg 14 of the UN Regulations. I confess some difficulty in following this submission, since reg 14 of UN Regulations only empowers the Minister to make exemptions from the provisions of the UN Regulations, and not the provisions of the MAS Regulations. The position under the MAS Regulations can be contrasted to the UK position under the Iran (Financial Sanctions) Order 2007 (SI 2007 No 281) (UK) ("the UK Order"), made pursuant to s 1 of the United Nations Act 1946 (c 45) (UK). Under Art 8(1) of the UK Order, a person may credit a frozen account with interest or earnings, as well as payments due under prior contracts, agreements or obligations. Under Art 10, the UK Treasury is empowered to grant exempting licenses. This power extends to exempting payments under prior contracts in accordance with operative para 15 of Resolution 1737: see the Bank of England's press release of 24 March 2007 entitled "Financial Sanctions: Iran" <http://www.hm-treasury.gov.uk/fin_sanctions_iran.htm> (accessed 5 January 2011). Putting Mr Ho's submissions to one side, I think that the court may be able to give indirect effect to operative para 15 in the present state of the law by applying the common law principle, described by Staughton LJ in *Secretary of State for Social Security v Tunncliffe* [1991] 2 All ER 712 at 724 and approved by Lord Nicholls of Birkenhead in *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816 at [19], "that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears". While Staughton LJ's dictum was made with reference to statutes enacted by Parliament, I should think that the presumption applies equally to subsidiary legislation such as the MAS Regulations. However,

the presumption cannot be applied inconsistently with the object of the MAS Regulations, which as mentioned is to assist in giving effect to the Iran Resolutions. This would be the case if the presumption is applied in its full force, since operative para 15 does not permit all payments under existing contracts, but only those payments which met the criteria stated therein. The presumption can therefore only apply to the extent that the stated criteria have been met. In this way, indirect effect can be given to operative para 15.

47 In any event, whatever the true position is under the present state of the law - and the facts do not require me to reach a concluded view - it would certainly be helpful, from a judicial perspective as well as for those who have to comply with the law, if operative paras 14 and 15 were expressly enacted.

ASSETS IN THE CUSTODY OF THE COURT OR ITS OFFICERS

48 As mentioned, I was concerned on the facts with applicability of the assets freeze to Vessels, which while they were arrested were assets in the custody of the Sheriff, an officer of the court. More generally, the treatment of assets in the custody of the court and its officers is an important issue given that the court, in the ordinary course of its business, has to deal with all manner of parties and their assets. In this regard, it appears that assets in the custody of the court or its officers are not explicitly covered by the MAS and UN Regulations, which concern assets in the custody of financial institutions and other private entities. Similarly, there is no explicit power for the court to direct the freezing of any assets in its custody. However, if it comes to the attention of the court that assets in its custody are owned or controlled by sanctioned entities, it may well be that those assets would be subject to a *de facto* freeze. This is because: (a) if the assets were ordered to be released, the recipient of such assets, or his agent in Singapore, would have to act to freeze the assets in accordance with the MAS or UN Regulations; and (b) if there was a risk that the recipient or his agent would not comply with the MAS or UN Regulations, the court will pre-empt this possible illegality by not releasing the assets in the first place. Further, in the case of funds paid into court, which are deposited with the Accountant-General's bank accounts, the court can direct the financial institutions administering those accounts to comply with their obligations under the MAS Regulations. In these ways, a *de facto* freeze

could be achieved. Of course, all this depends on the issue of sanctions and the identity of sanctioned entities being brought to the attention of the court. This is perhaps unlikely in ordinary civil litigation, since it is not in the interest of parties to point out to the court that the assets over which they are litigating may be frozen and put out of their reach. In this case, the issue of sanctions was only brought to the fore because they were clearly hampering the defendants' ability to make payment or provide security. Of course, if the authorities come to know that assets in the custody of the court should be frozen, I have no doubt that they will bring this to the attention of the court.

49 On the facts, two preliminary issues arose in relation to the possible application of the assets freeze to the Vessels. First, are the defendants, who own the Vessels, entities which are caught under the assets freeze? Secondly, assuming an affirmative answer to the first issue, how does the assets freeze affect the Vessels? I dealt with these two issues as follows.

ARE THE DEFENDANTS ENTITIES CAUGHT UNDER THE ASSETS FREEZE?

50 The answer to this question depended in large part on the more general question of which Iranian shipping entities are subject to the assets freeze imposed in operative para 12 of Resolution 1737.

51 The first three of the Iran Resolutions did not designate commercial entities as being subject to the assets freeze. This changed with the adoption of Resolution 1929, which amongst other things designated certain Iranian shipping entities as being subject to the assets freeze. This was done in operative para 19 of Resolution 1929, where the Security Council:

19. Decide[d] that the measures specified in paragraphs 12, 13, 14 and 15 of resolution 1737 (2006) shall also apply to the entities of the Islamic Republic of Iran Shipping Lines (IRISL) as specified in Annex III and to any person or entity acting on their behalf or at their direction, and to entities owned or controlled by them, including through illicit means, or determined by the Council or the Committee to have assisted them in evading the sanctions of, or in violating the provisions of, resolutions 1737 (2006), 1747 (2007), 1803 (2008) or this resolution[.] [emphasis in original]

Operative para 19 is very precisely worded. It refers to the entities of the IRISL specified in Annex III of Resolution 1929, ie, Irano Hind Shipping Company, IRISL Benelux NV and South Shipping Line Iran. It does not

refer to Iranian shipping entities in general, or to IRISL, or to IRISL entities generally. On its face, therefore, operative para 19 only imposes the assets freeze on the three Annex III entities, as well as “any person or entity acting on their behalf or at their direction, and to entities owned or controlled by them, including through illicit means”. This was the position taken by the defendants and the Attorney-General.

52 This view is confirmed by a perusal of the consolidated list, published by the Sanctions Committee on 19 August 2010, of the individuals and entities subject to the travel ban and assets freeze as a result of the Iran Resolutions. The three Annex III entities, ie, Irano Hind Shipping Company, IRISL Benelux NV and South Shipping Line Iran, are the only shipping entities appearing on the consolidated list, which remains current at the time of these grounds.

53 Furthermore, general confirmation can also be found in operative para 18 of Resolution 1929, where the Security Council:

18. Decide[d] that all States shall prohibit the provision by their nationals or from their territory of bunkering services, such as provision of fuel or supplies, or other servicing of vessels, to Iranian-owned or -contracted vessels, including chartered vessels, if they have information that provides reasonable grounds to believe they are carrying items the supply, sale, transfer, or export of which is prohibited by paragraphs 3, 4 or 7 of resolution 1737 (2006), paragraph 5 of resolution 1747 (2007), paragraph 8 of resolution 1803 (2008) or paragraphs 8 or 9 of this resolution, unless provision of such services is necessary for humanitarian purposes or until such time as the cargo has been inspected, and seized and disposed of if necessary, and underline[d] that this paragraph is not intended to affect legal economic activities[.] [emphasis in original]

Operative para 18, by prohibiting the provision of bunkering services, etc, to Iranian owned or contracted vessels if there are reasonable grounds to believe that they are carrying prohibited items, clearly implies that such services may be provided to Iranian owned or contracted vessels if there are no such grounds. This regime would be redundant if all Iranian owned or contracted vessels were captured under assets freeze. Such a wide approach would also be inconsistent with the last clause of operative para 18, which underlined that the paragraph is not intended to affect “legal economic activities”, which in context must mean legal shipping activities.

54 Mr Kwek submitted that IRISL itself is a designated entity under operative para 19 of Resolution 1737. His reason for taking this position was that it would be a stretch to read operative para 19 as excluding IRISL itself, because there would otherwise be no necessity to specifically state the name of IRISL in operative para 19 and in the heading to Annex III. Further, Mr Kwek referred to European Union legislation implementing the Iran Resolutions as well as the Union's own measures, recently consolidated in Council Regulation (EU) No 961/2010 of 25 October 2010 on restrictive measures against Iran and repealing Regulation (EC) No 423/2007 [2010] OJ L 281/1 ("the EU Regulation"). The relevant provisions are Arts 16(1) and 16(2), which provide in material part as follows:

Article 16

1. All funds and economic resources belonging to, owned, held or controlled by the persons, entities and bodies listed in Annex VII shall be frozen. Annex VII shall include the persons, entities and bodies designated by the United Nations Security Council or by the Sanctions Committee in accordance with paragraph 12 of UNSCR 1737 (2006), paragraph 7 of UNSCR 1803 (2008) or paragraph 11, 12 or 19 of UNSCR 1929 (2010).
2. All funds and economic resources belonging to, owned, held or controlled by the persons, entities and bodies listed in Annex VIII shall be frozen. Annex VIII shall include the natural and legal persons, entities and bodies, not covered by Annex VII ...

Mr Kwek pointed out that IRISL is listed in Annex VIII.

55 I was unable, with respect, to agree with Mr Kwek's submission. Admittedly, it is not apparent why operative para 19 only designated three IRISL entities and not IRISL itself. But on the other hand it seems clear that this was precisely the intended effect. If IRISL was itself targeted, it would be redundant to specifically mention the three Annex III entities, which appear to be controlled by IRISL. Also, treating IRISL itself as designated by operative para 19 would be inconsistent with the consolidated list issued by the Sanctions Committee which I have just referred to. Mr Kwek's position was also contrary to the EU Regulation, which he relies on - if IRISL needs to be listed in Annex VIII pursuant to Art 16(2), it cannot logically be designated under operative para 19 of Resolution 1929, which is already provided for in Art 16(1).

56 It is therefore clear to me that the only Iranian shipping entities which are designated persons within the meaning of the MAS Regulations are Irano Hind Shipping Company, IRISL Benelux NV and South Shipping Line Iran, ie, the three entities specified in Annex III of Resolution 1929. Other IRISL entities, including IRISL itself, are not designated persons. Likewise for Iranian shipping entities in general. The definitions of “designated person” and “UN List” in the MAS Regulations and UN Regulations (see reg 4 of both subsidiary legislation) should be interpreted accordingly.

57 However, the assets freeze does not stop at the designated IRISL entities only (or designated persons in general). As indicated in operative para 19 of Resolution 1929, and reflected in reg 5(2) of the MAS Regulations and regs 8(b) and 8(c) and 9(b) and 9(c) of the UN Regulations, the obligation extends to “any person or entity acting on their behalf or at their direction, and to entities owned or controlled by them, including through illicit means”. Whether a person or entity falls under this description would have to be determined on the facts of each case. The exercise would be difficult, not least because the position of the three designated entities within the IRISL group is unclear. But the precisely targeted nature of the UN sanctions requires that the exercise be undertaken in every case.

58 On the facts, and as mentioned, I noticed that the defendants had some links which concerned me. Specifically, I noticed that the defendants were wholly owned IRISL subsidiaries, and that IRISL and IRISL Europe GmbH were listed as guarantors under the Loan Agreement. I also noticed that Mr Mehrzad Soleymanifar, who affirmed the affidavit evidence on behalf of the defendants, was a director of Asia Marine Network Pte Ltd, which had been listed in the EU Regulation as an entity acting on behalf of IRISL in Singapore (see Annex VIII of the EU Regulation). Of course, these links to IRISL do not ipso facto mean that the defendants were linked to the three IRISL entities designated in Annex III of Resolution 1929. But I was sufficiently concerned about the possibility of Singapore’s international obligations being engaged that I directed the parties, as well as the MAS and the Ministry of Foreign Affairs (through responsible officers), to file affidavits to indicate whether any of the defendants are designated persons within the meaning of the MAS Regulations, or owned or controlled, directly or indirectly, by any designated person, or acting on behalf of or under the direction of any designated person. I framed my question with

reference to the MAS Regulations because that was the main domestic legislation raised in argument before me during the December hearings. The scope of argument has clearly widened since then, but the affidavits would be relevant for the Iran Resolutions generally, since the definition of designated person in the MAS Regulations is made with reference to the UN List, which is in turn defined with reference to the Iran Resolutions (see reg 4 of the MAS Resolutions).

59 It is clear that the defendants are not designated IRISL entities under operative para 19 and Annex III of Resolution 1929. The main question is whether they are controlled, etc, by any designated person.

60 MAS's affidavit in answer to my questions was made by Ms Denise Wong Jin Hua, a Deputy General Counsel with MAS. The Ministry of Foreign Affairs' affidavit was made through Ms Long Li Shen, Lynette. Her designation was not indicated in her affidavit but the Government's directory, available publicly online, stated her to be the Deputy Director of the Counter Proliferation and International Security Branch of the International Organisations Directorate in the Ministry. Both Ms Wong's and Ms Long's affidavits stated that they have no personal knowledge that the defendants are designated persons on the UN List as defined in the MAS Regulations, or owned or controlled, directly or indirectly, by any designated person, or acting on behalf of or under the direction of any designated person. I record the court's appreciation to both officers for attending to the matter so quickly.

61 The defendants affirmed two affidavits in response to my questions. Both were made by Mr Soleymanifar. The first affidavit did not answer my question on the defendants' links to designated persons. The second affidavit, which was expressed to be in response to Ms Wong's affidavit, confirmed that the defendants are not owned or controlled, directly or indirectly, by any designated person, or acting on behalf of or under the direction of any designated person. The plaintiff's affidavit was sworn by Mr Kwek. It was founded on the plaintiff's position that IRISL was a designated person, and stated that among other things that the defendants were subsidiaries of IRISL. But, as I have said, it is only the IRISL entities listed in Annex III of Resolution 1929 which are designated by operative para 19 of the same resolution, and not IRISL itself. Links to IRISL itself are, by themselves, neither here nor there.

62 In the circumstances, there was no evidence before the court that the defendants (or any of them) were controlled, etc, by any designated person. The assets freeze imposed by the Iran Resolutions would therefore not apply to assets owned by the defendants, specifically the Vessels in the custody of the Sheriff. Consequently, there can be no question of applying the implementing legislation, whether directly or indirectly, to the defendants.

THE EXTENT OF THE ASSETS FREEZE

63 My finding that the defendants were not entities caught under the assets freeze sufficiently disposed of any further issues in relation to the assets freeze. However, I considered, for completeness, the possible treatment of the Vessels had the defendants been found to be entities caught under the assets freeze.

64 In this regard, it should be recalled that operative para 12 of Resolution 1737, which imposes the assets freeze, is widely worded:

States shall freeze the funds, other financial assets and economic resources which are on their territories at the date of adoption of this resolution or at any time thereafter, that are owned or controlled by the persons or entities designated ... or by persons or entities acting on their behalf or at their direction, or by entities owned or controlled by them, including through illicit means ...

65 Mr Ho submitted that the assets freeze does not extend to what he called “property in rem”, such as vessels. I find that difficult to accept. *Prima facie*, a ship, as Mr Kwek acknowledged, would seem to be an economic resource in the ordinary signification of the term - and indeed a most valuable economic resource - that would have to be frozen.

66 However, the true scope of operative para 12 of Resolution 1737 must be determined not just with reference to its wording, which is no doubt important, but also with reference to the relevant practice of States in implementing the obligation imposed by it: see Art 31 (especially Art 31(3) (b)) of the Vienna Convention on the Law of Treaties (23 May 1969), UNTS vol 1155, p 331 (entered into force 27 January 1980); see also Sir Michael C Wood, “The Interpretation of Security Council Resolutions”, (1998) 2 *Max Planck YB UN Law* 73 at pp 94-95.

67 In this regard, it is instructive to refer again to Arts 16(1) and 16(2) of the EU Regulation, which I set out in full below:

Article 16

1. All funds and economic resources belonging to, owned, held or controlled by the persons, entities and bodies listed in Annex VII shall be frozen. Annex VII shall include the persons, entities and bodies designated by the United Nations Security Council or by the Sanctions Committee in accordance with paragraph 12 of UNSCR 1737 (2006), paragraph 7 of UNSCR 1803 (2008) or paragraph 11, 12 or 19 of UNSCR 1929 (2010).

2. All funds and economic resources belonging to, owned, held or controlled by the persons, entities and bodies listed in Annex VIII shall be frozen. Annex VIII shall include the natural and legal persons, entities and bodies, not covered by Annex VII, who, in accordance with Article 20(1)(b) of Council Decision 2010/413/CFSP, have been identified as:

(a) being engaged in, directly associated with, or providing support for Iran's proliferation-sensitive nuclear activities or the development of nuclear weapon delivery systems by Iran, including through involvement in the procurement of prohibited goods and technology, or being owned or controlled by such a person, entity or body, including through illicit means, or acting on their behalf or at their direction;

(b) being a natural or legal person, entity or body that has assisted a listed person, entity or body to evade or violate the provisions of this Regulation, Council Decision 2010/413/CFSP or UNSCR 1737 (2006), UNSCR 1747 (2007), UNSCR 1803 (2008) and UNSCR 1929 (2010);

(c) being a senior member of the Islamic Revolutionary Guard Corps or a legal person, entity or body owned or controlled by the Islamic Revolutionary Guard Corps or by one of more of its senior members;

(d) being a legal person, entity or body owned or controlled by the Islamic Republic of Iran Shipping Lines (IRISL).

It shall be prohibited, pursuant to the obligation to freeze the funds and economic resources of IRISL and of designated entities owned or controlled by IRISL, to load and unload cargoes on and from vessels owned or chartered by IRISL or by such entities in ports of Member States. That prohibition shall not prevent the execution of a contract concluded before the entry into force of this Regulation.

The obligation to freeze the funds and economic resources of IRISL and of designated entities owned or controlled by IRISL shall not require the impounding or detention of vessels owned by such entities or the cargoes carried by them insofar as such cargoes belong to third parties, nor does it require the detention of the crew contracted by them.

As can be seen, Arts 16(1) and 16(2) of the EU Regulation impose identically-worded obligations to freeze all funds and economic resources owned or controlled by persons designated by the Security Council and the European Union respectively. In this regard, the three IRISL entities designated in Annex III of Resolution 1929 are listed in Annex VII pursuant to Art 16(1); IRISL itself (including all its branches and subsidiaries), as well as 23 other IRISL entities are listed in Annex VIII pursuant to Art 16(2).

68 It will also be noticed that Art 16(2)(d) goes on to provide, among other things, that the obligation to freeze the funds and economic resources of IRISL and of designated entities owned or controlled by IRISL shall not require the impounding or detention of vessels owned by such entities. At first sight, this appears to be a substantive exception which pertains only to IRISL entities designated by the European Union pursuant to Art 16(2) (d) and which has nothing to do with Art 16(1). If this is indeed the case, then, Art 16(1), which imposes a freezing obligation identically worded with Art 16(2), and which is not subject to any exception, must be understood as requiring the impoundment or detention of a vessel owned by an entity covered by it. It would further follow that an IRISL entity falling under Art 16(1) could avoid having its vessel impounded or detained by the simple expedient of transferring the vessel to an IRISL entity falling under Art 16(2). This would substantially undermine Art 16(1), and in turn the freezing obligation imposed by the Iran Resolutions. It is extremely doubtful that the EU Regulation, which was evidently enacted in a robust spirit to implement the Iran Resolutions and to expand upon them, intended such a result. This is especially so given that operative para 20 of Resolution 1929 distinctly raised the possibility of transfers of IRISL-owned vessels to other companies to evade the UN sanctions. It is more likely that the proviso in Art 16(2)(d) was not a substantive exception as such, but was inserted for the avoidance of doubt, to reflect the European Union's understanding that the obligation to freeze the economic resources of IRISL entities, whether designated by the Security Council or the European Union, did not extend to the impoundment or detention of vessels owned by them.

69 Support for this proposition can be found in the notice issued on 27 October 2010 by the UK Treasury in relation to the EU Regulation. The relevant part of the notice reads as follows:

Section I

FREEZING OF FUNDS AND ECONOMIC RESOURCES (Chapter IV - Articles 16-20)

7. Articles 16-20 of the Regulation replicate the previous asset freezing measures.

8. Article 16(2)(d) clarifies the effect of the asset freezing measures on the Islamic Republic of Iran Shipping Line (IRISL), and of designated entities owned or controlled by IRISL. It is prohibited to load and unload cargoes on and from vessels owned or chartered by IRISL or by such entities in ports of Member States. However, the asset freeze imposed on IRISL does not require the impounding or detention of vessels owned by such entities or the cargoes carried by them if the cargoes belong to third parties, nor does it require the detention of the crew contracted by them.

[emphasis added in italics]

It is evident that the issue of impounding or detaining vessels was considered by the drafter of the Treasury notice. In the circumstances, it would seem natural for the notice to state that IRISL entities covered under Art 16(1) remain liable to have their vessels impounded or detained, if indeed this was required. However, there is nothing to that effect.

70 In the circumstances, it seems clear, from its implementation efforts, that the European Union did not understand the assets freeze imposed by the Security Council to require the impoundment or detention of vessels owned by designated IRISL entities. This understanding is vital to the interpretation of the scope of the assets freeze imposed by operative para 19 of Resolution 1929 read with operative para 12 of Resolution 1737. This is not just because the membership of the European Union includes two permanent and veto-wielding members of the Security Council, ie, France and the UK, but also because the European Union as a whole has taken a very robust attitude in implementing UN sanctions against Iran, as well as adding further measures of its own. In this regard, I should add that, while the United States would also fall within this description, I could not derive much interpretive assistance from her domestic legislation because,

judging from the United States' report to the Sanctions Committee dated 25 August 2010 (UN Doc No S/AC 50/2010/7), the United States' legislation made pursuant to her own foreign policy had completely anticipated operative para 19 of Resolution 1929. The relevant part of the United States' report reads as follows:

Paragraph 19

Under the authorities of Executive Order 13382 and the International Emergency Economic Powers Act, the United States designated IRISL and 17 other entities controlled by or acting or purporting to act on behalf of IRISL on 10 September 2008. Other IRISL-related entities have been designated subsequently under Executive Order 13382. All three entities included in annex III of resolution 1929 (2010) were so designated on 10 September 2008, prior to the adoption of the resolution. Individuals and entities that are designated under Executive Order 13382 are denied access to the United States financial and commercial systems, and United States persons, including United States citizens, permanent resident aliens, United States companies (wherever located), and any person or company in the United States, are prohibited from engaging in transactions with them. This national authority also allows the United States to implement effectively the provisions set forth in operative paragraph 19 of the resolution. In addition to IRISL itself, the following IRISL-related entities have been designated under Executive Order 13382:

Valfajr 8th Shipping Line Co. SSK
Khazar Sea Shipping Lines
Irinivestship, Ltd.
Iran o Hind Shipping Company
Shipping Computer Services Company
Iran o Misr Shipping Company
IRISL Marine Services & Engineering Company
IRITAL Shipping SRL Company
South Shipping Line Iran
IRISL Multimodal Transport Co.
Oasis Freight Agencies
IRISL Europe GmbH
IRISL Benelux NV
IRISL (UK) Ltd.
IRISL China Shipping Co., Ltd.
Asia Marine Network PTE. Ltd.
CISCO Shipping Co. Ltd.

IRISL (Malta) Limited
Hafiz Darya Shipping (HDS) Lines
Safirani Payan Darya Shipping
Seibow Ltd.
Seibow Logistics Ltd.
Soroush Sarzamin Asatir Ship Management Co.

In addition to these designations, the United States has listed the names and International Maritime Organization (IMO) numbers of more than 90 IRISL-related vessels as a 'blocked vessel'.

In accordance with domestic law and international legal frameworks, the United States cooperates closely with partner States to scrutinize the activities of the Islamic Republic of Iran Shipping Lines and other Iranian shipping-related companies that pass through airports, seaports, and other international borders, and takes steps to prevent transfers of items prohibited by this and by previous Iran-related resolutions, the United States cooperates closely with partner States to scrutinize the activities of IRISL as well as Iranian cargo shipping companies.

As can be seen, the United States had already designated Irano Hind Shipping Company, IRISL Benelux NV and South Shipping Line Iran pursuant to Executive Order 13382 and the International Emergency Economic Powers Act on 10 September 2008, with the attendant consequences described in the United States' report, almost two years before Resolution 1929 was adopted.

71 I also noted the parties' submissions that there has been no known case of ships being impounded or detained, in Singapore or elsewhere, pursuant to the Iran Resolutions. This is not what I would expect, some six months after the adoption of Resolution 1929, if there had been an obligation on Member States to impound or detain Iranian shipping, or any part thereof.

72 Therefore, it seemed to me that the assets freeze imposed by operative para 19 of Resolution 1929 read with operative para 12 of Resolution 1737 does not require the impounding or detention of vessels owned or controlled by the designated IRISL entities. Accordingly, even if I was wrong and the defendants were in fact entities caught under the assets freeze, the Vessels, which were the defendants' only assets in Singapore, would not need to be impounded or detained under the Iran Resolutions. Consequently, there can be no question of applying the implementing legislation, whether directly or indirectly, to the Vessels.

THE ADMIRALTY ASPECT

73 I was therefore of the view that the assets freeze imposed by the Iran Resolutions was inapplicable on the facts because: (a) the defendants were not entities caught under the assets freeze; and (b) the assets freeze would not require the detention or impoundment of the Vessels, which were the defendants' only assets in Singapore. In the light of this, the applications fell to be disposed of as normal admiralty matters, albeit with rather exceptional facts. In this, my sole concern was whether the defendants had paid the sums claimed from them or provided sufficient security for the claims, such that the Vessels could be released. It is important to note here that the relevant fund transfers occurred in Europe, outside of Singapore. There was therefore no question of a Singapore court freezing the funds - that was up to the relevant European authorities. To reiterate, my only concern was whether the plaintiff's claims had been met or security provided for them.

74 In this regard, the defendants had made three transfers of funds to Société Générale in Paris:

- (a) €4,754,463.91 on 10 September 2010;
- (b) €49,228.35 on 15 September 2010; and
- (c) €155m on 14 December 2010.

The last transfer was made by Bank Tejarat on behalf of IRISL and the defendants.

75 All three transfers were caught by Art 16(2) of the EU Regulation (or its materially identical predecessor) relating to entities designated by the European Union on top on those designated under the Iran Resolutions. Therefore, the necessary authorisations under Art 18 of the EU Regulation, which related to existing contracts such as the Loan Agreement and its related contracts, had to be obtained before the funds could be applied towards payment. Otherwise, the funds would remain frozen and could not be considered valid payments or tenders of payment at law. They would also not comply with the Loan Agreement, of which cll 16.12.1 and 16.12.2 provided:

16.12.1 The Agent may at any time at the request of any Lender require evidence satisfactory to the Agent that any payment under this Agreement is legally compliant and until such evidence has been provided to the Agent neither the Agent nor the Lenders (each a beneficiary) shall be obliged to accept any such payment but each

beneficiary shall be entitled to place such payment into a suspense account and such payment shall not be an effective discharge of the liabilities of the Borrowers under this Agreement.

16.12.2 For the purposes of this Clause legally compliant means that the payment of any funds under this Agreement and their source (whether direct or indirect) and their receipt and handling is or will be in the opinion of the Agent in all respects in accordance with any law and regulatory requirements of any relevant jurisdiction and [sic], and the receipt of such funds by any beneficiary will not or is not reasonably likely in the opinion of the Agent to impose on any beneficiary any obligation to make a report to any authority or to repay such funds.

[emphasis in original]

76 The relevant evidence in relation to the authorisations is set out by the plaintiff's English solicitors, SNR Denton UK LLP, in their letter of 4 January 2011, which was annexed to Mr Kwek's affidavit of 4 January 2011. Since it was not challenged or contradicted, I accepted its contents as correct for present purposes. Based on the letter, the parties had to obtain the following authorisations:

- (a) Société Générale, a French entity, needed the authorisation of the Direction générale du Trésor for it to receive the funds for its own benefit as well as on behalf of the plaintiff and KEXIM.
- (b) The plaintiff, also a French entity, similarly needed the authorisation of the Direction générale du Trésor for it to receive its share of the funds from Société Générale.
- (c) KEXIM, a Korean entity, also needed the authorisation of the Direction générale du Trésor for it to receive its share of the funds from Société Générale. However, because it was a Korean entity, KEXIM needed to obtain the authorisation of the Central Bank of Korea, a translated version of which was required to be submitted in support of the application for the Direction générale du Trésor's authorisation.

The position in relation to the authorisations was as follows:

- (a) Société Générale made an application on 12 August 2010 to the Direction générale du Trésor and was granted a license on 7 October 2010: (i) to receive funds transferred in payment of the sums due from the defendants under the Loan

Agreement and related contracts; and (ii) to pay to itself the portion due to it out of the funds transferred.

- (b) In respect of the first two transfers of €4,754,463.91 and €49,228.35 made on 10 and 15 September 2010 respectively:
 - (i) The plaintiff applied on 19 October 2010 to the Direction générale du Trésor for authorisation to receive its portion of the funds and on 21 October 2010 such authorisation was granted.
 - (ii) KEXIM applied on 27 October 2010 to the Central Bank of Korea for authorisation to receive its portion of the funds and on 2 November 2010 such authorisation was granted. Further to this, Société Générale as Agent applied on 5 November 2010 to the Direction générale du Trésor for authorisation to pay KEXIM its portion of the funds and on 31 December 2010 such authorisation was granted.
- (c) In respect of the third transfer of €155m made on 14 December 2010:
 - (i) The plaintiff applied on 15 December 2010 to the Direction générale du Trésor for authorisation to receive its portion of the funds and on 27 December 2010 such authorisation was granted.
 - (ii) KEXIM applied on 17 December 2010 to the Central Bank of Korea for authorisation to receive its portion of the funds and on 22 December 2010 such authorisation was granted. Further to this, Société Générale as Agent applied on 3 January 2011 to the Direction générale du Trésor for authorisation to pay KEXIM its portion of the funds. The application was pending when I heard parties on 5 January 2011.

77 In summary, the repayment position when I heard the parties on 5 January 2011 was that Société Générale and the plaintiff had been fully paid the sums owed to them, having received the requisite authorisations from the Direction générale du Trésor, while KEXIM was only awaiting the Direction générale du Trésor's authorisation for it to receive its portion of the €155m received on 14 December 2010.

78 Contrary to what I was told by counsel on 13 December 2010 when I heard the applications to postpone the sale of the Vessels, apart from the initial wait of eight weeks before the 7 October 2010 license was granted to Société Générale, the Direction générale du Trésor only took a matter of two to 12 days to grant the various authorisations to the plaintiff. In the case of KEXIM's first application on 5 November 2010, there was a similar eight-week wait before authorisation was given on 31 December 2010. However, in fairness to counsel, a not insignificant portion of these authorisations came after the hearings in mid-December 2010 and I suspect that those instructing them had not forwarded the relevant facts and details until they were asked for by me.

79 As mentioned, the final obstacle to KEXIM receiving full payment was the Direction générale du Trésor's authorisation in respect of the €155m transfer. Once the authorisation was given, KEXIM would receive payment in full. In this connection, both Mr Tan and Mr Kwek accepted that there was no reason why such authorisation would not be forthcoming in light of the history set out above. Mr Kwek also submitted, quite candidly, that the €155m was sufficient security for the sums claimed by the plaintiff in the interim. According to him, Société Générale would certainly not repatriate the funds back to IRISL or Bank Tejarat no matter what happened.

80 In these rather unique circumstances, I rescinded the orders to sell the Vessels and ordered them to be released.

Sovereignty

INDIA

SOVEREIGN IMMUNITY – RESTRICTIVE AND ABSOLUTE IMMUNITY – APPLICABILITY OF CONSUMER PROTECTION LAWS TO FOREIGN STATE ENTITIES – SECTION 86 OF THE INDIAN CIVIL PROCEDURE CODE

***Ethiopian Airlines v. Ganesh Narain Saboo* [Civil Appeal No. 7034 of 2004, August 9, 2011]**

Facts

The Reactive Dyes consignment of the respondent booked in Bombay on the appellant airlines was not delivered in time at the Dar Es Salaam, Tanzania. According to the respondent on account of this gross delay in arrival of the consignment at the designated destination it deteriorated. The respondent took the matter to the State Dispute Redressal Forum for appropriate relief. The appellant had raised several preliminary objections regarding the maintainability of the complaint which included prior permission to be taken from the Central Government before suing a foreign State entity under Section 86 of the Indian Civil Procedure Code. Further, the appellant contended that a foreign State or its instrumentality can legitimately claim sovereign immunity from being proceeded against under the provisions of the Consumer Protection Act in respect of civil claim. It was further submitted that in India presumption was that sovereign immunity was absolute, but that a foreign sovereign could still be sued in India under certain circumstances with the permission of the Government of India. These circumstances as outlined in the Section 86 of the Indian Civil Procedure Code were: (a) the foreign State itself had instituted a suit in the Court against the person desiring to sue it; or (b) the foreign State traded within the legal limits of the jurisdiction of the Court; or (c) the foreign State was in possession of immovable property situated within those limits and was to be sued with reference to such property or for money charged thereon or; (d) the foreign State had expressly or impliedly waived the privilege of immunity

Judgment

The Court noted the submissions made by the appellant outlining the scheme of section 86 of the Indian Civil Procedure Code (CPC) with regard to the doctrine of immunity and reiterated the legal position that "...no foreign State may be sued in any court in India, except with the consent of the Central Government which has to be certified in writing by the Secretary to that Government." The Court also referred to the submission made by the appellant based on several earlier decisions of the Court that "...when interpreting Section 86 CPC, it should always be kept in view that the said Section gives effect to the principles of international law."

Besides Section 86 CPC, the Court also had to examine the applicability of Consumer Protection Act to a foreign State entity and as to whether it would have the overriding effect over the provisions of CPC. The provisions of the Carriage by Air Act, 1972 which was enacted to give effect to Convention for Unification of Rules relating to International Carriage by Air signed at Warsaw in 1929 as amended by the Hague Protocol of 1955 and the Montreal Convention of 1999 were also invoked in the present case.

According to the Court the central question which required adjudication was whether the appellant Ethiopian Airlines was entitled to sovereign immunity in the present case. The other issue related to the nature of adjudication and to determine whether the proceedings before the Consumer forum were suits. The Court pointed out that "Section 86 of the CPC is inapplicable because the legislative intent is deemed to exclude older and more general statute by more recent and special statutes: the Consumer Protection Act, 1986 and the Carriage by Air Act, 1972. And under these Acts, Ethiopian Airlines is not entitled to sovereign immunity in a suit like that at issue here. Thus, consent of the Central Government is not required to subject Ethiopian Airlines to suit in an Indian court, let alone in a consumer redressal forum."

The Court concluded that the Ethiopian Airlines was not entitled to sovereign immunity with respect to a commercial transaction. The Court also noted that this was also consonant with the holdings of other countries courts and with the growing International Law principle of restrictive immunity. It held Airlines accountable for the contractual and commercial activities and obligations that it undertook in India.

Statement on Report of the International Law Commission On The Work of its Sixty-Third Session, Chapters I-V, Sixth Committee, UNGA 66th Session, October 24, 2011.

Commending the work on the topic “Protection of persons in the event of disasters,” India supported in principle the provision under draft article 10 recognizing the duty of the affected State to seek assistance from the other States and relevant international organizations including the NGOs. While noting the draft articles on the subject, India stressed that the sovereignty, territorial integrity and national unity of States must be fully respected in accordance with the UN Charter while providing the assistance within the territory of the affected State.

Territory

MALAYSIA

LAND EXCHANGE – MALAYSIAN-SINGAPORE LAND SWAP – JOINT DEVELOPMENT BY SOVEREIGN WEALTH FUND

Agreement Between Malaysia and Singapore Concerning Swapping Land Parcels to Finalize the Malaysia-Singapore Points of Agreement of 1990, May 24, 2010

In 2010, Malaysia and Singapore finalized an agreement to swap land parcels in Singapore as part of the Malaysia–Singapore Points of Agreement of 1990. Under this 1990 Agreement, Malaysia was to surrender control of railway land that runs through Singapore and shift its railway terminal from Singapore’s central business district to an area close to the Woodlands Checkpoint (one of two entry ways by land to Malaysia). In exchange, the returned properties at the station and three other land parcels would be jointly developed under a joint venture company between Malaysia’s and Singapore’s respective sovereign wealth funds/companies. This agreement concluded a two decade impasse between the two countries.

Terrorism

CHINA

DOMESTIC MEASURES – DECISION CONCERNING STRENGTHENING ANTI-TERRORISM EFFORTS

On October 29, 2011, the 23rd meeting of the Standing Committee of the 11th National People's Congress adopted the Decision on Issues concerning Strengthening Anti-Terrorism Work. The full text reads as follows:

To strengthen anti-terrorism work, protect the national security and the life and property safety of the people, and maintain the social order, the following decision is made on issues concerning anti-terrorism work:

- I. The state fights against all forms of terrorism, resolutely bans terrorist organizations, and rigorously prevents and severely punishes terrorist activities.
- II. Terrorist activities are activities conducted by violence, destruction, intimidation and other means to create social panic, endanger public security or threaten state organs or international organizations and causing or attempting to cause casualties, grave property loss, damage to public facilities, disruption of social order and other severe social harm, as well as activities to assist the above activities by instigation, financing or any other means. Terrorist organizations are criminal groups formed for conducting terrorist activities. Terrorists are individuals who organize, plan or conduct terrorist activities and the members of terrorist organizations.
- III. The leading office for national anti-terrorism work shall uniformly lead and command anti-terrorism work across this country. Public security organs, national security organs, people's procuratorates, people's courts, justice administrative organs, and other relevant state organs shall perform their respective duties and closely cooperate with each other to ensure the sound performance of anti-terrorism work. The People's Liberation Army, the Chinese People's Armed Police Force and militia organizations shall prevent and combat terrorist activities in accordance with laws, administrative regulations, military regulations and orders of the State Council and the Central Military Commission.
- IV. The list of terrorist organizations and terrorists shall be determined and adjusted by the leading office for national anti-terrorism work

pursuant to Article 2 of this Decision. The list of terrorist organizations and terrorists shall be announced by the public security department of the State Council.

- V. When announcing the list of terrorist organizations and terrorists, the public security department of the State Council shall also decide to freeze the funds or other assets related to the terrorist organizations and terrorists. Financial institutions and designated non-financial institutions shall immediately freeze the funds or other assets related to terrorist organizations and terrorists announced by the public security department of the State Council, and report to the public security department, the national security department and the anti-money laundering administrative department of the State Council in a timely manner according to the relevant provisions.
- VI. The People's Republic of China conducts international anti-terrorism cooperation in accordance with international treaties concluded or acceded to or under the principles of equality and reciprocity.
- VII. The specific measures for determining the list of terrorist organizations and terrorists shall be formulated by the State Council. The specific measures for freezing assets related to terrorist activities shall be formulated by the anti-money laundering administrative department of the State Council jointly with the public security department and the national security department of the State Council.
- VIII. This Decision shall come into force on the date of issuance.

INDIA

INTERNATIONAL COOPERATION – MEASURES TAKEN

Statement on Measure To Eliminate International Terrorism, Sixth Committee, UNGA 66th Session, October 3, 2011

India, while thanking the Secretary General of the United Nations for his annual report on "Measures to Eliminate International Terrorism," noted that it gave an account of the measures taken at the national and international levels to combat terrorism and international legal instruments adopted for this purpose. India also pointed out that terrorism is a scourge that undermined peace, democracy and freedom endangering the

very foundations of the continued existence of democratic societies. Referring to the nature of terrorism, it noted that it has become truly globalized with “global logistical supply chains and transnational financial support systems: terrorists use the latest and most sophisticated technologies to their advantage and have command and control mechanisms in place that enable them to operate across continents on a real time basis. All these complexities have posed enormous challenge in countering terrorism.”

India noting that terrorism was a global problem that required global solutions, pointed out that the international community had invested considerable time and resources in developing a normative framework for countering terrorism. Referring to the Declaration on Measures to Eliminate International Terrorism adopted by UNGA Resolution 49/60 that condemned international terrorism in all its forms and manifestations and also to the general framework of 12 international conventions and five protocols on international terrorism, India noted that so far United Nations had adopted a sectoral approach in these international instruments. It also noted that it was party to 13 international conventions and protocols and was fully committed to its obligations under these conventions.

Referring to its national laws, India pointed out that it had taken several steps to strengthen international cooperation in combating terrorism. While referring to its efforts towards strengthening of strategic and operational framework to combat terrorism effectively, India informed that it had also amended and strengthened its domestic legislation entitled Unlawful Activities (Prevention) Act, 1967 integrating the sanctions regime of the Al Quada Sanctions Committee established pursuant to resolutions 1267 and 1989. It further noted that its amended domestic law incorporated provisions dealing with all aspects of terrorism including conspiracy and incitement to terrorism. The enactment, India further noted, criminalized raising of funds for terrorist activities, holding proceeds of terrorism, harbouring of terrorists, unauthorized possession or use of any bomb, dynamite or hazardous explosive substances or other lethal weapons. The Weapons of Mass Destruction (Prevention) Act, 2005, India pointed out, provided detailed measures preventing the falling of weapons of mass destruction or dual use materials in the hands of terrorists and non-state actors.

To enhance international cooperation for the investigation, prosecution and extradition of persons involved in terrorism, organized crime,

money laundering, terrorist financing and illicit drug trafficking, India pointed out that it had concluded forty bilateral treaties on extradition and mutual legal assistance in criminal matters. India also pointed out that in the absence of a bilateral treaty it could also cooperate under the relevant international conventions and on the basis of reciprocity.

According to India though “lot has been accomplished but more remains to be done.” While supporting the work of the United Nations in this field it sought the international community to focus further on strengthening anti terrorism legal framework and to implement the Global Counter Terrorism Strategy in an integrated manner. It strongly urged all States to conclude the consideration of the Comprehensive Convention on International Terrorism (CCIT) by the Sixth Committee.

SRI LANKA

DOMESTIC MEASURES – AMENDMENT OF SUPPRESSION OF FINANCING OF TERRORISM

Convention on the Suppression of Terrorist Financing (Amendment) Act No 41 of 2011

This Amendment primarily gives effect to the obligation of parties to the Convention for the Suppression of the Financing of Terrorism, A/RES/54/109 (1999) to provide for the detection and freeing of funds used for acts of terrorism. The Amendment extends the offence of financing a terrorist act to include the financing of terrorist, terrorists and a terrorist organization.

A police officer not below the rank of an Assistant Superintendent of Police has the authority to issue a freezing order on funds and property. Such an order may be valid for seven days and can be extended for a maximum of two years (three months at a time) by a judge of the High Court. Within seven days of making the order, the police officer is required to confirm the order by application to the High Court. The violation of a freezing order is punishable before the High Court with a fine of up to One Hundred Thousand Rupees or one and a half times the value of the funds dealt with in contravention of the freezing order.

The Amendment introduces definitions for several terms including, ‘finance business’, ‘funds or property’, ‘material support or resources’ and ‘terrorist act.’

DETENTION – EMERGENCY REGULATIONS – ADMISSIBILITY OF CONFESSIONS BY A POLICE OFFICER

Subsequent to the lifting of the state of emergency new regulations were introduced under the Prevention of Terrorism Act of 1979 (as amended). Four sets of regulations were introduced:

- 1) Prevention of Terrorism (Proscription of the Liberation Tigers of Tamil Ealam) Regulation No 1 of 1022, Gazette Extraordinary No 1721/2 of August 29th 2011;
- 2) Prevention of Terrorism (Proscription of the Tamil Rehabilitation Organization) Regulation No 2 of 2011, Gazette Extraordinary No 1721/2 of August 29th 2011;
- 3) Prevention of Terrorism (Extension of Application) Regulation No 3 of 2011, Gazette Extraordinary No 1721/3 of August 29th 2011;
- 4) Prevention of Terrorism (Detainees and Remandees) Regulations No 4 of 2011, Gazette Extraordinary No 1721/4 of 29th August 2011.

These regulations provided, among other things for continued detention of persons detained under the former Emergency regulations, to be detained under the Prevention of Terrorism Act where no decision is made to release them and the admissibility of confessions made by an accused to a police officer not below the rank of Assistant Superintendent.

Treaties

PHILIPPINES

RATIFICATION – ROME STATUTE – CUSTOMARY INTERNATIONAL

Bayan Muna v. Alberto Romulo, in his capacity as Executive Secretary, and Blas F. Ople, in his capacity as Secretary of Foreign Affairs [GR No. 159618. February 1, 2011]

On December 28, 2000, the Philippines signed the Rome Statute which, by its terms, is “subject to ratification, acceptance or approval” by the signatory states. As of the filing of this petition before the Supreme Court, the Philippines has not completed the ratification, approval and concurrence process. On May 9, 2003, then Ambassador Francis J. Ricciardone sent

US Embassy Note No. 0470 to the Department of Foreign Affairs (“DFA”) proposing the terms of a non-surrender bilateral agreement between the United States and the Philippines. In Exchange of Notes No. BFO-028-03 dated May 13, 2003, the Philippines, represented by then DFA Secretary Ople, agreed with and accepted the US proposals.

According to the Supreme Court, in essence, the Agreement aims to protect what it refers to and defines as “persons” of the Philippines and the United States from frivolous and harassment suits that might be brought against them in international tribunals. The Court states that it is reflective of the increasing pace of the strategic security and defense partnership between the two countries, and similar agreements were effected by and between the United States and 33 other countries as of May 2, 2003. Ambassador Ricciardone maintains that the exchange of diplomatic notes constitutes a legally binding agreement under international law; and that, under US law, the said agreement does not require the advice and consent of the United States Senate.

The Agreement provides in part that:

1. For purposes of this Agreement, “persons” are current or former Government officials, employees (including contractors), or military personnel or nationals of one Party.
2. Persons of one Party present in the territory of the other shall not, absent the express consent of the first Party, be surrendered or transferred by any means to any international tribunal for any purpose, unless such tribunal has been established by the UN Security Council, or
 - (b) be surrendered or transferred by any means to any other entity or third country, or expelled to a third country, for the purpose of surrender to or transfer to any international tribunal, unless such tribunal has been established by the UN Security Council.
3. When the [US] extradites, surrenders, or otherwise transfers a person of the Philippines to a third country, the [US] will not agree to the surrender or transfer of that person by the third country to any international tribunal, unless such tribunal has been established by the UN Security Council, absent the express consent of the Government of the Republic of the Philippines [(“GRP”)].
4. When the [GRP] extradites, surrenders, or otherwise transfers a person of the [USA] to a third country, the [GRP] will not agree

to the surrender or transfer of that person by the third country to any international tribunal, unless such tribunal has been established by the UN Security Council, absent the express consent of the Government of the [US].

5. This Agreement shall remain in force until one year after the date on which one party notifies the other of its intent to terminate the Agreement. The provisions of this Agreement shall continue to apply with respect to any act occurring, or any allegation arising, before the effective date of termination.

Firstly, Bayan Muna, a duly registered party-list group established to represent the marginalized sectors of society, imputes grave abuse of discretion in the conclusion and ratification of the Agreement. It prays for the declaration of the Agreement as unconstitutional, or at the very least, without force and effect. Secondly, it argues that the Agreement, which was not submitted to the Philippine Senate for concurrence, contravenes and undermines the Rome Statute and other treaties. On the other hand, the Philippine Government questions Bayan Muna's standing to maintain the suit. Also, the Agreement does not require Senate concurrence for efficacy since it is in the nature of an executive agreement. Most importantly, the agreement is constitutional.

Preliminarily, the Court ruled that Bayan Muna complied with the qualifying conditions or specific requirements exacted under the locus standi rule. What the Court said is noteworthy: "As citizens, their interest in the subject matter of the petition is direct and personal. At the very least, their assertions questioning the Agreement are made of a public right, i.e., to ascertain that the Agreement did not go against established national policies, practices, and obligations bearing on the State's obligation to the community of nations."

On the initial challenge against the form of the Agreement, using the doctrine of incorporation (as expressed in Section 2, Article II of the Philippine Constitution, wherein the Philippines adopts the generally accepted principles of international law and international jurisprudence as part of the law of the land), the Court stated that an exchange of notes falls "into the category of inter-governmental agreements" which is an internationally accepted form of international agreement. The Court quotes the United Nations Treaty Collections' (Treaty Reference Guide) definition of an "exchange of notes." From another perspective, the terms "exchange

of notes” and “executive agreements” are used interchangeably. Exchange of notes is a form of executive agreement that becomes binding through executive action. Executive agreements concluded by the President take the form of exchange of notes or more formal documents (e.g., agreements or protocols). In *The Constitutionality of Trade Agreement Acts*, former United States High Commissioner to the Philippines Francis B. Sayre has observed the difficulty in ascertaining where ordinary correspondence ends and agreements begin. Therefore, the exchange of notes, viewed as the Non-Surrender Agreement itself or an integral instrument of acceptance or consent to be bound, is a recognized mode of concluding a legally binding international written contract between nations.

On the need for Senate concurrence of the exchange of notes to be effective, the Court first quoted the definition of treaty under the Vienna Convention on the Law of Treaties. International agreements may be in the form of treaties (require legislative concurrence after executive ratification) or executive agreements (similar to treaties, except that they do not require legislative concurrence and are usually less formal and deal with a narrower range of subject matters). The Court reasoned that under international law, there is no difference between treaties and executive agreements in terms of binding effect as long as the negotiating functionaries have remained within their powers. Under Philippine domestic law, neither violates the Constitution. However, one is distinct from another for accepted reasons apart from the concurrence-requirement aspect. According to United States constitutional scholars, said the Court, “a treaty has greater ‘dignity’ than an executive agreement, because its constitutional efficacy is beyond doubt, a treaty having behind it the authority of the President, the Senate, and the people; a ratified treaty, unlike an executive agreement, takes precedence over any prior statutory enactment.”

To this, Bayan Muna asserts that the Agreement partakes the nature of a treaty. Therefore, it must be concurred in by the Philippine Senate. Citing domestic jurisprudence, it mainly argues that the subject of the Agreement does not fall under any of the subject-categories recognized as covered by executive agreements (e.g., commercial/consular relations, most-favored nation rights, patent rights, trademark and copyright protection, postal and navigation arrangements and settlement of claims). Furthermore, an executive agreement through an exchange of notes cannot be used to amend a treaty.

The Court brushed aside the contentions of Bayan Muna on this point. It stated that the categorization of subject matters that may be covered by executive agreements mentioned is not cast in stone since there are no hard and fast rules on the propriety of entering, on a given subject, into a treaty or an executive agreement as an instrument of international relations. The parties' intent and desire to craft an international agreement in the form they wish to further their interests are a primary consideration. Form takes a back seat to effectiveness and the binding effect of the enforcement of a treaty or executive agreement, as the parties in either labor under the *pacta sunt servanda* principle. Moreover, the Court also used the dynamic nature of international law to justify this conclusion. Almost half a century has elapsed since the Court rendered a decision which defined the matters covered by executive agreement. The conduct of foreign affairs has become more complex and the domain of international law wider. One type of executive agreement is a treaty-authorized or a treaty-implementing executive agreement, which cover the same matters subject of the underlying treaty. As a general proposition, the Constitution does not classify any subject (like that involving political issues) to be in the form of, and ratified as, a treaty. What the Constitution merely prescribes is that treaties need the concurrence of the Senate to complete the ratification process.

On whether the Agreement undermines the Rome Statute since it unduly restricts the International Criminal Court's jurisdiction and infringes upon the effectivity of the Statute, the Court held that the Agreement does not contravene or undermine, nor does it differ from, the Statute. On December 28, 2000, the Philippines became a signatory to the Statute. The Agreement and the Statute complement each other. The principle of complementarity underpins the creation of the International Criminal Court ("ICC"). Under Article 1 of the Statute, the jurisdiction of the ICC is to be complementary to national criminal jurisdictions of signatory states. The sixth preambular paragraph of the Statute declares it a duty of every State to exercise criminal jurisdiction over those responsible for international crimes. Thus, primary jurisdiction over the so-called international crimes rests, at the first instance, with the state where the crime was committed, and only secondarily, with the ICC in appropriate situations contemplated under Article 17, paragraph 1 of the Statute. The principle of *ne bis in idem* under Article 20, paragraph 3 of Statute, supports the primacy of the jurisdiction of a state. No person who has been tried by another court

for conduct constituting crimes within its jurisdiction shall be tried by the ICC for the same conduct. There is hence no jurisdictional conflict. The complementary jurisdiction of the ICC comes into play only when the signatory states are unwilling or unable to prosecute. That the Philippines violated its duty required by imperatives of good faith and breached its commitment under the Vienna Convention to refrain from performing any act tending to impair the value of a treaty (e.g., the Rome Statute), by entering into the Agreement, was rejected. Article 98(2) of the Statute contains a proviso that enjoins the ICC from seeking the surrender of an erring person, should the process require the requested state to perform an act that would violate an international agreement that it has entered into.

The Court also rationed the difference between a State-Party and a signatory to a treaty inasmuch as the Philippines is only a signatory to the Rome Statute and not a State-Party for lack of ratification by the Philippine Senate. Under the Vienna Convention on the Law of Treaties, a signatory state is only obliged to refrain from acts which would defeat the object and purpose of a treaty; a State-Party is legally obliged to follow all the provisions of a treaty in good faith. Bayan Muna's argument that State-Parties with non-surrender agreements are prevented from meeting their obligations under the Rome Statute, specifically Articles 27, 86, 89 and 90, must fail. Articles 27, 86, 89 and 90 are only binding upon State-Parties (not signatories).

To note, Bayan Muna has alleged that the Agreement was constituted solely for the purpose of providing individuals or groups with immunity from ICC's jurisdiction. The grant of immunity through non-surrender agreements does not legitimately fall within the scope of Article 98 of the Statute. Because the overall object and purpose of the Rome Statute is to ensure that those responsible for the worst possible crimes are brought to justice, primarily by States, but as a last resort, by the ICC, any agreement that precludes the ICC from exercising the complementary function of acting when a State is unable to or unwilling to do so, defeats the object and purpose of the Statute.

On Bayan Muna's contention that the Philippines, through the Agreement, abdicated its sovereignty by bargaining away its right to seek recourse through the Rome Statute for erring Americans who committed international crimes in the country, the Court reasoned that the Agreement is a form of affirmance and confirmance of the Philippines' criminal jurisdic-

tion. National criminal jurisdiction being primary, it is the responsibility and within Philippine prerogative either to prosecute criminal offenses equally covered by the Statute or to accede to the jurisdiction of the ICC. As to “persons” of the United States whom the Philippines refuses to prosecute, the Philippines would accord discretion to the United States to exercise either its national criminal jurisdiction over the “person” concerned or to give its consent to the referral of the matter to the ICC. The United States must extend the same privilege to the Philippines with respect to “persons” of the Philippines committing high crimes in the United States. One State can agree to waive jurisdiction, to the extent agreed upon, to subjects of another due to recognition of the principle of extraterritorial immunity. According to the Court, almost every time a State enters into an international agreement, it voluntarily sheds off part of its sovereignty, and by their nature, treaties and international agreements actually have a limiting effect on the otherwise encompassing and absolute nature of sovereignty.

On the argument that the Agreement is immoral and at variance with principles of international law, the Court disposed the same by stating that the immoral aspect proceeds from the fact that the Agreement, as Bayan Muna puts it, “leaves criminals immune from responsibility for unimaginable atrocities that deeply shock the conscience of humanity.” It precludes the Philippines from delivering an American criminal to the ICC. The Court called the argument as a kind of recycling of a position discussed above. The Agreement is an assertion of Philippine primary jurisdiction. It is mistaken to state that the Agreement would allow Filipinos and Americans committing high crimes of international concern to escape criminal trial and punishment. Persons who may have committed acts penalized under the Statute could be prosecuted and punished in the Philippines or in the United States; or with the consent of the Philippines or the United States, before the ICC, assuming both States are parties to the Statute. What the Agreement contextually prohibits is the surrender by either party of individuals to international tribunals, e.g., the ICC, without the consent of the other party, which may desire to prosecute the crime under its existing laws.

On the allegation that the Agreement contravenes Republic Act No. 9851 or the “Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity,” the Court ruled that Bayan Muna makes much of Section 17 of the Act as requiring the Philip-

piners to surrender to the proper international tribunal those persons accused of crimes sanctioned under said law if it does not exercise its primary jurisdiction to prosecute such persons. The law provides discretion to the Philippines on whether to surrender or not a person accused of the crimes under Republic Act No. 9851. The provision uses the word “may” which denotes discretion, and cannot be construed as having mandatory effect.

Moreover, assuming that the surrender of a person is mandatorily required when the Philippines does not exercise its primary jurisdiction in cases where “another court or international tribunal is already conducting the investigation or undertaking the prosecution of such crime,” the tenor of the Agreement is not repugnant to the domestic law. The surrender may be made to another State pursuant to the applicable extradition laws and treaties. The Agreement can already be considered a treaty since an executive agreement is a ‘treaty’ within the meaning of that word in international law and constitutes enforceable domestic law. Also, the Philippines and the United States has an extradition treaty. The extradition treaty is application to Republic Act No. 9851 since the Philippines has criminalized under the said law the acts defined in the Rome Statute as war crimes, genocide and other crimes against humanity. The United States has also enacted legislation punishing the high crimes mentioned. Bayan Muna uses a report by Victoria K. Holt and Elisabeth W. Dallas, entitled “On Trial: The US Military and the International Criminal Court,” as its basis. The Court pointed out that the report may not have any weight or value under international law since it is not among the list of sources of international law under Article 38 of the Statute of the International Court of Justice. It cannot even be considered as the “teachings of highly qualified publicists” because a highly qualified publicist is a scholar of public international law and the term usually refers to legal scholars or “academic writers.” The authors of the report were not shown to be highly qualified publicists.

Assuming that the report bears weight, the perceived gaps in the definitions of the crimes are non-existent. The cited report even admits this. Be that as it may, despite the lack of actual domestic legislation, the United States notably follows the doctrine of incorporation. The Court cites United States jurisprudence. For instance, *The Paquete Habana* case already held international law as part of the law of the United States. A person can be tried in the US for an international crime despite the lack of domestic legislation. The Court opines that this rule finds an even stronger hold in the

case of genocide, war crimes and crimes against humanity for they have attained the status of customary international law. Some have stated that these crimes have attained the status of *jus cogens*. *Jus cogens* crimes are related to the concept of universal jurisdiction. Even with the current lack of domestic legislation on the part of the United States, it has the doctrine of incorporation and universal jurisdiction to try these *jus cogens* crimes.

On the other hand, the ICC, as an international tribunal, is not declaratory of customary international law. The first element of customary international law (State practice) does not obtain because the limited number of parties to the Statute casts doubt on whether or not the perceived principles contained in the Statute have attained the status of customary law and should be deemed as obligatory international law. It argues against the urgency of establishing international criminal courts envisioned in the Statute. The Philippines does not even feel bound by the Statute as the treaty has not been transmitted to the Senate for the ratification process. There is no consensus and practice among States that the prosecution of internationally recognized crimes of genocide, etc., should be handled by a particular international criminal court. The Statute itself rejects the concept of universal jurisdiction over the crimes enumerated therein as evidenced by it requiring State consent.

In addition, an act of the executive branch with a foreign government must be afforded great respect. The President's power to enter into executive agreements has long been recognized. Absent any clear contravention of the law, courts should exercise utmost caution in declaring any executive agreement invalid.

CONCLUSION – AGREEMENTS CONCURRED

In 2011, the Senate of the Philippines has concurred with two important agreements that involve technical cooperation between the Philippines and Japan, and the Rome Statute.

CONCLUSION – AGREEMENT ON TECHNICAL COOPERATION – PHILIPPINES AND JAPAN

Philippine Senate Resolution No. 36, March 14, 2011

On April 4, 2006, the Agreement on Technical Cooperation between the Government of the Republic of the Philippines and the Government of

Japan was signed in Tokyo, Japan. It was the States' desire to strengthen relations through the cooperation agreement which involves the development of human resources for economic progress and stability.

According to the Senate resolution, the Agreement provides, among others, (1) for forms of technical cooperation that would be carried out by the Japan International Cooperation Agency (e.g., technical training to Philippine nationals in Japan, dispatching experts to the Philippines, dispatching missions to the Philippines to conduct surveys of economic and social development projects of the Philippine Government); (2) exemption of experts, members of the mission, senior volunteers and their families from certain taxes, fiscal charges, fees and other privileges, exemptions, and benefits as are no less favorable than those accorded to those persons of any third country or international organization performing a similar mission in the Philippines; (3) suitable office and other necessary facilities; provision of local staff and Philippine counterparts to experts, members of the mission, and senior volunteers; (4) that the Philippines is to bear claims against the experts, members of the mission, senior volunteers, and the Japanese Overseas Cooperation Volunteers resulting from or occurring in the course of the performance of duties, except those which arise from gross negligence or wilful misconduct.

United Nations

CHINA

INTERNATIONAL CODE OF CONDUCT FOR INFORMATION SECURITY – REQUEST TO UN SECRETARY-GENERAL TO DISSEMINATE

On September 12, 2011, the permanent representatives of China, Russia, Tajikistan and Uzbekistan to the United Nations submitted a letter jointly to the United Nations Secretary-General Ban Ki-moon, asking him to distribute the International Code of Conduct for Information Security drafted by their countries as a formal document of the 66th session the General Assembly and called upon countries to further discuss the document within the framework of the United Nations so as to reach consensus on the international norms and rules standardizing the behavior of countries concerning information and cyberspace at an early date.

The International Code of Conduct for Information Security raises a series of basic principles of maintaining information and network security which cover the political, military, economic, social, cultural, technical and other aspects. The principles stipulate that countries shall not use such information and telecom technologies as the network to conduct hostile behaviors and acts of aggression or to threaten international peace and security and stress that countries have the rights and obligations to protect their information and cyberspace as well as key information and network infrastructure from threats, interference and sabotage attacks. They advocate establishing a multilateral, transparent and democratic international Internet governance mechanism, fully respecting the rights and freedom of information and cyberspace with the premise of observing laws, helping developing countries develop the information and network technologies and cooperating on fighting cyber crimes.

In recent years, information and network security have drawn wide attention from the international community. There are rising calls to formulate international rules to standardize information and cyberspace behavior. It is understood that the draft submitted by China, Russia, Tajikistan, Uzbekistan and Uzbekistan is the first relatively comprehensive and systematic document in the world proposing the international rules on information and network security.

INDIA

MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY – ROLE OF THE UN

Statement on Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization, Sixth Committee, UNGA 66th Session, October 6, 2011

India made remarks on the work of the Special Committee with specific focus on the maintenance of international peace and security; impact and application of sanctions; peaceful settlement of disputes and on the overall thrust of some of the proposals under consideration.

On the issue of impact of application of sanctions in the context of maintenance of international peace and security, India pointed out that Security Council, which mandated sanctions, had the nodal responsibility for finding solution to the problems of third States affected by the Sanc-

tions. It also pointed out that Article 50 of the UN Charter conferred the right on third States confronted with special economic problems, because of Security Council sanctions, to consult the Security Council for solution to those problems. India also reiterated its position along with other NAM countries that the Security Council was obliged to directly focus upon the effects on third States of any sanction under Chapter VII of the UN Charter.

India also noted with happiness the shift of the Security Council from general sanctions against States to targeted sanctions against individuals and entities, especially in the global fight against terrorism. India considered that the proper implementation of targeted financial sanctions, focused arms embargoes and travel sanctions will minimize the economic and social and humanitarian impact in targeted as well as non-targeted States.

India, while thanking the Secretary General for his report A/66/213 of July 29, 2011, entitled "Implementation of the provisions of the UN Charter related to assistance to third States affected by the application of sanctions," submitted pursuant to resolution 65/31 of the UN General Assembly, noted with appreciation the information provided in the report that the shift from comprehensive to targeted sanctions had reduced the incidence of unintended harm to third States and that no official appeals had been received to monitor or evaluate special economic problems since 2003. India also considered that it was important to ensure that sanctions were issued in accordance with the provisions of the UN Charter and did not violate the principles of international law.

India supported, in principle, the proposal for an advisory opinion of the International Court of Justice (ICJ) on the use of force by a state or a group of states without the express sanction of the Security Council. According to India such an advisory opinion would help clarify the legal principles governing the right to use force under the Charter.

India also supported, in principle, the new topic being suggested for a study of the functional relationship between the different organs of the United Nations. Referring to the Outcome of the World Summit, 2005 which reaffirmed the commitment to strengthen the United Nations, India noted that the Summit highlighted the role of the General Assembly as the chief deliberative, policy-making and representative organ of the UN. India also noted that the Summit called for the strengthening of relationship between General Assembly and other principal organs of the UN and had stressed for the early reforms of the Security Council to make it more

broadly representative. India also pointed out that it attached significance to the reforms of the United Nations, including the revitalization of the General Assembly and democratization and expansion of the Security Council in both permanent and non-permanent category of membership. India also reiterated its position on peaceful settlement of disputes which it noted was a “fundamental principle under article 2, paragraph 3 of the UN Charter.” Referring to Article 33 of the Charter it noted that this provision further strengthened this duty and provided the means which the parties to a dispute could choose freely, including arbitration, enquiry, mediation and judicial settlement.

SINGAPORE

CONVENTION ON THE SAFETY OF UNITED NATIONS AND ASSOCIATED PERSONNEL – LOCAL SUPPORTING LEGISLATION

On 26 March 1996, Singapore acceded to the Convention on the Safety of United Nations and Associated Personnel without reservation. Local legislative effect was given to the Convention in 2011 by the passage of the United Nations Personnel Act (Cap 339A), which came into force on 31 May 2012.

Speech by Senior Minister of State for Foreign Affairs Zainul Abidin Rasheed on the Second Reading of the United Nations Personnel Bill in Parliament, March 10, 2011

Mr Speaker, Sir, I beg to move, that the Bill be now read a second time.

INTRODUCTION

2 Sir, this Bill, when passed, will give effect to the Convention on the Safety of United Nations and Associated Personnel, as well as the Optional Protocol to the Convention. Drafted in response to the growing number of casualties and fatalities resulting from deliberate attacks on UN workers engaged in peacekeeping operations, the Convention aims to ensure that perpetrators of such attacks are brought to justice. In recognition of the risks that UN and associated personnel also face in non-peacekeeping missions, the Optional Protocol expands the scope of protection of the Convention to UN non-peacekeeping missions such as humanitarian

relief operations, and delivery of political or development assistance in peacebuilding.

3 Although Singapore does not host any UN operations, it is our duty as a responsible member of the international community to put in place measures to protect those who carry out the important work undertaken by the UN in its various missions around the world. Singapore has deployed personnel from the Singapore Armed Forces, Singapore Police Force and Singapore Civil Defence Force to various UN missions. To date, more than 1,500 of our SAF personnel and over 475 SPF officers have participated in UN operations in countries as diverse as Namibia, Cambodia, Nepal and Timor-Leste. [Five photographs shown to depict the SAF/SPF in UN operations and Mercy Relief in humanitarian emergency projects, in collaboration with the UN.]

4 Apart from peacekeeping missions, our uniformed personnel have also participated in various UN humanitarian assistance operations. For instance, about 20 of our SCDF officers have been deployed to assist in UN Disaster Assessment and Coordination (UNDAC) missions and Asia-Pacific Humanitarian Partnership teams to provide emergency humanitarian aid in places like New Zealand following the recent earthquake in Christchurch, Indonesia, Myanmar, Papua New Guinea, Pakistan and the Philippines. SAF personnel were also deployed under the ambit of UNDAC to assist in humanitarian efforts in Pakistan in August last year after monsoon rains triggered the worst floods in more than 80 years of the country's history. They were similarly involved in humanitarian aid operations in the Philippines following Typhoon Lupit in October 2009, and in Thailand in the aftermath of the 2004 tsunami. Apart from our uniformed personnel, Singaporean civilians are also increasingly involved in humanitarian relief work abroad, which may include UN operations. It is therefore in Singapore's interest to ensure that Singaporeans, whether uniformed personnel or civilians, engaged in present and future UN operations are afforded the protection and recourse they deserve.

5 The provisions of our Penal Code by and large address our obligations under the Convention on the Safety of United Nations and Associated Personnel if such offences were to be committed in Singapore. Many of the Convention's provisions and obligations are similar to those found in the Convention on the Prevention and Punishment of Crimes against Interna-

tionally Protected Persons, including Diplomatic Agents which Singapore become party to in 2008. Thus, the UN Personnel Bill, while covering a different group of individuals, is closely modelled on the Internationally Protected Persons Act (IPP Act) that was passed in 2008. The present UN Personnel Bill extends Singapore's jurisdiction to deal with specific crimes against UN workers outside Singapore. The Bill also provides for mutual legal assistance and extradition procedures in relation to individuals accused of offences under the Convention.

...

CONCLUSION

16 As a responsible member of the UN, Singapore's implementation of the United Nations Personnel Bill and adoption of the Optional Protocol would demonstrate our clear commitment to the protection of UN workers. It ensures that perpetrators of crimes against UN and associated personnel will not find a safe haven in Singapore.

17 Sir, I beg to move.

War and Armed Conflict

CHINA

TREATIES AND CONVENTIONS – PROTOCOL TO SOUTHEAST ASIA NUCLEAR-WEAPON-FREE ZONE TREATY

On November 20, 2011, Foreign Ministry Spokesperson Liu Weimin made remarks with regard to the five nuclear states coming to an agreement with ASEAN on the Protocol to the Southeast Asia Nuclear-Weapon-Free Zone Treaty:

The five nuclear states held consultation with ASEAN on issues concerning the Protocol to the Southeast Asia Nuclear-Weapon-Free Zone Treaty in Bali, Indonesia from November 12 to 14. Thanks to their concerted efforts, the parties have reached an agreement on resolving all the outstanding issues of the Protocol to the Southeast Asia Nuclear-Weapon-Free Zone Treaty. According to relevant provisions of the Protocol, the five nuclear states, namely China, the US, Russia, the UK and France should assume the obligation

of not using or threatening to use nuclear weapons against the signatories to the Treaty upon signing and ratifying the Protocol.

China attaches great importance to developing with ASEAN the strategic partnership for peace and prosperity and actively supports the establishment of the Southeast Asia nuclear-weapon-free zone. As early as the 1990s, China stated clearly that it will take the lead in signing the Protocol to the Southeast Asia Nuclear-Weapon-Free Zone Treaty once it is open to signing. China will work together with all relevant parties to put the Protocol into force at an early date.

INDIA

Statement on Report of the International Law Commission on the Work of its Sixty-Third Session, Chapters I-V, Sixth Committee, UNGA 66th Session, October 24, 2011

While commending the work of the Special Rapporteur on the topic “Effects of armed conflicts on treaties,” India supported the general proposition of draft articles that the treaties were not automatically terminated or suspended as a result of an armed conflict. India pointed out that the termination, withdrawal or suspension of a treaty in the event of an armed conflict would be determined in accordance with the law on treaties, taking into account all relevant factors including the nature of the treaty, its subject-matter, object and purpose, and the characteristics of the armed conflict. While referring to the structure and content of the draft articles, India noted that the indicative list of treaties listed out in the annex were different in nature and scope. According to India some were permanent in character such as treaties establishing land and maritime boundaries. These permanent treaties, India pointed out, should be listed out differently from other treaties whose continued existence would depend on the intention of parties. However, India stated that it took note of the statement by the Chairman of the International Law Commission that list of treaties in the annex were neither definitive nor exhaustive.

India also took the view that the scope of the topic should be limited to treaties concluded between States and should not include treaties concluded between international organizations. Further, India pointed out that the definition of ‘armed conflict’ should be limited to armed conflicts between States and should not include internal conflicts, as treaties were

entered into between States, and that internal conflicts did not directly affect treaty relationships.

PHILIPPINES

NUCLEAR WEAPONS – PROTOCOL ADDITIONAL TO THE AGREEMENT BETWEEN THE REPUBLIC OF THE PHILIPPINES AND THE INTERNATIONAL ATOMIC ENERGY AGENCY FOR THE APPLICATION OF SAFEGUARDS IN CONNECTION WITH THE TREATY ON THE NON-PROLIFERATION OF NUCLEAR WEAPONS

Philippine Senate Resolution No. 219

The Protocol Additional to the Agreement Between the Republic of the Philippines and the International Atomic Energy Agency (IAEA) was signed on September 30, 1997 in Vienna. Under the protocol, the IAEA has the right to access specific information regarding the utilization and application of nuclear materials and facilities.

The resolution describes the protocol as an enhanced safeguard system designed to aid the IAEA in detecting nuclear material and to give the agency the ability to provide credible assurance that states parties to the Non-Proliferation Treaty would honor undertakings not to use nuclear material and facilities for nuclear weapons purposes.

LITERATURE

BOOK REVIEW

Seokwoo Lee and Hee Eun Lee (eds), *Dokdo: Historical Appraisal and International Justice* • The Hague: Martinus Nijhoff, 2011 • ISBN 978-90-04-19338-3 • 252 + xiv pp

The contentious Dokdo/Takeshima territorial dispute between Korea and Japan is examined under the lens of international law, international relations, and history in this recent book edited by Professor Seokwoo Lee of Inha University School of Law (Incheon, Korea) and Professor Hee Eun Lee of Handong International Law School (Pohang, Korea).

Situated about 87.4 km southeast of Korea's Ulleungdo Island and 216.8 km from the Korean coastline, and about 157.5 km northwest of Oki Island of Japan's Shimane Prefecture, Dokdo is located roughly in the middle of the East Sea / Sea of Japan, and squarely at the center of Korea-Japan tensions. Although Korea currently has physical possession of the island, both countries claim ownership.

Japan's position is that Dokdo was *terra nullis* at the time it was incorporated into its Shimane Prefecture in 1905. Korea, however, argues that historical documents prove its ownership of the island prior to Japan's alleged incorporation. (For readers unfamiliar with the dispute, a convenient place to start is with the official claims of the two countries, which are provided on government websites.)¹ The dispute has become increasingly heated in the last decade. In March 2005, for example, many Koreans responded with bitter demonstrations when Japan's Shimane Prefecture declared a "Takeshima Day."

Published in 2011, this volume is one of the latest (no. 67) in the Publications on Ocean Development series published by Brill. It is comprised of selected papers from two international conferences held in Seoul, Korea. The contributors come from various countries: Korea, U.S., China, Japan, Iran, and Nigeria. Although most are leading scholars of international law, others have backgrounds in political science, international relations, and history.

1 See, e.g., MINISTRY OF FOREIGN AFFAIRS OF JAPAN, JAPANESE TERRITORY, <http://www.mofa.go.jp/region/asia-paci/takeshima>; MINISTRY OF FOREIGN AFFAIRS, DOKDO, <http://dokdo.mofa.go.kr/eng>.

Unlike other publications on this dispute, this book is not a simple “for/against” or “Korean/Japan” treatment of the issue. Divided into eleven chapters, some (especially chapters III and VII) directly address the question of ownership, but most attempt to formulate a broad framework for better appreciating not only the Dokdo, but also other territorial disputes in the region, in particular the Diaoyudao/Senkaku and Kurile/Northern Islands disputes.

Chapter I serves as a general introduction to the book by the editors. But they do more than simply summarize subsequent chapters. The editors identify four main approaches proposed in recent years for resolving the dispute: (1) detaching the issue of territorial sovereignty from maritime delimitation and related issues; (2) examining other territorial issues involving Japan for comparisons and insights; (3) highlighting the role of the U.S. in resolving the issue; and (4) analyzing the history of Japanese expansionism and colonialism in relation to the dispute. The editors point out that the book focuses on the first three approaches; the fourth is not fully discussed. However, they helpfully provide a summary of discussions based on the historical approach and other chapters examine aspects of it.

In the second chapter, Harry N. Scheiber of the University of California, Berkeley, School of Law, presents a moral and historical perspective on the Dokdo dispute, drawing not only on international law but also aspects of Japan’s colonization of Korea. Professor Scheiber first analyzes the historical context of Japan’s alleged incorporation of Dokdo. He then examines the 1951 San Francisco Peace Treaty, critiquing Japan’s narrow and literal interpretation of the document. The chapter concludes with an attractive, if perhaps “utopian,” proposal: Japan can make amends for the past by withdrawing its claim to Dokdo, and in return Korea can limit its claims with regards to maritime delimitation and resource issues between the two.

Chapter III directly addresses the question of Dokdo’s ownership and is written by the late Jon M. Van Dyke of the University of Hawai‘i at Mānoa, School of Law. Professor Van Dyke applies rules derived from international tribunals to argue that Korea’s claim to Dokdo is more persuasive than Japan’s. His conclusion is based on Korea’s effectivities on the island prior to 1905 and from the 1950s onwards, as well as Japan’s acknowledgment that it lacked possession or ownership of Dokdo prior to 1905. He warns however that even if Dokdo belongs to Korea, it will likely have minimal influence in maritime delimitation as the island is likely only a “rock”

under international law,² and even assuming it is an “island,” judicial decisions suggest that islands as small as Dokdo exert little influence on maritime boundaries.

The fourth chapter is written by Seokwoo Lee of Inha University School of Law, one of the editors of this volume. Professor Lee examines the effects of the 1951 San Francisco Peace Treaty on territorial disputes in East Asia, observing that these disputes are largely caused by ambiguities in the territorial clauses, which reflected the geo-political and strategic concerns of the Allied Powers rather than the interests of East Asian countries. He also examines the earlier drafts of the Treaty. He observes gaps, a lack of specific definitions, and even indications of reluctance to make territorial dispositions. With regards to Dokdo, Professor Lee concludes that while the Treaty could ostensibly assign the island to Japan, a close study of the earlier drafts indicates that Dokdo can be considered as part of the “Korea” renounced by Japan under the Treaty.

In the following chapter, Atsuko Kanehara of Sophia University reviews the history of maritime conflicts and cooperation between Japan and Korea, and calls for a practical solution for the Dokdo/Takeshima dispute from the perspective of the law of the sea. Professor Kanehara observes that both countries have resolved maritime boundary issues in the past by applying UNCLOS, and have cooperated in marine scientific research, joint development of seabed resources, and fishery resources, while avoiding a final delimitation of their EEZs – remarkable evidence of cooperation considering that Dokdo can be regarded as a critical point for delimitation. In her view, if such issues can be successfully managed without touching upon the matter of Dokdo’s ownership, insisting on ownership is in neither country’s interest.

Written by Dakas C.J. Dakas of the University of Jos, chapter VI examines the 2002 ICJ case between Cameroon and Nigeria regarding sovereignty over the Bakassi Peninsula (hereinafter Bakassi case) and its implications for the Dokdo dispute. Professor Dakas observes that in Baskassi, the Court awarded the Peninsula to Cameroon primarily on the basis of treaties between Great Britain, Germany, and France, while largely ignoring the unequivocal terms of an earlier 1884 treaty between Great Britain and the old Calabar Kingdom, under which Nigeria should

2 Under UNCLOS article 121, “rocks” unlike “islands” do not generate an exclusive economic zone.

have sovereignty – this, he says, is the legacy of colonialism in today's Eurocentric international law. He draws several lessons from this for the Dokdo dispute, and opines that Korea is justified in its reluctance to use the Court to adjudicate disputes with Japan given decisions like *Bakassi* where the Court failed to critically engage in the matter of colonialism.

In the following chapter, the late Kaiyan Homi Kaikobad of Brunel University examines in great detail the roles of geographical contiguity, adjacency, proximity, and distance, when determining the ownership of Dokdo. He argues that the rules relating to natural unity of islands and comparative proximity are the most applicable to the dispute. Analyzing the evidence – both “sub-surface” (i.e., geomorphology, geology, and bathymetry) as well as “surface unity” (i.e., historical, political, economic, etc. links to the island) – Professor Kaikobad concludes that the principle of contiguity favors Korea in the dispute.

The eighth chapter presents an American assessment of the policy options available to Korea. Larry Niksch, senior advisor with Political Risk Services (PRS), cautions that while Korea may have a stronger historical claim to Dokdo, resolving the dispute in its favor remains a difficult task due to the United States' neutrality. As a result, he believes Korea has three options: (1) continue to strengthen its physical presence on Dokdo, anticipating that other states will eventually support its claim; (2) submit the dispute to adjudication; and (3) negotiate a settlement with Japan. However, Larry Niksch observes that many Koreans view disputes with Japan as a “zero sum game,” and he warns that Korea must choose between settlement-reaching diplomacy and continued “Japan bashing.”

The remaining chapters examine Japan's other territorial disputes with China and Russia to shed light on the Dokdo issue. In chapter IX, Ji Guoxing of Shanghai Jiaotong University compares and contrasts the Diaoyudao/Senkaku and the Dokdo/Takeshima disputes, observing for instance that Japan claims that both islands were *terra nullis* prior to their alleged discovery and subsequent occupation during periods of Japanese military expansionism and colonialism. He also examines how ownership over these islands affect delimitation issues, and provides a legal analysis of the territorial disputes, concluding that in both instances Japan's claim to ownership by prescription is unsupportable.

The next chapter, written by Leszek Buszynski of the International University of Japan, focuses on Japan's territorial dispute with Russia.

Professor Buszynski proposes classifying territorial issues into disputes over “homeland” and “peripheral” territories. Although most “peripheral” disputes can be settled by negotiation, he observes that sometimes they can transform into non-negotiable ones. Professor Buszynski explains that Japan’s territorial disputes are linked: if it concedes one, it risks losing the others, and as a result cannot make concessions regardless of the territory’s “peripheral” nature. Seeing that for Japan, the Northern Islands are more important than Dokdo, he advises Korea to craft a regional approach that addresses the Northern Islands issue. This he believes may ultimately speed the resolution of the Dokdo dispute.

In the eleventh and final chapter, Jean-Marc Blanchard of San Francisco State University considers how economic factors may affect the resolution of territorial disputes. Examining Japan’s disputes with its neighbors over the East China Sea, Diaoyu Islands, and the Northern Territories, he observes that economic interdependence and economic incentives do not appear to significantly aid in resolving such issues. Politics, rather than economics, he concludes is the key to finding meaningful solutions. With regards to Dokdo, this means that negotiators must pay careful attention to the other side’s level of stateness in determining when to hold discussions and what to propose.

The scholarly value of this book has several attributes. First, as mentioned above, this book goes beyond the “black/white” or “for/against” paradigm in which the Dokdo dispute is often framed. Several chapters discuss the issue of ownership, but others approach the dispute from broader perspectives. Second, the book embraces a multi-layered, interdisciplinary approach that looks to international law, international relations, and history. Chapters VIII, X, and XI approach Dokdo from the perspective of international relations, and chapters I, II, and III discuss at some length aspects of the Japanese militarism and colonialism in relation to Korea. Third, there is significant comparative analysis with other current and past territorial disputes. For example, chapters IX, X, and XI compare Japan’s other territorial disputes in the region for insights into the Dokdo issue, while chapter IV draws lessons for Dokdo from the dispute between Cameroon and Nigeria over the Bakassi Peninsula.

It should be pointed out that nearly all the contributors in this book are generally supportive of Korea’s position. While this reviewer does not dispute that the arguments presented are balanced and well-supported,

it is difficult to ignore this aspect. The book perhaps could have benefited from contributions from more Japanese scholars, or included views reflecting Japan's position.

In the end, however, these criticisms are minor. The academic value of this volume outweighs any real or perceived shortcomings. The arguments presented in this volume are balanced, well-reasoned, and even compelling. Legal scholars, historians, policymakers, and students of international law, international relations, and history will find this multilayered book an indispensable addition to the literature on the Dokdo dispute, as well as territorial disputes in general. The editors have stated that one of the goals of this book is to move beyond the "Korea/Japan" paradigm and create a broad, regional, interdisciplinary framework for approaching the issue, and to a large extent they have succeeded.

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International Law in Asia: A Bibliographic Survey

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EDITORIAL INTRODUCTION

This bibliography provides information on books, articles, and other materials dealing with public and private international law in Asia, broadly defined. Only English language publications are listed. In the preparation of this bibliography, good use has been made of the list of acquisitions of the Peace Palace Library in The Hague, The Netherlands, as well as book reviews in journals of international law, Asian studies, and international affairs. Most, if not all, of the materials can be listed under two or more categories, but in order to save space, each item has been placed under one category.

The bibliography is limited to new materials published in 2011, or in some cases, previously published materials that have new editions in 2011. In addition, some materials that are listed as published in 2010, but were made available in 2011, are included here as well. Such entries are marked with an asterisk (*). The headings used in this year's bibliography are as follows:

1. General
2. States or group of states
3. Territory and the law of the sea
4. Watercourses
5. Air and Space
6. Environment
7. NGOs
8. Jus ad bellum, jus in bello, and security
9. International criminal law
10. International dispute settlement

11. Diplomatic relations
12. Human rights and state practice
13. Colonialism, decolonization, and self determination
14. International economic and financial law
15. Development
16. Information and communication
17. International/regional organizations
18. Private International law
19. Nuclear
20. Cultural property

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