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VOLUME 18
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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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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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Incorporating Human Rights: Mitigated Dualism and Interpretation in Malaysian Courts

Jaclyn L. Neo¹

1. INTRODUCTION

“If it wasn’t crystal clear before today, it is now: the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) has the force of law in Malaysia”;² the Joint Action Group for Gender Equality (JAG) proclaimed in response to a seminal gender discrimination case decided in 2011.³ Following the judgment in *Noorfadilla Binti Ahmad Saikin v. Chayed bin Basirun* (Noorfadilla), the plaintiff, an aspiring schoolteacher, became the first person to successfully sue the Malaysian government for gender discrimination. The High Court of Shah Alam held that the government violated the plaintiff’s constitutional right to equality when it revoked her appointment as a relief schoolteacher. While

1 LL.B (Hons.) (NUS); LL.M (Yale); J.S.D (Yale), Assistant Professor of Faculty of Law, National University of Singapore.

2 Joint Action Group for Gender Equality (JAG), *Government Withdraws Appeal; CEDAW Has the Force of Law*, WAO (June 27, 2013), http://www.wao.org.my/news_details.php?nid=299&ntitle=Government+withdraws+appeal;+CEDAW+has+the+force+of+law. JAG consists of prominent women’s groups in Malaysia: Women’s Aid Organisation (WAO), All Women’s Action Society (AWAM), Perak Women for Women Society (PWW), Persatuan Kesedaran Komuniti Selangor (EMPOWER), Persatuan Sahabat Wanita Selangor (PSWS), Sabah Women’s Action Resource Group (SAWO), Sisters in Islam (SIS), Tenaganita, and Women’s Centre for Change Penang (WCC).

3 *Noorfadilla Binti Ahmad Saikin v. Chayed bin Basirun*, [2012] 1 MALAYSIAN LAW JOURNAL 832 (Malay.) [hereinafter *Noorfadilla*].

a laudable case and one that significantly advances the cause of women's rights in Malaysia, it was far from clear that the case established CEDAW as binding law in Malaysia. If the statement quoted above means that CEDAW is now binding law that could prevail over all domestic laws and even the constitution, it surely goes too far. But if it means that CEDAW is now a relevant and legitimate source of norms for interpretation, and a highly persuasive one, the statement appositely identifies an important trend towards international engagement in Malaysian courts as well as an erosion of the strict dualist approach to international law.⁴ It is this trend that this article is concerned with.

The starting point of examination is this: Malaysia practices dualism, in line with its British colonial legal heritage. This dualist approach has always formed a critical obstacle to the implementation of international law in Malaysia. Under dualism, international law exists on a different plane from domestic law, and would only be binding and enforceable *if* it has been directly incorporated on the domestic plane. This has been the accepted position in Malaysia even though the Malaysian constitution does not contain any general statement as to the relationship between international and national law.⁵ The Federal Constitution provides that the federal Parliament has the power to make laws with respect to the implementation of treaties, agreements and conventions, but does not state that implementing legislation is necessary to give effect to international treaties.⁶ Nonetheless, Malaysian courts have conventionally followed a strict dualist approach towards international law. Further, as Shad Faruqi points out, international law is not part of the definition of "law" in Article 160(2) of the Federal Constitution.⁷ Thus, whatever the effect of international human

4 For a closer examination of the case and the use of interpretive incorporation, see Jaclyn Ling-Chien Neo, *Calibrating Interpretive Incorporation: Constitutional Interpretation and Pregnancy Discrimination Under CEDAW*, 35 HUMAN RIGHTS QUARTERLY 910 (2013).

5 Heliliah Bt. Haji Yusof, *Internal Application of International Law in Malaysia and Singapore*, 1 SINGAPORE LAW REVIEW 62, 63 (1969).

6 See PERLEMBAGAAN PERSEKUTUAN MALAYSIA [MALAY. CONST.] Aug. 31, 1957, art. 74(1).

7 Shad Saleem Faruqi, *Human Rights, International Law and Municipal Courts*, SUHAKAM, 3 (Oct. 24, 2009), <http://www.suhakam.org.my/wp-content/uploads/2013/12/Human-Rights-International-Law-24.10.09.pdf>.

rights law, it remains on the international plane. In the domestic plane, only the constitution, statutes, and the adopted common law are effective and enforceable in courts.

But there is evidence that this strict dualist stance is changing. In the last decade, there has been a remarkable rise in judicial engagement with human rights law in Malaysia. This coincides with a shift in political attitudes towards greater engagement with international human rights mechanisms. In 1995, Malaysia acceded to CEDAW and the Convention on the Rights of the Child (CRC). In 2010, it also ratified the Convention on the Rights of Persons with Disabilities. In addition, purportedly to demonstrate its commitment to human rights, Malaysia established a human rights commission in 1999 with the stated aim to protect and promote human rights in Malaysia. The Human Rights Commission of Malaysia (Suruhanjaya Hak Asasi Manusia Malaysia or SUHAKAM) has the power to receive complaints and review the government's human rights practices. Its powers are however limited; it does not have the power to invalidate or enforce any laws, or to provide any remedies for complainants.⁸ Nonetheless, despite early skepticism about its independence as well as its ability to review and check governmental abuse, SUHAKAM has generally vindicated itself well enough to draw the ire of the government and applause from human rights activists.⁹

Malaysia's engagement with human rights has also been affected by regional changes. Malaysia is a key player in the Association of South East Asian Nations (ASEAN) and in November 2012, ASEAN countries adopted the ASEAN Human Rights Declaration (AHRD). The declaration is the product of the ASEAN Intergovernmental Commission on Human Rights, established in 2009 under Article 14 of the ASEAN Charter. The AHRD is envisaged as a precursor to a formal human rights treaty for the region. To be sure, the AHRD has been heavily criticized for its abundance

8 For an analysis of Suhakam's early work, see Amanda Whiting, *Situating Suhakam: Human Rights Debates and Malaysia's National Human Rights Commission*, 39 STANFORD JOURNAL OF INTERNATIONAL LAW 59 (2003).

9 See Li-ann Thio, *Panacea, Placebo, or Pawn? The Teething Problems of the Human Rights Commission of Malaysia (SUHAKAM)*, 40 GEORGE WASHINGTON INTERNATIONAL LAW REVIEW 1271 (2009).

of caveat and provisos.¹⁰ It has also been censured for undermining the universal nature of human rights and thereby its capacity to limit governmental overreach. For example, Article 7 entrenches cultural relativism as a permissible constraint on human rights; it states that while all human rights are “universal, indivisible, interdependent, and interrelated,” their realization must also take into account “different political, economic, legal, social, cultural, historical and religious backgrounds.”¹¹ Furthermore, in many of its articles, the enjoyment of rights is made subject to national laws.¹² This emphasizes state sovereignty. Taken literally, it could mean that despite the declaration, individual ASEAN member states retain the final say over the scope and content of human rights.

These problems aside, the crucial observation here is that Malaysia’s engagement with human rights is arguably becoming more diverse and nuanced. This stands in contrast with its earlier engagement which was dominated by the Asian Values rhetoric, largely developed as a defense to criticism of Malaysia’s dismal human rights record. The Asian Values discourse was part of an anti-colonial sentiment and was strongly propounded during Malaysia’s “Mahathir era.” For Mahathir, human rights were part of a Western imperial enterprise.¹³ In light of globalizing influences where the

10 See, e.g., Yuval Ginbar, *Human Rights in ASEAN – Setting Sail or Treading Water?*, 10 HUMAN RIGHTS LAW REVIEW 504 (2010).

11 Catherine Shanahan Renshaw, *The ASEAN Human Rights Declaration 2012*, 13 HUMAN RIGHTS LAW REVIEW 557 (2013). Many civil society organizations argue that escape clauses such as these provide ready-made justifications for human rights violations by ASEAN states, which is made more egregious by the fact that these states would still be able to flaunt their human rights credentials. See Media Release, *Rights Groups Reject Flawed ASEAN Declaration* (Nov. 19, 2012), <http://www.phuketwan.com/tourism/rights-groups-reject-flawed-asean-declaration-17082>, for media release put out by fifty-three individual human rights groups.

12 Media Release, *Rights Groups Reject Flawed ASEAN Declaration*, PHUKET WAN TOURISM NEWS (Nov. 19, 2012), <http://www.phuketwan.com/tourism/rights-groups-reject-flawed-asean-declaration-17082>.

13 Mahathir Mohamad, *Western Modernism vs. Eastern Thought*, in *THE VOICE OF ASIA: TWO LEADERS DISCUSS THE COMING CENTURY* 71-86 (Mahathir Mohamad & Shintaro Ishihara eds., 1995). See generally EVA BREMS, *HUMAN RIGHTS: UNIVERSALITY AND DIVERSITY* 82 (2001). But cf. Inoue Tatsuo, *Liberal Democracy and Asian Orientalism*, in *THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS* 27 (Joanne R. Bauer & Daniel A. Bell eds., 1999); and Jack Donnelly, *Human Rights*

state itself seeks to engage with international human rights mechanisms, this rhetoric of anti-colonial exceptionalism has been superseded for most intents and purposes. Indeed, Malaysia's engagement with CEDAW and the CRC has also generated changes in Malaysia's domestic laws and policy. The 2001 amendment of the constitution to include gender as one prohibited bases for discrimination was clearly directed at fulfilling Malaysia's CEDAW obligations.

This article examines judicial treatment of international human rights law against this backdrop of increased international and regional engagement. It examines how Malaysian courts have used or declined the use of international human rights law in deciding domestic cases. I argue that there is a trend towards greater acceptance of human rights law in Malaysia, and that this leads to a mitigated form of dualism. Part II sets out an analytical framework of strict dualism as being comprised of three legal propositions. Part III examines earlier cases that established and followed a strict dualist position using this analytical framework. Part IV identifies a range of human rights argumentation that Malaysian lawyers have used to challenge the strict dualist position, and judicial reaction to these arguments. It analyzes a divergent line of cases where international human rights law is treated as relevant and even persuasive. It should here be noted that the analysis is not based on any clear periodization of cases; I identify the last decade as significant for the mitigation of a strict dualist approach, but concede that there is no clear and unimpeded trend. While some cases in the last decade have accepted the relevance of international law and suggest openness to superordinating international human rights norms to domestic law, others have fallen back on the strict dualist position. This notwithstanding, Part V contends that the cases taken as a whole indicates a mitigation of a strict dualist approach. Part VI contextualizes these developments and identifies major developments that have influenced the judiciary and the legal profession, who are key actors in this shift towards greater reception towards international human rights law in domestic jurisprudence. On a whole, therefore, this article demonstrates that human rights advocates, through the use of strategic litigation, have

been at least somewhat successful in eroding the firm ground on which strict dualism stood in Malaysia.

2. DUALISM: THREE LEGAL PROPOSITIONS

Dualism is based on the general notion that international law is a “horizontal legal order based on and regulating mainly the relations and obligations between independent and theoretically equal sovereign States.”¹⁴ State actions on this horizontal legal order do not have direct or automatic effect on the domestic level. This dualist position contrasts with monist systems, which see international and municipal law as forming part of one and the same continuous legal order. In monist states, treaties are self-executing. There is a distinct hierarchy: international human rights law sits at the apex, followed by constitutional law, and then statutes or common law. There is no need for international obligations to be transformed into rules of national law. Furthermore, in cases of conflict in a monist system, international law prevails.¹⁵

Dualism’s insistence on additional and intentional domestication of international law is commonly justified on the basis of the separation of powers. Since the executive is responsible for ratifying treaties whereas the legislature is responsible for making laws, allowing treaties signed by the executive to gain legal status domestically without more would intrude into the legislature’s law-making powers. Another common argument proponents of strict dualism often raise are (sometimes exaggerated) fears that having regard to international law in judicial reasoning would encourage judicial activism and undermine the autochthonous nature of domestic law, especially the constitution.¹⁶

Nonetheless, as Eileen Denza rightly points out, the dualist versus monist dichotomy is often too simplistic. It is not always determinative of,

14 Eileen Denza, *The Relationship between International and National Law*, in *INTERNATIONAL LAW* 415, 421 (Malcolm D. Evans ed., 2003).

15 *Id.* at 421.

16 See Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 82 (2004); Melissa A. Waters, *Justice Scalia on the Use of Foreign Law in Constitutional Interpretation: Unidirectional Monologue or Co-Constitutive Dialogue*, 12 *TULSA JOURNAL OF COMPARATIVE AND INTERNATIONAL LAW* 149 (2004).

for instance, a state's constitutional approach to international obligations or how its government will proceed in implementing a new treaty, or even (increasingly) in predicting how its courts will approach complex questions of applicability as they arise in litigation.¹⁷ Accordingly, it might be more appropriate to consider the monist and dualist approaches as polar opposites on a continuum on which different states stand as being closer to one or the other. The use of monist versus dualist theories remains useful but only as ideal types. State practice however exists on a non-ideal basis and is more complex. It also differs based on the type of international law it encounters. One common distinction is between international treaty law and customary international law. Indeed, even a self-professedly dualist system such as the British legal system treat customary international law as directly applicable in the domestic realm as part of its common law.

Consequently, in order to provide a more nuanced perspective on these divergent approaches, I identify three interrelated propositions that are commonly associated with the dualist position. These propositions provide indicators to determine how far or close a particular state is to the ideal type. First, it is commonly said that under a dualist system, unless directly incorporated, international law is irrelevant to domestic legal developments. I call this proposition "*absolute non-relevance*." A second position commonly associated with the dualist approach is that international law may be relevant but nonetheless could not override or supersede national statutes and the common law of the state. In the face of a conflict, domestic law prevails. This includes the whole panoply of a country's domestic legislation: its unwritten customs, its common law, written statutes, and constitution. Let us call this *domestic law prevails*. A third proposition asserts that while international law is relevant, it could not override or supersede the supreme constitution of the state. The relationship between international law and laws of a lower hierarchy than the constitution is indeterminate under this third proposition. This, I denote as the "*constitution prevails*" proposition.

A strict dualist would simply assert the first proposition of *absolute non-relevance* of international law and this categorically rejects any reference or consideration of international law. This strict position effectively obviates the second and the third propositions. If international law were strictly regarded as not part of the corpus of law recognized by national

17 *Id.*

courts, then the question of the relative status of international law with the constitution or domestic laws would not arise at all. International law is entirely outside the contemplation of judges operating on the domestic plane. In contrast, the second and third propositions are less strict in insisting upon the division between international and domestic law. They contemplate the possibility that international law could be relevant, such as where there is a gap in domestic law. Nonetheless, these two propositions remain committed to the primacy of domestic law over international law on the domestic plane. The following sections employ this analytical framework to examine judicial engagement with international human rights law in Malaysia.

3. JUDICIAL ENGAGEMENT WITH INTERNATIONAL HUMAN RIGHTS LAW

a. International Treaty Law

Until very recently, strict dualism was the established orthodoxy in Malaysian law. There was *absolute non-relevance* of international law, except perhaps with respect to customary international law. The relevance of international human rights law was examined in the 1981 case of *Merdeka University Berhad v. Government of Malaysia*.¹⁸ This controversial case involved the proposed establishment of a university using Chinese as a medium of instruction.¹⁹ The government blocked the proposal under the Universities and University Colleges Act 1971. The applicants argued that the refusal to grant them an incorporation order under the statute was unconstitutional and moreover incompatible with Article 26 of the Universal Declaration of Human Rights (UDHR) (which guaranteed equal access to education). Adopting a strict dualist position, the High Court

18 *Merdeka Univ. v. Malaysia*, [1981] 2 MALAYSIAN LAW JOURNAL 356 (Malay.) [hereinafter *Merdeka University*].

19 *Id.*

held that the UDHR was not a legally binding instrument and, in any case, was not part of Malaysian law.²⁰

This strict dualist position can still be found in later cases. For instance in the 2005 case of *Beatrice a/p At Fernandez v. Sistem Penerbangan Malaysia*,²¹ the Federal Court appeared to regard CEDAW as a non-relevant source of law in determining whether a contractual clause in a collective agreement constituted pregnancy discrimination in breach of the constitution and of CEDAW.²² Under the collective agreement, a pregnant air-stewardess would have to resign from her position, failing which her employer, Malaysian Airlines, would have the right to fire her. The plaintiff, Fernandez, became pregnant but refused to resign. The company terminated her employment. She brought suit, claiming a declaration for reinstatement and damages on the basis that the contract and her termination discriminated on the basis of gender and therefore violated Article 8 of the Federal Constitution.²³ Fernandez invoked CEDAW to buttress

20 This issue was not addressed on appeal by the Federal Court.

21 *Beatrice Fernandez v. Sistem Penerbangan Malay.*, [2005] 3 MALAYSIAN LAW JOURNAL 681 (Malay.) [hereinafter *Beatrice Fernandez FC Judgment*]; see also *Beatrice Fernandez v. Sistem Penerbangan Malay. & Anor*, [2004] 4 MALAYSIAN LAW JOURNAL 466 (Malay.) [hereinafter *Beatrice Fernandez CA Judgment*].

22 The collective bargaining agreement was concluded between Malaysian Airlines System (the employer) and the second respondent, Kesatuan Sekerja Kakitangan Sistem Penerbangan Malaysia (the MAS Employees Union), dated May 3, 1988.

23 *Beatrice Fernandez FC Judgment*, *supra* note 21, at ¶¶ 23, 26, 28. The plaintiff also raised other arguments pursuant to the Employment Act which specified that female employees are entitled to maternity leave and allowance, provided certain conditions such as length of employment and notice of intended leave of absence are satisfied. The courts rejected the argument, reasoning that the Employment Act only provided for the nature of entitlement but did not expressly prohibit any term and condition of employment that requires flight stewardesses to resign upon becoming pregnant. Neither did it prohibit employers from imposing conditions requiring female employees in specialized occupation such as flight cabin crew to resign if they had become pregnant because they could not work during their pregnancy. *Id.*

her constitutional challenge. Notably, Article 11 of CEDAW prohibits pregnancy discrimination.

The Federal Court (as well as the Court of Appeal below it) did not refer to CEDAW or appear to take the relevant CEDAW provisions into account in dismissing Fernandez's case. In its refusal of leave to appeal, the Federal Court only addressed the viability of the questions raised under domestic law and did not address the CEDAW question at all.²⁴ Instead, it concluded that the Court of Appeal's judgment did not raise a point of general principle that had not previously decided upon and that Fernandez did not raise a point of such importance in which further argument would be to the public's advantage.²⁵ These cases effectively affirm the strict dualist position of *absolute non-relevance*.

b. Customary International Law

The status of customary international law in Malaysia is less certain. English law treats customary international law as part of its common law without the need for specific incorporation. Commentators have argued that Malaysian courts should take the same approach and accept customary international law as part of its common law. For instance, Abdul Ghafur Hamid argues that since the English common law is part of Malaysian law (based on section 3(1) of the Civil Law Act), customary international law should *ipso facto* be recognized as part of Malaysian law.²⁶ However, since section 3 of the Civil Law Act only required courts in Malaysia to apply the common law and the rules of equity as administered in England on April 7, 1956, there remains a question of whether customary international law developed post 1956 could have direct application in Malaysian law.

The one subject matter where this has arisen for consideration is in the doctrine of state immunity. The older rule under customary international law asserted the absolute immunity of the state. This later evolved to a restricted form of state immunity. The older rule had been applied

24 *Id.* ¶ 11.

25 *Id.* ¶¶ 9-10.

26 Abdul Ghafur Hamid & Khin Maung Sein, *Judicial Application of International Law in Malaysia: An Analysis*, THE MALAYSIAN BAR (Mar. 31, 2006), http://www.malaysianbar.org.my/international_law/judicial_application_of_international_law_in_malaysia_an_analysis.html#f21.

in English courts and was thereby part of the common law.²⁷ Thus, the doctrine of absolute immunity was similarly applicable in Malaysia.²⁸ The question of whether to accept the limited state immunity doctrine came up for consideration in the 1990 case of *Commonwealth of Australia v. Midford (Malaysia) Sdn. Bhd.*²⁹ Significantly, the Supreme Court decided in the affirmative.

While this case could suggest that Malaysian law is receptive to customary international law, the incorporation process appears to still be mediated through English common law. It should be noted that the English Court of Appeal, under Lord Denning's leadership, had accepted the newer rule of restricted immunity in the 1977 case of *Trendtex Trading Corporation Ltd v. Central Bank of Nigeria*.³⁰ According to the English Court of Appeal, English courts could give effect to changes in customary international law without an act of parliament.³¹ It was this change in common law that the Malaysian Supreme Court relied upon to adopt the newer rule of restricted immunity. As the court puts it:

When the *Trendtex* case [1977] 2 WLR 356; [1977] 1 All ER 881 was decided by the UK Court of Appeal in 1977, it was of course for us only a persuasive authority, but we see no reason why our courts ought not to agree with that decision and rule that under the

27 *E.g., The Parlement Belge*, [1879] 4 P.D. 129 (Eng.).

28 *See, e.g., Village Holdings Sdn.Bhd. v. Her Majesty the Queen in Right of Can.*, [1988] 2 MALAYSIAN LAW JOURNAL 656 (Malay.).

29 *Australia v. Midford (Malay.) Sdn. Bhd.*, [1990] 1 MALAYSIAN LAW JOURNAL 475 (Malay.) [hereinafter *Australia v. Midford*].

30 *Trendtex Trading Corp. v. Cent. Bank of Nigeria*, [1977] Q.B. 529 (Eng.) [hereinafter *Trendtex*]. *See also* Denza, *supra* note 14, at 428-29.

31 Although this gives effect to customary international law, the Court of Appeal was also criticized for having been speculative in asserting that there had been a definitive change in the customary international rule on state immunity. ERNEST K. BANKAS, *STATE IMMUNITY CONTROVERSY IN INTERNATIONAL LAW: PRIVATE SUITS AGAINST SOVEREIGN STATES IN DOMESTIC COURTS* 105-11 (2005). In dissent, Judge Stephenson (Stephenson, A.L.J.) argued that there was insufficient evidence that a new customary international rule had been fully developed such that it is binding on all nations.

common law in this country, the doctrine of restrictive immunity should also apply.³²

This begs the question of whether the Malaysian courts could develop the common law to take into account new rules of customary international law, independently of developments in English common law. I would argue that Malaysian courts do have the authority to do so and should do so as part of its obligations as a member of the international community.

This possible acceptance of customary international law as directly applicable as part of the common law in Malaysia however remains within dualist thinking. This is because such customary international, as part of the common law, are still subject to statutory law as well as the constitution. Consequently, where there is a conflict between customary international law and domestic statutory or constitutional law, it is the latter that prevails. Indeed, the Supreme Court in *Australia v. Midford* was careful to clarify that this common law position “could well be superseded and changed by an Act of Parliament later on should our legislature decide to define and embody in a statute the limits and extent of sovereign immunity in this country.”³³ Thus while customary international law could be a relevant source of law, and could arguably be used to change the common law, it could not override statutory law where there is a conflict. Domestic law and constitutional law would prevail.

This position is consistent with an earlier 1987 case of *PP v. Narongne Sookpavit*.³⁴ The case concerned a group of Thai fishermen who were arrested off the coast of Johor and charged for being in possession of fishing appliances in contravention to Malaysia’s Fisheries Act 1963. The accused persons raised as part of their defense the right of innocent passage. They argued that such right was part of customary international law, and thereby part and parcel of Malaysian law.

The court accepted the possibility that customary international law could be relevant in domestic adjudication, but rejected the accused persons’

32 *Australia v. Midford*, *supra* note 29, at 480.

33 *Id.*

34 *Pub. Prosecutor v. Narongne Sookpavit*, [1987] 2 MALAYSIAN LAW JOURNAL 100 (Malay.).

arguments on the basis that Malaysian domestic law would nonetheless prevail. It reasoned:

Even if there was such a right of innocent passage and such right was in conformity with customary English law or customary international law as it is applied in England, the passage by the accused person in the circumstances of this case could not be regarded as innocent passage *since it contravened Malaysian domestic legislation*.³⁵

This case does not provide certainty as to whether customary international law is directly applicable in Malaysia, even as part of adopted common law. However, it does establish that even if relevant, customary international law would nonetheless have limited effect and remain subject to domestic law.

4. THE RISE OF HUMAN RIGHTS ARGUMENTATION AND THE EROSION OF THE STRICT DUALIST POSITION

a. Three Types of Human Rights Argumentation

In Malaysia, the dualist position has been increasingly challenged in recent years due to rising engagement by litigants, and thereby the courts, with international human rights norms. Broadly, three types of arguments have been used to invoke international human rights law in domestic courts. The first posits that the Universal Declaration of Human Rights has been statutorily incorporated. This is based on section 4(4) of the 1999 Human Rights Commission of Malaysia Act (SUHAKAM Act), which provides that the commission shall have regard to the UDHR, particularly in performing its functions and powers. Litigants have argued that this effectively incorporated the UDHR into Malaysian law.

The second type advocates the doctrine of legitimate expectation. According to this doctrine, citizens have a legitimate expectation that the government will not act inconsistently with their treaty obligations. Now, it is a widely accepted rule of interpretation, even in dualist systems, that courts should, as far as possible, interpret constitutional provisions and statutes in conformity with a state's treaty obligations. The justification for this is that it is reasonable for courts to assume that the state intends to comply with its treaty obligations. The doctrine of legitimate expectation

35 *Id.* (emphasis added).

however extends this rule of interpretation to give individuals the right to effectively *enforce* the treaty domestically.³⁶ There is some disagreement as to whether this translates into a procedural or a substantive right. In the seminal case of *Minister of State for Immigration and Ethnic Affairs v. Ah Hin Teoh*, the High Court of Australia recognized this doctrine of legitimate expectation on the basis that:

[R]atification of the convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision makers will act in accordance with the convention.³⁷

This is however, according to the Australian High Court, limited to a procedural right. Chief Justice Mason and Justice Deane observed in their combined judgment that the existence of a legitimate expectation does not necessarily compel a decision-maker to act in a particular way. This, they clarify, is the difference between a legitimate expectation and a binding rule of law. What it does require is that if a decision-maker proposes to make a decision inconsistent with a legitimate expectation, procedural fairness requires that the persons affected should be given notice and an adequate opportunity of presenting a case against the taking of the course. In comparison, leading Malaysian constitutional lawyer Malik Imtiaz Sarwar has proposed a doctrine of legitimate expectation that goes beyond procedural fairness. Not only is it sometimes difficult to separate the procedural from the substantive, he argues that, in certain situations, the expectation created could be a substantive right, such as where constitutional safeguards

36 For discussion on the doctrine of legitimate expectations, see Malik Imtiaz Sarwar, *Representations by Governments and Legitimate Expectations: A Means to the Enforcement of International Norms in Domestic Courts*, THE MALAYSIAN BAR (Jan./Feb. 2004), http://www.malaysianbar.org.my/human_rights/representations_by_governments_and_legitimate_expectations_a_means_to_the_enforcement_of_international_norms_in_the_domestic_courts.html.

37 *Minister of State for Immigration & Ethnic Affairs v. Ah Hin Teoh*, [1995] 128 AUSTRALIAN LAW REPORTS 353 (Austl.).

are implicated.³⁸ Under such circumstances, the nature and extent of the relief available could be (and should be) substantive.³⁹

The third type of argument entails using international human rights law as an interpretive source. This is part of a broader movement within the commonwealth where judges have increasingly sought to take international human rights law into account in their judicial reasoning. This emerging approach was given expression in the so-called Bangalore Principles, which identified a “growing tendency for national courts to have regarded to . . . international norms for the purpose of deciding cases where the domestic law – whether constitutional, statute or common law – is uncertain or incomplete.”⁴⁰ What is especially significant is the declared propriety of doing so. The Bangalore Principles stated:

It is within the proper nature of judicial process and well established judicial functions for national courts to have regard to international obligations which a country undertakes — whether or not they have been incorporated into domestic law — for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.⁴¹

This rejects a strict dualist position, which would regard international norms as irrelevant to domestic courts. Nonetheless, the 1988 Bangalore Principles remained circumspect; principle 8 clarified that “where national law is clear and inconsistent with the international obligations of the State concerned in common law countries the national court is obliged to give effect to national law.”⁴² In such cases, the court’s main role would be to draw attention to such inconsistency so that the legislature and the executive could take steps to rectify the situation which would be a breach of the state’s international obligations.

Of these three types of arguments, it is the last type, i.e. interpretive incorporation, which has been the most successful in Malaysia. The landmark case for this is the *Noorfadilla* case mentioned in the introduction.

38 Sarwar, *supra* note 36.

39 *Id.*

40 *Bangalore Principles*, in COMMONWEALTH SECRETARIAT, DEVELOPING HUMAN RIGHTS JURISPRUDENCE: THE DOMESTIC APPLICATION OF INTERNATIONAL HUMAN RIGHTS NORMS ix (1988) [hereinafter *1988 Bangalore Principles*].

41 *Id.*

42 *Id.*

Nonetheless, *Noorfadilla* must be seen as part of a line of cases where the strict dualist position has been increasingly challenged by these three types of argumentation.

b. Effective Statutory Incorporation

On the first, although the Malaysian courts have expressly rejected the effective statutory incorporation argument their treatment of this argument demonstrates a mitigation of the strict dualist position which sees international law as simply irrelevant. For instance, in the 2002 case of *Mohamad Ezam bin Mohd Noor v. Ketua Polis Negara*, the Federal Court specifically addressed and rejected the argument that the UDHR has been effectively incorporated.⁴³ However, it also threw open the possibility that an international treaty (as opposed to a declaration) could be regarded differently.

In this case, the Federal Court was asked to consider the relevance of international law in defining the substantive right to counsel under the Federal Constitution's Article 5(3). The appellants had been detained without trial and were denied access to counsel during their detention. They applied for habeas corpus. The Federal Court decided in the detainees' favor, holding that the order of detention was *mala fide* (made in pursuant of a political agenda rather than on grounds of national security). An argument was made that the court should have regard to international standards in determining the scope and meaning of Article 5(3) of the Federal Constitution. More specifically, the effective incorporation argument was advanced. Counsel argued that the approach taken by international community as manifest in various United Nations' documents on the subject of legal representation had received statutory recognition by the passing of the SUHAKAM Act. The Federal Court did not accept this argument. Addressing the relevance of the UDHR, Siti Norma Yaakob FCJ opined that the status and weight to be given to the UDHR remained unchanged even after the SUHAKAM Act. Her Honour reasoned that section 4(4) only provides for reference (or regard) to the UDHR which indicates "an invitation to look" at it "*if one is disposed to do so*"⁴⁴ and to

43 *Mohamad Ezam bin Mohd Noor v. Ketua Polis Negara*, [2002] 4 MALAYSIAN LAW JOURNAL 449 (Malay.) [hereinafter *Mohamad Ezam*].

44 *Id.* at 514 (emphasis added).

“consider the principles stated therein and be persuaded by them if need be.”⁴⁵ It does not oblige or compel adherence. The courts are not required to consider UDHR principles if they do not wish to. Therefore, it could not be said that the SUHAKAM Act had effectively incorporated the UDHR into Malaysian law.

This judicial refusal to accept that the UDHR has been incorporated into Malaysian law, and is thereby a binding source of law is premised on three reasons. First, reliance was placed on the declaratory nature of the UDHR. Since declaratory principles do not have any force of law or binding effect on member states in any case, Her Honor observed:

If the United Nations wanted those principles to be more than declaratory, they could have embodied them in a convention or a treaty to which member states can ratify or accede to and those principles will then have the force of law.⁴⁶

The second reason is that section 4(4) was in any case qualified; it states that regard shall be had but only “to the extent that it is not inconsistent with the Federal Constitution.”⁴⁷ Lastly, the judge opined that it was not necessary to refer to the UDHR because Malaysia’s “own laws backed by statutes and precedents” were sufficient to deal with the issue of access to legal representation.⁴⁸

Considering that the court decided to uphold the right to legal representation in this case, thereby producing a pro-rights outcome, this refusal to take into account UDHR principles was not determinative of the result. However, the relevance of UDHR principles could theoretically be more determinative in other cases. What is significant about this case is that it opens the door to the possibility of mitigating the earlier strict dualist position. The Federal Court did not consider the *Merdeka University* case strictly applicable because it was decided prior to the passing of the SUHAKAM Act.⁴⁹ Implicit in the reasoning is an important concession that the UDHR could be a relevant source of legal norms for constitutional interpretation. This must be considered significant not least because section

45 *Id.*

46 *Id.*

47 *Id.*

48 *Id.*

49 *Id.* at 514B.

4(4) of the SUHAKAM Act only directs the human rights commission, and *not the judiciary*, to have regard to the UDHR in performing its functions and powers. The judge's acceptance that section 4(4) permits judges to have regard to the UDHR is an important extension of the scope of the provision. It is also an acceptance that judges do play a role in upholding human rights in Malaysia. Furthermore, the judgment appears to leave open the question of whether the Federal Court would take a different position and accept an international human rights convention (i.e. a binding treaty) as being persuasive or even binding law in Malaysia.

c. The Limits of the Doctrine of Legitimate Expectation

Although the doctrine of legitimate expectation has made inroads in Australia, it has yet to be explicitly accepted as part of Malaysian law. The doctrine was considered and rejected in the 2010 case of *SIS Forum (Malaysia) v. Dato' Seri Syed Hamid bin Syed Jaafar Albar (Menteri Dalam Negeri)*⁵⁰ and the 2012 case of *Sepakat Efektif Sdn Bhd v. Menteri Dalam Negeri Malaysia*.⁵¹ In *SIS Forum*, the applicants challenged a ministerial decision to the ban a book it publishes titled *Muslim Women and the Challenges of Islamic Extremism*. The book was a compilation of essays submitted at an international meeting entitled "International Round Table on Muslim Women and the Challenge of Religious Extremism: Building Bridges between Southeast Asia and the Middle East" and had been in circulation for several years before the prohibition order was made under section 7(1) of the Printing Presses and Publications Act 1984. Relying on a determination by the Department of Islamic Development (Jabatan Kemajuan Islam Malaysia) that the book has the tendency to confuse Muslims, particularly Muslim women, the Minister issued the ban on the ground that the book was "prejudicial to public order." The High Court decided for the publisher, holding that a tendency to confuse Muslims did not amount to being prejudicial to public order.

The applicants argued that they had a legitimate expectation that "they will not be discriminated against on the basis of gender or religion and

50 *SIS Forum (Malay.) v. Dato' Seri Syed Hamid bin Syed Jaafar Albar (Menteri Dalam Negeri)*, [2010] 2 MALAYSIAN LAW JOURNAL 378 (Malay.) [hereinafter *SIS Forum*].

51 *Sepakat Efektif Sdn. Bhd. v. Menteri Dalam Negeri Malay.*, [2012] 9 MALAYSIAN LAW JOURNAL 550 (Malay.) [hereinafter *Sepakat Efektif*].

that their freedom of expression will only be curtailed by the Malaysian government in accordance with international human rights norms”⁵² To support their argument, they relied not only on the UDHR but also on CEDAW, to which Malaysia is a party. Reference was also made to the 1988 Bangalore Principles’ exhortation “to have regard to international obligations which a country undertakes . . . for the purpose of removing ambiguity or uncertainty from national constitutions, legislation, or common law.”⁵³

Sepakat Efektif similarly concerned a ministerial decision restricting free speech rights. Here, the Minister of Home Affairs had banned three books with political content for being prejudicial to public order. In addition to raising arguments that the ban violated their constitutional rights, the applicants also made reference to the UDHR. The applicants argued that the doctrine of legitimate expectation required the government to instruct the Minister to observe its obligations under the UDHR.⁵⁴

There were divergent outcomes in the two cases. The High Court of Kuala Lumpur, which decided both cases, ruled in the applicants’ favor in *SIS Forum* but dismissed the applicants’ case in *Sepakat Efektif*. Nonetheless, both courts treated the argument based on legitimate expectation in the same way. In both cases, the High Court rejected the doctrine of legitimate expectation, highlighting that the law set out in *Minister of State for Immigration and Ethnic Affairs v. Ah Hin Teoh* (discussed above) is controversial even in Australia.⁵⁵ Instead, the *Merdeka University* strict dualist approach whereby the “the Malaysian courts [do] not directly accept norms of international law *unless they are incorporated* as part of our municipal law” was affirmed.⁵⁶

Of the two, *SIS Forum* deserves slightly more attention because the status of CEDAW was put to question in the case. Regrettably, the High Court did not address the distinction made earlier by the *Mohamad Ezam* court between declaratory texts and ratified treaties. This lack of attention to the differing nature of the two types of documents contrasts with the

52 *SIS Forum*, *supra* note 50, at ¶ 23.

53 *Id.*

54 *Sepakat Efektif*, *supra* note 51, at ¶ 30.

55 *Id.* ¶ 33.

56 *SIS Forum*, *supra* note 50, at ¶ 37; *Sepakat Efektif*, *supra* note 51, at ¶ 33 (emphasis added).

approach taken by the High Court in *Noorfadilla*. There, the High Court clearly relied on this distinction to buttress its reliance on CEDAW principles. In light of *Noorfadilla* and, indeed since the High Court here did not fully address the distinction the Federal Court accepted in *Mohamad Ezam*, it is arguable that the applicability of human rights treaties remains open for consideration in the context of the doctrine of legitimate expectation.

This is especially in light of the High Court of Ipoh's judgment in *Indira Gandhi a/p Mutho v. Pengarah Jabatan Agama Islam Perak*.⁵⁷ The case concerned the validity of unilateral conversion of minors to Islam by one parent, without the consent of the other. This is a seminal case as the High Court decisively held that the conversion was invalid because it violated the non-consenting parent's constitutional rights of freedom of religion, rights of guardianship, and guarantee of equal protection. The doctrine of legitimate expectation (based on *Teoh*) was again raised, in addition to the argument of effective incorporation of the UDHR based on the SUHAKAM Act. In addition to the UDHR, the applicant also relied on CEDAW and CRC.

The High Court in *Indira Gandhi* essentially accepted that Malaysia's international commitments evidenced by its ratification of human rights treaties and affirmations of its obligations contained therein imposed on Malaysia a legal obligation (on the domestic plane) to give effect to the rights set out in those treaties. Thus, the High Court concluded:

Where there are two possible interpretations of the word "parent" in Article 12(4) of the Federal Constitution, the interpretation that best promotes our commitment to international norms and enhance basic human rights and human dignity is to be preferred. Where a particular interpretation makes the right of the equal rights of the mother with the father where guardianship is concerned under the Guardianship of Infants Act 1961, illusory and infirm, then an interpretation that is consistent with international human rights principle must be invoked to infuse life into it.⁵⁸

Although not specifically couched in legitimate expectation language, the High Courts' reference to how international obligations could directly create domestic obligations approximates and could suggest an underlying

57 *Indira Gandhi A/P Mutho v. Pengarah Jabatan Agama Islam Perak*, [2013] 5 MALAYSIAN LAW JOURNAL 552 (Malay.) [hereinafter *Indira Gandhi*].

58 *Id.*

acceptance of the doctrine. It remains to be seen if this jurisprudence would take root and be applied in future cases. Nonetheless, it should be noted that the High Court in *Indira Gandhi* also relied heavily on *Noorfadilla*, which I will discuss in the next section on interpretive incorporation.

d. Interpretive Incorporation

Of the three types of human rights argumentation, interpretive incorporation has been most successfully employed in domestic courts. Among the various cases where international human rights norms have been invoked to support judicial interpretation is a 2001 seminal decision on indigenous rights. In *Nor Anak Nyawai v. Borneo Pulp Plantation*, the High Court of Kuching referred extensively to the United Nations' Draft Declaration on the Human Rights of Indigenous Peoples to support recognition and upholding of the plaintiffs' native customary right over parts of land in Sarawak.⁵⁹ Although the judge was careful to add that the draft declaration played "no part" in his decision because "they do not form the law of the land," the declaration's provisions were clearly important for reinforcing the judge's censure of the defendant's treatment and attitude towards the plaintiffs.⁶⁰ As the court recognized, the draft Declaration was a reflection of global attitude and thus was an important resource in interpreting the protections envisaged under the Federal Constitution for natives of Sabah and Sarawak.⁶¹

The use of human rights declarations to reinforce a judicial decision was also present in the 2008 case of *Abd Malek bin Hussin v. Borhan bin Hj Daud*,⁶² where the High Court of Kuala Lumpur referred to the UDHR to support a robust reading of a constitutional guarantee of the right to be informed of the grounds for a person's arrest, as well as the right to counsel.⁶³ This case was a tort claim for false imprisonment, assault, and battery against the police. In ruling that the arrest was unlawful, Justice

59 *Nor Anak Nyawai v. Borneo Pulp Plantation*, [2001] 6 MALAYSIAN LAW JOURNAL 241 (Malay.) [hereinafter *Nor Anak Nyawai*].

60 *Id.* at 298.

61 *Id.* at 297; *see also* MALAY. CONST. art. 161A.

62 *Abd Malek bin Hussin v. Borhan bin Hj Daud*, [2008] 1 MALAYSIAN LAW JOURNAL 368 (Malay.) [hereinafter *Abd Malek bin Hussin*].

63 *See* MALAY. CONST. art. 5(3).

Hishamudin opined that “[t]he preservation of the personal liberty of the individual is a sacred universal value of all civilised nations and is enshrined in the [UDHR].”⁶⁴ Thus, the judge relied on the UDHR to reinforce his decision that the arrest was unlawful.

Finally, *Noorfadilla* is to-date the most significant case for interpretive incorporation. The plaintiff, Noorfadilla, had applied for and was offered employment as a relief teacher by a local district education office. After she attended a briefing and received placement in a local school, she was asked whether she was pregnant, to which she answered in the affirmative. The briefing officer then proceeded to withdraw her appointment. The Ministry of Education later admitted that it had a policy of not employing pregnant women as relief teachers because they were deemed to be less reliable (“may not frequently be able to attend to her job due to various health reasons”) and they would need maternity rest (“the period between the time of delivery to full health is too long (two months)”). Thus, hiring them would be economically inefficient (“when she gives birth she needs to be replaced by [a] new teacher who will require further briefings”). The High Court decided in the applicant’s favor, declaring that the Ministry’s refusal to employ women as relief teachers on the basis of their pregnancy, as well as the revocation of the plaintiff’s appointment in this instance was unconstitutional under Article 8(2) of the Federal Constitution. This article prohibits gender discrimination in the appointment of any office or employment by a public authority. Arguably, the case could have been adequately determined on the basis of Article 8(2). Pregnancy discrimination is clearly gender discrimination since it treats women differently and unequally from men. But the judge relied extensively on CEDAW to make this point. The link between Article 8(2) and CEDAW was derived from the fact that the constitution was amended in 2001 to include gender as an additional prohibited basis for discrimination with the stated aim of complying with the country’s CEDAW obligations.⁶⁵ Not only does Article 1 of CEDAW provide a broad definition of discrimination against women, Article 11(2) (a) expressly provides that State parties shall take appropriate measure to prohibit, subject to the imposition of sanctions, dismissal on the grounds,

64 Abd Malek bin Hussin, *supra* note 62, at 383; *See also* Borhan bin HjDaud v. Abd Malek bin Hussin, [2010] 6 MALAYSIAN LAW JOURNAL 329 (Malay.) (overturning the High Court’s decision).

65 *See* Constitution (Amendment) (No. 2) Act (Act No. A1130/2001) (Malay.).

inter alia, of pregnancy. CEDAW thus provides support for clarifying the meaning of gender discrimination under Article 8(2).

Unlike in *SIS Forum*, the High Court did draw a distinction between declarations and ratified treaties. It emphasized that CEDAW is not a mere declaration, but a convention, which means that it is binding on member states.⁶⁶ The High Court drew from the Federal Court's decision in *Mohamad Ezam*, which stressed this distinction. The judgment further relied on a slew of state practices to show that Malaysia intends to comply with its CEDAW commitments. These include a letter affirming its commitments from the Permanent Mission of Malaysia to the Permanent Missions of the Members States of the United Nations dated 9 March 2010, parliamentary debates on the constitutional amendment, as well as the Malaysia's participation at the 1988 Bangalore meeting and the ensuing Bangalore Principles.

On this basis, the High Court determined that it had the "duty" to take into account Malaysia's commitment and obligations at the international plane, and therefore "no choice but to refer to CEDAW in clarifying the term "equality" and gender discrimination under Article 8(2) of the Federal Constitution."⁶⁷

e. Relevant and Superordinate to National Laws

The cases discussed so far in this section demonstrate a mitigation of the strict dualist position. Although some courts still affirmed the strict dualist position represented by the *absolute non-relevance* proposition, many departed from this to engage with international human rights law. None of the cases discussed so far, however, went far as to also clearly depart from the propositions that *domestic law prevails* or *constitutional law prevails*. It is therefore interesting to note the 2011 case of *Suzana Binti Md Aris v. DSP Ishak bin Hussain*, which appears to go against even the mitigated dualist position that domestic law prevails. The facts of the case were rather extraordinary in the allegations of human rights abuse. It involved a claim of police abuse and negligence. The plaintiff's husband died while in police custody and it transpired that he was denied proper

66 *Id.*

67 *Id.* ¶ 28.

medical care and attention.⁶⁸ The High Court found for the plaintiff.⁶⁹ In the appeal on damages, the High Court increased the amount of damages assessed and added aggravated and exemplary damages.⁷⁰ According to the Court, exemplary damages were necessary to reflect the seriousness of police conduct.⁷¹ Police officers had acted in such a way as to unlawfully deprive a person of his life. Furthermore, the Court opined that “[f]or the state to deprive a person of medical treatment promptly when he is in police custody, especially when he is in pain and vomiting blood, as in the instant case, is to subject the person to torture, cruel, inhuman or degrading treatment by default though not deliberately by design.”⁷²

The interesting part of this judgment is that the High Court declared that the “UDHR is part and parcel of [Malaysia’s] jurisprudence as the international norms in the UDHR are binding on all member countries.”⁷³ There was a need to ground the court’s decision to grant exemplary damages in international law because section 8(2)(a) of Malaysia’s Civil Law Act 1956⁷⁴ specifically prohibits the recovery of exemplary damages where a cause of action is brought by the estate of a deceased person. The court thus had to show that the police actions were especially egregious in the eyes of the law. This is where the UDHR comes in; Article 3 guarantees to every person the right to life, liberty, and security of person while Article 5 states that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. The Court opined that any award for breach of “fundamental liberties” protected under the Federal Constitution (supposedly buttressed by the UDHR) stands on a separate head by itself.⁷⁵ That the police had violated these provisions made their actions

68 *Suzana Binti Md Aris v. DSP Ishak bin Hussain*, [2011] 1 MALAYSIAN LAW JOURNAL 107, ¶ 1-2 (Malay.) [hereinafter *Suzana Aris*].

69 *Id.* ¶ 32.

70 *Id.*

71 *Id.* ¶ 34.

72 *Id.* ¶ 24.

73 *Id.*

74 Civil Law Act (Act No. 67/1956) (Malay.).

75 *Suzana Aris*, *supra* note 68, at ¶ 34.

particularly serious. Such human rights violations were thereby regarded as valid bases upon which to grant exemplary damages.

It must here be conceded that this case may be an outlier in the existing jurisprudence addressing the status of international human rights law in domestic courts. However, its jurisprudential value is substantial. It departs from the *domestic law prevails* proposition in asserting that international human rights law (even without a directly contradicting principle) can be used to overrule domestic law, which in this particular case was a domestic statute. This is a serious erosion of the dualist position since it accepts the direct application of international law in the domestic realm, and asserts a legal order where international law is hierarchically above domestic law. The court did concede however that the UDHR remains subject to the constitution. It may not be followed if the particular provision is “inconsistent” with a country’s constitution.⁷⁶

The resulting order is intriguing. The constitution, it would seem, is located at the top of this legal order, followed by international human rights law, and finally, domestic law. Since the UDHR is a declaration, which is deemed less binding than treaties, this suggests that under this legal schema, human rights treaties such as CEDAW and CRC should also take precedence over domestic law. Notably, this is a legal order consistent with section 4(4) of the SUHAKAM Act, which subjects the UDHR to the Federal Constitution (i.e. regard shall be had “to the extent that it is not inconsistent with the Federal Constitution”). This would be a significant incursion of dualist theory since international human rights law prevails over domestic law, and would be subject only to constitutional provisions.

5. MITIGATED DUALISM

a. Relevance of International Human Rights Law

One could surmise from the cases discussed in Part 4 that there is a fairly robust judicial trend in Malaysia repudiating the strict dualist position embodied by the *absolute non-relevance* of international law proposition. The cases show that international human rights law could be relevant for adjudication regardless of its source: whether it is derived from treaty obligations or from a widely accepted declaration. In this regard, section

76 *Id.* ¶ 27.

4(4) of the SUHAKAM Act is significant for asserting the relevance of the UDHR for the human rights commission, which has in turn opened the door for courts to accept UDHR as a source of law.

Theoretically speaking, the degree of relevance could differ depending on the source of human rights law. Whereas judges can more legitimately justify adopting human rights treaty principles on the basis that the state had explicitly ratified the treaty and the government cannot have intended not to comply with its treaty obligations, the justification for applying human rights declaration stands on less solid grounds. That said, a further distinction could be drawn between the UDHR and other declarations on account of the fact that the UDHR has attained the status of customary international law (which remains contested), or on the basis of section 4(4) of the SUHAKAM Act.

b. Legal Status of International Human Rights Law in Malaysia

Beyond the rejection of the first proposition of non-relevance, the status of international human rights law in Malaysia, whether subject to domestic law as a whole or only to the constitution, however is at a state of flux. If *Suzana Binti Md Aris* becomes firm precedent, international human rights law (even where derived from the UDHR) could prevail over national laws. This, as explained above, departs from the second proposition associated with dualism, which is that *domestic law prevails* over international law. This case however remains at the moment an outlier. Even *Noorfadilla*, which has been lauded for supposedly standing for the position that CEDAW is now binding law in Malaysia, does not, on a close reading, go so far as to support the priority of international human rights treaties over domestic law. This is because the court's decision was squarely based on its interpretation of the constitution. The invalidation of the ministerial decision and the underlying discriminatory administrative policy was based on inconsistency with the constitution's gender discrimination provision.⁷⁷

One reading of *Noorfadilla* would hold that Article 8(2) of the Federal Constitution effectively incorporated the entirety of CEDAW into Malaysian law. In other words, Article 8(2) must be read as an incorporating law and that through this, CEDAW has been domesticated into the Malaysian legal system. This however falls back on the dualist structure:

77

MALAY. CONST. art. 8(2).

international law has to be specifically incorporated in order to have legal force in domestic law. Even this reading of *Noorfadilla* would be limited by current jurisprudence. This is because the extent of incorporation would be constrained by the text and scope of the constitutional provision. CEDAW provisions are incorporated only insofar as they fall within the purview of the constitutional provision.

This explains why the court in *Noorfadilla* was more willing to accept that there was gender discrimination that could attract judicial sanction in this case, and not in *Beatrice Fernandez*. Article 8(2) applies only to public actors, which the defendants were in *Noorfadilla*. However, *Beatrice Fernandez* involved a private corporation, and this may explain why the Federal Court did not consider CEDAW norms relevant in that case despite the arguments raised on the basis of Article 8(2). A private actor is not subject to its prohibition against gender discrimination. Clearly, if CEDAW had been incorporated wholesale, such a distinction would not matter since CEDAW does not admit a distinction between public and private actors when it comes to discrimination. This public-private distinction could be at the heart of another 2012 case where the Federal Court refused leave to appeal by female employees who claimed gender discrimination because the employer stipulated a lower retirement age for female employees.⁷⁸ As such, the argument that CEDAW is directly applicable and could be used to invalidate domestic law and policy (including administrative action) remains unproven.⁷⁹

A consistent reading of the cases would locate the source of this judicial overruling in *Noorfadilla* to the constitution. If gender had not been included as a prohibited basis for discrimination, the legal basis for invalidating the ministerial decision on grounds of gender/pregnancy discrimination would have stood on less solid grounds. CEDAW principles

78 *Female Workers Refused Leave To Appeal*, STRAITS TIMES (Aug. 14, 2012), <http://www.nst.com.my/nation/general/female-workers-refused-leave-to-appeal-1.124800> (explaining that while male employees could work till they were 55, female employees had to retire at 50).

79 For this reason, the Malaysian Bar has called upon the government to pass specific legislation prohibiting gender discrimination by both public and private entities. *Press Release: A Right Step in a Long and Unfinished Journey*, THE MALAYSIAN BAR (June 30, 2013), http://www.malaysianbar.org.my/press_statements/press_release_a_right_step_in_a_long_and_unfinished_journey.html.

gave specific content and meaning to gender discrimination prohibited under Article 8(2) of the Federal Constitution. As such, the *Noorfadilla* case suggests that human rights *treaty* law could be a source of norms for constitutional interpretation. While it has departed from the *absolute non-relevance* proposition, *Noorfadilla* did not go as far as the *Suzana* case to stand for the position that international law could directly invalidate domestic law, thereby abandoning the *domestic law prevails* proposition.

6. CONTEXTUALIZING MITIGATED DUALISM

a. Transnational Judicial Dialogue

The cases show that Malaysia's courts are still working within the structure of dualism, but this has been mitigated to some extent by the departure from the strict position of *absolute non-relevance* of international law. This coincides with a broader shift in Malaysia's political climate towards increased state engagement with international and regional human rights discourse. Another crucial factor for this shift is the growing transnational judicial dialogue of which Malaysian judges are a part. On a whole, judges who find themselves increasingly engaged in transnational dialogue with judges in other jurisdictions, realize that categorically rejecting international law, particularly international human rights law, may lead to criticisms of provincialism.⁸⁰

Now, commonwealth judges adjudicating over legal systems with a shared heritage in the English common law have always been part of a transnational dialogue. Referring to and referencing judicial opinions from other parts of the Commonwealth remains a common practice. The "new" development however is the broadening of this transnational dialogue to global and international actors. Judges from legal systems that do not share a common legal heritage now find themselves in conversation with each

80 This is part of a broader debate about the relevance of foreign law in domestic case. Justice Scalia of the Supreme Court of the United States is one of the most vocal opponents of this broad transnational trend in judicial reasoning. *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2776 (2004) (Scalia, J., concurring) (decrying the use of foreign state practices (forming the basis of customary international law) stating "[t]he Framers would, I am confident, be appalled by the proposition that, for example, the American people's democratic adoption of the death penalty ... could be judicially nullified because of the disapproving view of foreigners.").

other and with international actors.⁸¹ Furthermore, as Gerald Neuman observes, the postwar development of international human rights law has widened the field for interaction between international law and constitutional interpretation.⁸² Thus, judiciaries that insist on categorically rejecting international law risk being perceived locally and globally as overly statist, parochial, and perhaps somewhat archaic in today's climate. This may explain why instead of dismissing outright the relevance of international human rights law, many judges now assert instead that international law is still subject to the constitution and other domestic laws. This way, judges are able to defend local sovereignty and autochthony without appearing antiquated to the transnational judicial community.

Categorical rejection of international law is furthermore less appealing for Malaysian judges when even commonwealth judges, who are conventionally committed to strict dualism, have moved beyond this position. As Waters points out, judges in many dualist countries are increasingly implementing and entrenching their nations' international treaty obligations into domestic law, thus becoming powerful domestic enforcers of international human rights law.⁸³ She calls this trend "creeping monism."⁸⁴ This refers to the abandonment among common law courts of their traditional dualist orientation in favor of utilizing unincorporated human rights treaties in their work despite the absence of legislation giving domestic legal effect to such treaties.⁸⁵ It entails developing a more *flexible* conception of the role of such treaties in interpreting domestic legal texts.⁸⁶ Judges engaged in this transnational shift no longer treat unincorporated human rights treaties as having no domestic legal effect, but have developed a wider range

81 For instance, the Yale Law School's annual Global Constitutionalism was a forum aimed at fostering such transnational dialogue on constitutional law.

82 Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AMERICAN JOURNAL OF INTERNATIONAL LAW 82, 84 (2004).

83 Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUMBIA LAW REVIEW 628, 633-34 (2007).

84 *Id.* at 633.

85 *Id.*; see also Michael Kirby, *The Impact of International Human Rights Norms: 'A Law Undergoing Evolution'*, 25 WESTERN AUSTRALIAN LAW REVIEW 130 (1995).

86 Waters, *supra* note 83, at 635.

of interpretive incorporation techniques to utilize treaties in domestic adjudication.⁸⁷

An important forum for transnational dialogue among Commonwealth judges is a series of Judicial Colloquiums held between 1988 and 1998. Organized by the human rights non-governmental organization Interights and the British Commonwealth Association (an intergovernmental organization representing fifty-three Commonwealth member states), these colloquia have been instrumental in creating a common aspiration among common law judges to develop and advocate judicial principles that take a more robust view of judicial role in protecting rights. The most prominent set of principles were the ones declared in 1988 at the conclusion of the Judicial Colloquium held in Bangalore, India. These are the 1988 Bangalore Principles, referred to above. Nonetheless, while the Principles declare that national courts should “have regard to international obligations,” they also state that:

[W]here national law is clear and inconsistent with the international obligation of the state concerned, in common law countries the national court is obliged to give effect to national law. In such cases the court should draw such inconsistency to the attention of the appropriate authorities since the supremacy of national law in no way mitigates a breach of an international legal obligation which is undertaken by a country.⁸⁸

The 1988 Bangalore Principles therefore entail balancing the conventional and limited role of the judiciary in implementing human rights treaties with the judicial impetus to protect individual human rights from state violations. On the one hand, judges affirm the primacy of domestic law (and implicitly, parliament’s role in incorporating international law). On the other hand, judges assert a public policy (which judges are bound to uphold) to give effect to clearly established rules of international law and, to the extent possible, interpret legislation so as to avoid a conflict with international law.⁸⁹ This rests on a legal fiction, that there is “prima facie presumption that Parliament does not intend to act in breach of interna-

87 *Id.* at 636.

88 1988 *Bangalore Principles*, *supra* note 40.

89 MALCOLM SHAW, *INTERNATIONAL LAW* 139, 153 (6th ed. 2008).

tional law, including therein specific treaty obligations.”⁹⁰ Thus, although the 1988 Principles provided a normative appeal for a judicial role in incorporating international law, this is still limited by the need to respect the doctrine of the separation of powers and the proper role of parliament.

In contrast, the 1998 Colloquium went further in conceptualizing the judiciary as having an even more robust role in achieving human rights. By 1998, commonwealth judges have come to see themselves as more central to the realization of human rights.⁹¹ The colloquium concluded with the statement that takes an even more assertive view of judicial function:

[F]undamental human rights form part of the public law of every nation, protecting individuals and minorities against the misuse of power by every public authority and any person discharging public functions. It is the special province of judges to see to it that the law’s undertakings are realized in the daily life of the people.⁹²

This judicial theory sees human rights as a normative framework which judges are bound to apply. It sees judges as not only operating within the domestic system but also as engaging in the international sphere. Judicial interpretation is thus aimed at achieving substantive convergence between the domestic legal system and the international human rights system.⁹³ This suggests that international human rights law is the “primary, authoritative

90 *Salomon v. Comm’r of Customs and Excise*, [1967] 2 Q.B. 116, 143 (Eng.).

91 *Waters*, *supra* note 83, at 648.

92 COMMONWEALTH SECRETARIAT, *DEVELOPING HUMAN RIGHTS JURISPRUDENCE VOL. 8: EIGHTH JUDICIAL COLLOQUIUM ON THE DOMESTIC APPLICATION OF INTERNATIONAL HUMAN RIGHTS NORMS* 267-70 (2001); *see also* Lord Lester of Herne Hill QC, *The Challenge of Bangalore: Making Human Rights a Practical Reality*, 25 COMMONWEALTH LAW BULLETIN 47 (1999).

93 *See* Vicki Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARVARD LAW REVIEW 109 (2005). It should be noted that treating unincorporated human rights treaties as soft law or hard law can conform to the view that convergence with international law (and laws of other nations) is desirable. This is what Jackson has called the Convergence Model that the constitution is best viewed as a site for implementing international law or for the development of transnational norms.

source for human rights” and that domestic law is “merely derivative of international human rights law.”⁹⁴

The influence of the 1988 Bangalore Principles can be discerned from the High Court decision in *Noorfadilla* where the High Court referred the principles in support. As the Court noted: “The Chief Justice of Malaysia at that time was one of the participants of the colloquium.”⁹⁵ This served to reinforce the Court’s determination that it is part of its judicial obligation to have regard to Malaysia’s obligations under CEDAW in defining equality and gender discrimination under Article 8(2) of the Federal Constitution.⁹⁶

Notably, the Bangalore Principles were first agreed to in 1988, more than twenty years before *Noorfadilla* was decided. The delayed acceptance and influence of these principles could be attributed to the constitutional crisis that thrust the Malaysian judiciary into a state of disarray in 1988. This was the year when the Malaysian judiciary became embroiled in a clash with the executive under then Prime Minister Mahathir Mohammad’s administration. It is widely known that the executive was reacting to a series of public law cases that went against the interests of the ruling party. As the judiciary fought off executive interference and sought to assert its independence, this led to an executive maneuver for an inquiry into alleged judicial misconduct.⁹⁷ It was a clash that the judiciary lost; the Lord President and two Supreme Court judges were unceremoniously removed from office.⁹⁸ Three other Supreme Court judges were suspended but later reinstated. It is notable that Malaysia’s representative at the 1988 Bangalore Colloquium was Tun Salleh Abas, the Lord President who was removed

94 Waters, *supra* note 83, at 648.

95 Noorfadilla, *supra* note 3, at ¶ 25.

96 *Id.* ¶ 26.

97 V. Sinnadurai, *The 1988 Judiciary Crisis and its Aftermath*, in CONSTITUTIONAL LANDMARKS IN MALAYSIA: THE FIRST 50 YEARS 1957–2007 173 (Andrew Harding & H. P. Lee eds., 2007); Khoo Boo Teik, *Between Law and Politics: The Malaysian Judiciary since Independence*, in LAW, CAPITALISM AND POWER IN ASIA: THE RULE OF LAW AND LEGAL INSTITUTIONS (Kanishka Jayasuriya ed., 1999).

98 Tun Mohamed Salleh Abas, MAY DAY FOR JUSTICE (1989); Andrew Harding, *The 1988 Constitutional Crisis in Malaysia*, 39 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 57 (1990).

in this crisis.⁹⁹ The Malaysian judiciary did not participate in subsequent years.¹⁰⁰ As mentioned, the last commonwealth judicial colloquium in this series was in 1998.¹⁰¹

The recent revival of the Bangalore Principles and the restoration of the sense of transnational judicial dialogue could be a sign that the judiciary is emerging from this period of crisis. In 2008, a Panel of Eminent Persons cleared the removed Supreme Court judges of any wrongdoing.¹⁰² The Panel concluded that there was no cogent material available to frame a triable charge against the Lord President, Tun Salleh Abas. Not only was the Lord President declared innocent of the charges against him, he was also deemed to have been performing his constitutional duty to uphold and protect the doctrine of separation of powers and the rule of law.¹⁰³ It should be noted that this was not an official panel – the Malaysian government repeatedly refused to open an official inquiry into the incident – but was jointly established by the Malaysian Bar Council, the International Bar Association, Lawasia, and Transparency International. The Panel's conclusions were however crucial in restoring the reputations of the respective judges,

99 See COMMONWEALTH SECRETARIAT, *DEVELOPING HUMAN RIGHTS JURISPRUDENCE VOL. 7: SEVENTH JUDICIAL COLLOQUIUM ON THE DOMESTIC APPLICATION OF INTERNATIONAL HUMAN RIGHTS NORMS* 217-18 (1998).

100 *Id.* at 219-37. In 1989, the judicial colloquium was held in Harare, Zimbabwe, and resulted in the Harare Declarations of Human Rights. The 1990 judicial colloquium was held in Banjul, The Gambia, and concluded with the Banjul Affirmation. In 1991, the judicial colloquium took place in Abuja, Nigeria, resulting in the Abuja Confirmation. The Baliol Statement of 1992 came out of the 1992 judicial colloquium in Oxford, whereas the 1993 judicial colloquium took place in South Africa and concluded with the Bloemfontein Statement. The 1996 judicial colloquium was held in Guyana, and produced the Georgetown Conclusions.

101 See COMMONWEALTH SECRETARIAT, *supra* note 99, at ix-x. The last judicial colloquium in this series was held in 1998 in Bangalore, India. Judges from Australia, Bangladesh, Canada, India, New Zealand, Pakistan, South Africa, Sri Lanka, Uganda, United Kingdom, USA and Zimbabwe attended.

102 *Report of the Panel of Eminent Persons to Review the 1988 Judicial Crisis in Malaysia*, THE MALAYSIAN BAR (July 26, 2008), http://www.malaysianbar.org.my/index.php?option=com_docman&task=doc_view&gid=1715&Itemid=332.

103 See Mahaletchumi Balakrishnan, *Panel of Eminent Persons Report on the 1988 Judicial Crisis in Malaysia*, THE MALAYSIAN BAR (Sept. 2, 2008), http://www.malaysianbar.org.my/bar_news/berita_badan_peguam/panel_of_important_persons_report_on_the_1988_judicial_crisis_in_malaysia.html.

and, possibly, rebuilding the dignity of the judiciary in the long run. One significant observation to be made from this is also the self-appointed role of the Malaysian Bar Council in not only upholding judicial independence and the rule of law as core values of the Malaysian legal system, but, as the next section demonstrates, also of human rights in general.

Further evidence that the Malaysian judiciary may be recovering from the traumatic period of the constitutional crisis can be seen in its participation in a 2009 Judicial Colloquium on the Domestic Application of International Human Rights Norms in Bangkok, Thailand. Convened by the Office of the United Nations High Commission for Human Rights, participants at the colloquium referred to the 1998 Bangalore principles and subsequent outcomes on the commonwealth judicial colloquia, and affirmed that:

[J]udiciaries should consider referring, where pertinent, to the jurisprudence of the UN human rights treaty bodies and of the regional human rights mechanisms, in interpreting the international human rights treaties binding their States and their domestic Constitutions and Bills of Rights protecting these rights.¹⁰⁴

The Chief Justice of Malaysia led the Malaysian delegation.¹⁰⁵ This resumption of participation in the transnational judicial dialogue after a long period of disengagement is significant.

b. Malaysian Lawyers and Human Rights Advocacy

Another crucial factor in the rise in human rights discourse and the mitigation of strict dualism in the courts is the instrumental role of the Malaysian Bar Council in mainstreaming human rights among lawyers and the public. This should, at least partially, account for the increase in human rights arguments being raised in the courts over the last decade. The Bar Council's Human Rights Committee, for instance, expressly aims to "[i]ncrease the level of awareness and education of human rights norms

104 The Office of the United Nations High Commissioner for Human Rights, *Judicial Colloquium on the Domestic Application of International Human Rights Norms* 4 (Mar. 23-25, 2009), www2.ohchr.org/english/bodies/docs/Bangkok_declaration_23-25march09.doc.

105 This was the then Chief Justice Tan Sri Dato' Seri Zaki bin Tun Azmi, who was accompanied by two Court of Appeal Judges, a High Court Judge, and a Judicial Commissioner of the High Court.

within the Malaysian Bar and the public” and it does so through a range of advocacy, monitoring, and training activities.¹⁰⁶ It has been an active participant in monitoring Malaysia’s human rights treaty obligations, noting for instance when periodic reports are due under CEDAW and the CRC, and in making submissions to the Human Rights Council as part of the Universal Periodic Review process.¹⁰⁷ These efforts create an awareness and understanding among lawyers and the public of Malaysia’s human rights obligations, and empower them to bring or substantiate legal claims with arguments premised upon international human rights law.

As Harding and Whiting highlight, Malaysian lawyers have been able to mobilize and sustain efforts to defend civil and political rights as well as other core values commonly underlying liberal legal systems (such as the rule of law, the independence of the judiciary, and the integrity of the constitution and of constitutional government).¹⁰⁸ Harding and Whiting identify five reasons for this. First, they argue, Malaysian lawyers have been able to preserve the Bar’s corporate autonomy, and resist state interference in its self-governance.¹⁰⁹ Secondly, they contend that Malaysian lawyers have been able to forge crucial alliances with civil society advocacy groups and use mass media (particularly new digital media) effectively. The third reason Harding and Whiting identify is the “cultural orientation of common lawyers to liberal ‘legalism.’”¹¹⁰ A fourth reason is that since civil and political rights are constitutionally guaranteed, lawyers are in a position to frame social and political conflict in legal terms, specifically in terms

106 For an overview of the range of activities, see Malaysian Bar Council, *Human Rights Committee: 2012/2013 Annual Report*, THE MALAYSIAN BAR (2013), http://www.malaysianbar.org.my/index.php?option=com_docman &task=doc_view&gid=4125.

107 See for instance, Malaysian Bar Council, *Submission of Bar Council Malaysia for the Universal Periodic Review of Malaysia 2013*, THE MALAYSIAN BAR (2013), http://www.malaysianbar.org.my/index.php?option=com_docman&task=doc_view&gid=4096&Itemid=332.

108 Andrew Harding & Amanda Whiting, *Custodians of Civil Liberties and Justice in Malaysia: The Malaysian Bar and the Moderate State*, in *FATES OF POLITICAL LIBERALISM IN THE BRITISH POST-COLONY: THE POLITICS OF THE LEGAL COMPLEX* 247 (Terence C Halliday et al. eds., 2012) available at <http://www.law.unimelb.edu.au/files/dmfile/CustodiansofCivilLibertiesandJustice20122.pdf>.

109 *Id.* at 298.

110 *Id.*

of constitutional rights and their violations. Lastly, the politicization of a broad range of policy issues has magnified the importance of constitutional litigation as it “shifts social and political disputes into courts and translates them in lawyerly parlance of due process.”¹¹¹

This is especially consequential and confirms Bruce Ackerman’s observation that the transformation of the professional culture is most crucial to successful social movements. Empirical evidence, he argues, shows that “the mobilization of a powerful movement for constitutional change is neither necessary nor sufficient for large doctrinal changes” in courts.¹¹² Instead, Ackerman observes that successful social movements have to change the political culture and, through it, the professional culture.

Indeed, the Bar Council’s close alliance with civil society organizations to monitor, critique, and lobby the government on has also contributed to a strengthened human rights movement in Malaysia.¹¹³ This movement operates on multiple fronts, encompassing a wide range of NGOs, the Bar Council, as well as the human rights commission (SUHAKAM).¹¹⁴

111 *Id.*

112 Although he speaks of the Supreme Court of the United States, this insight is generalizable for other constitutional systems, especially in common law jurisdictions that follow the doctrine of stare decisis. Bruce Ackerman, *Interpreting the Women’s Movement*, 94 CALIFORNIA LAW REVIEW 1421, 1424 (2006).

113 Whiting for instance has mapped out a constructive cooperation between the Bar Council with human rights and women’s organizations in law reform. Amanda J. Whiting, *Secularism, the Islamic State, and the Malaysian Legal Profession*, 5 ASIAN JOURNAL OF COMPARATIVE LAW 18-19 (2010). See *Joint Statement by COMANGO, JOAS and Bar Council Human Rights Committee - More Attention and Action Needed on Human Rights*, THE MALAYSIAN BAR (Oct. 28, 2013), http://www.malaysianbar.org.my/human_rights/joint_statement_by_comango_joas_and_bar_council_human_rights_committee_more_attention_and_action_needed_on_human_rights.html, for an example of such cooperation.

114 See Meredith L. Weiss, *The Malaysian Human Rights Movement*, in SOCIAL MOVEMENT IN MALAYSIA: FROM MORAL COMMUNITIES TO NGOS 140 (Meredith L. Weiss & Saliha Hassan eds., 2003); see also Asian Human Rights Charter, May 17, 1998, available at <http://www.refworld.org/pdfid/452678304.pdf>. While these various human rights actors have diffused and divergent goals, they share a common ground in their endorsement of the UDHR. For instance, several NGOs endorsed a Malaysian Charter on Human Rights in 1999 which enumerates a broad range of civil and political rights due to Malaysians, which is based primarily on the UDHR as well as the Asian Human Rights Charter.

Cooperation and support among these organizations is especially crucial considering the tight restrictions on freedom of assembly, speech, and the press.¹¹⁵ As Weiss highlights, civil society organizations “have played a key role in exploring and espousing political, social and economic reforms, in the process sustaining a nucleus of committed activists.”¹¹⁶

Thus, the rise in human rights discourse and the increasing acceptability of human rights argumentation in Malaysian courts can be attributed to a large extent to the involvement of Malaysian lawyers increasingly familiar with international human rights norms, whether by virtue of the work of the Malaysian Bar Council or through collaboration with civil society organizations involved in human rights work.

7. CONCLUSION

In conclusion, there has been increased engagement with human rights norms in Malaysian courts. Although the results are mixed, with the court accepting the direct application of human rights law in some cases and rejecting it in other cases, it is at least clear that the strict position of *absolute non-relevance* has now given way to the intermediate position characterized by the proposition that *domestic law (and constitutional law) prevails*. Whether this greater openness towards international human rights law will be sustained and whether it could further influence legal interpretation depends to a large extent on judicial self-definition and on the involvement of Malaysian lawyers in strategic litigation. Borrowing from Ignatieff’s still apposite observation, the success of global human rights movement lies in its ability to go local.¹¹⁷ The ability to sustain efforts to domesticate human rights law in local courts is crucial to this process.

115 See Meredith L. Weiss, *Edging Toward a New Politics in Malaysia: Civil Society at the Gate?*, 49 *ASIAN SURVEY* 741 (Sept./Oct. 2009), for discussion examining the role of civil society in bringing about political changes and noting the “sheer scale” of civil societal involvement in the 2008 general elections.

116 Meredith L. Weiss, *Malaysian NGOs; History, Legal Framework, and Characteristics*, in *SOCIAL MOVEMENT IN MALAYSIA: FROM MORAL COMMUNITIES TO NGOS* 42 (Meredith Weiss & Saliha Hassan eds., 2003).

117 MICHAEL IGNATIEFF, *HUMAN RIGHTS AS POLITICS & IDOLATRY* 70 (1999).

An Overview of Indonesia's Protection on Women Migrant Workers

Koesrianti¹

1. INTRODUCTION

International migration has increased dramatically over the last four decades, particularly in high-income countries. Wealthy countries have attracted millions of people who want a better standard of living, social services, safe communities, healthy environment, and overall security.² For instance, the current numbers of migrant laborers who work and live in the countries of the Middle East are approximately 10 million, and a majority of them are from Southeast Asia, South Asia, and Africa. Migration brings benefits to both sending and receiving states in remittances and cheap labor respectively. Currently, at least 232 million people in the world have become migrants for a variety of reasons.³

Millions of Indonesians live in foreign countries. Approximately 400,000 Indonesians are registered to have legally migrated to other countries each year since 1998.⁴ The actual figure is estimated to be much higher

1 LL.M. (New South Wales); Ph.D (New South Wales); Associate Professor, Faculty of Law, Universitas Airlangga.

2 ANDRES SOLIMANO, *INTERNATIONAL MIGRATION IN THE AGE OF CRISIS AND GLOBALIZATION: HISTORICAL AND RECENT EXPERIENCES* 4 (2010).

3 *Migration and Human Rights*, OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, available at <http://www.ohchr.org/en/Issues/Migration/Pages/MigrationAndHumanRightsIndex.aspx> (last visited Mar. 26, 2015). This number increased dramatically. In 2005, only 119 million people worldwide were living in a country different from the country where they were born.

4 Chitrawati Buchori & Mia Amalia, *Fact Sheet: Migration, Remittance, and Female Migrant Workers*, THE WORLD BANK, 1 (2006), http://www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/2009/10/26/000333037_20091026001512/Rendered/PDF/512450WP0Box341actsheetmigrationeng.pdf.

A large number of migrants today move between developing countries, and

because many migrate illegally.⁵ Some migrant workers are considered as documented or in a regular situation, while others are considered as undocumented or in an irregular situation based on their administrative status under national immigration laws. The latter also can be referred to as illegal migrant workers and treated differently by their destination states. The real number may be twice or three times bigger, partly due to the high incidence of undeclared domestic work and the fact that national statistics often do not count domestic workers as a distinct category. Pursuant to the regulations and migration policies, Indonesian agencies are obliged to report data of migrant workers to the Indonesian Embassy of the destination countries but these agencies often ignore this obligation.⁶

The Ministry of Foreign Affairs stated that the total number of Indonesian citizens who reported to the Indonesian Embassy in foreign countries is more than three million as can be seen in *Table 1*. Approximately 30% of this total number represents migrant workers. Indonesian migrant workers have been called “foreign exchange heroines” as they send a large amount of their remittance to Indonesia every year.⁷ However, the National Agency for the Placement and Protection of Overseas Labor (Badan Nasional Penempatan dan Perlindungan Tenaga Kerja Indonesia, BNP2TKI) claims that there are at least six million Indonesian migrant workers in the formal and informal sectors.

Destination country	Total number	Percentage
Malaysia	1,410,787	42%
Saudi Arabia	641,039	19%
Middle East	379,963	11%

around forty percent (40%) of the total global migrants have moved to a neighboring country within their region of origin.

5 *Id.*

6 Tatang Budi Utama Razak, Director of Protection Indonesian Citizens and Legal Entities, Ministry of Foreign Affairs, Address at Workshop on the Improvement Capacity of District Civil Servant in Implementing Diplomacy and Technical Cooperation (Mar. 21, 2013).

7 Imam Bukhori, *Remitansi TKI Tahun 2013 Capai RPG 81.34 Trilyun*, BADAN NATIONAL PENEMPATAN DAN PERLINDUNGAN TENAGA KERJA INDONESIA (Dec. 23, 2013, 7:06 AM), <http://www.bnp2tki.go.id/read/8591/Remitansi-TKI-Tahun-2013-Capai-Rp-8134-Trilyun>. In 2013, the remittance was Indonesian Rupiah (IDR) 81,345 billion or equivalent to USD 7,395,017,768.

Destination country	Total Number	Percentage
East Asia	359,844	11%
Southeast Asia	249,100	7%
United States of America	130,851	4%
Europe	59,735	2%
Pacific Countries	55,591	2%
Africa	4,439	1%
South Asia	2,760	1%
Total	3,294,109	100%

Table 1: Destination countries and total number/percentage⁸

In 2014, the number of Indonesian migrant workers making a living in the Middle East was 1,269,000; of this number, 1,009 migrant laborers live in Saudi Arabia.⁹ They fill employment and make significant contributions to the host country's economy as well as to their families back home. They are often found working in jobs that are dirty, dangerous, and degrading (so-called 3D jobs) that people in the receiving state do not wish to do.¹⁰

The number of migrant workers — especially female workers — has been increasing throughout the decades due to the demand for migrant women to fill low-wage service work in many cities throughout the world. However, the reports of violations and abuse of migrant workers' rights have also been escalating significantly.¹¹ These violations include inhumane

8 Tatang Budi Utama Razak, *supra* note 6.

9 *Number of Indonesian Migrant Workers by Host Country*, BANK INDONESIA & BNP2PKI, 1, http://www.bi.go.id/seki/tabel/TABEL5_30.pdf (last visited Mar. 26, 2015); See also Gazafar Ali Khan, *Indonesian Mission Working Toward Solving 32 Maids Cases*, ARAB NEWS (June 26, 2012), <http://www.arabnews.com/indonesian-mission-working-toward-solving-32-maids-cases>.

10 See John Connell, *Kitanai, Kitsui, and Kiken: the Rise of Labor Migration to Japan* (Economic & Regional Restructuring Research Unit, Working Paper No. 13, 1993). 3D jobs are often defined as dirty, dangerous and demeaning/demanding. This terminology came from the Japanese term “3K” referring to *kitanai*, *kiken*, *kitsui*. These jobs are described as high risk and of low status.

11 Sevil Sonmez et al., *Human Rights and Health Disparities for Migrant Workers in the UAE*, HHR (Dec. 2011), available at <http://www.hhrjournal.org/wp-content/uploads/sites/13/2013/06/Sonmez21.pdf>. For example, the total cases in 2011 was 38,880 and the total number of Indonesian migrant workers subject to the

treatment, unsafe working conditions, non-payment of wages and multiple deductions, unreasonable working hours and conditions, physical and verbal abuse, accidents and illnesses, as well as unfair treatment in legal proceedings.¹² Related to these violations, domestic workers even have less recourse when their rights are violated since they are systematically excluded from most labor law protection. As a consequence, they receive less protection than workers engaged in other types of labor if they receive one at all.

While some Indonesian female domestic workers find being a migrant a positive and empowering experience, for others, it can be a bitter experience as they have to endure human rights violations, discrimination, and exploitation. Indeed, the migrant workers have less legal protection compared to local workers. Although some destination countries have employment laws that provide rights and obligations for migrant workers, the lack of effective enforcement and the migrant workers' dependence on their employers and recruitment agents, lead them to have few or no safeguards against abuse. To some extent, migrant workers, particularly informal female migrant workers, are considered vulnerable. Many migrant workers face violence and abusive treatments within the entire spectrum of their migration. Therefore, Indonesia, as the sending state, should provide adequate protection to female migrant workers.

This article attempts to identify the root of the problem of vulnerable, informal Indonesian migrant workers and evaluate their protection based on the concept of the state responsibility. It discusses the responsibility of Indonesia over migrant workers, especially Indonesian female domestic migrant workers. This article analyzes the concept of state responsibility over informal migrant labor that requires the provision of protection during the entire process of employment including the stages of pre-departure, employment, and their return home. It simultaneously reviews Indonesian government policies and regulations as well as the institutions that deal

death penalty was 231; Tatang Budie Utama Razak, *Perlindungan Warga Negara Indonesia di Luar Negeri: Proyeksi dan Tantangan*, Rapat Koordinasi Nasional Perlindungan Warga Negara Indonesia 2013, Jakarta, (Aug. 18, 2013).

12 RESEARCH CENTER OF INDONESIAN FOREIGN AFFAIRS MINISTRY & UNIT CENTRE FOR LAW PROTECTION OF LEGAL ENTITIES AND CITIZENS ABROAD LAW FACULTY UNIVERSITAS AIRLANGGA, *BUKU PETUNJUK TEKNIS* 45 (2011).

with migrant worker protection. Lastly, this article draws conclusions and provides suggestions for improvement.

2. INDONESIAN WOMEN MIGRANT WORKERS

According to the Indonesian Ministry of Foreign Affairs, of the 3,965,000 Indonesian migrant workers, 67% are women.¹³ More than 90% of Indonesian female migrant workers work in the informal sector as domestic workers while the rest work in agricultural and industrial sectors as day laborers, caregivers to the elderly, shop assistants, and waitresses.¹⁴ Thus, a majority of Indonesian female migrant workers work informally in the receiving states.

Due to the characteristic of their work being domestic in nature, housemaid workers are a vulnerable group. Indonesian housemaid workers face work-related problems including unpaid work, physical abuse, sexual harassment, overwork, dissatisfaction, disagreements with their employer, sickness, and the possibility of facing death penalty.¹⁵ Of these problems, the death penalty is the most serious and this has escalated the tension in Indonesian society due to frequent news media reports on their plight.

Most of the violations of rights are suffered by Indonesian unskilled domestic migrant workers. There are reports of abuse upon Indonesian female migrant workers by their Saudi Arabian employers including physical abuses and in some cases have led to the death of Indonesian maids.¹⁶ In addition, some were even arrested on alleged charges of murder, witchcraft, and sexual offenses, and were subject to threats of the death penalty.¹⁷ As indicated in *Table 1* above, Malaysia and Saudi Arabia are the two biggest receiving countries of Indonesian migrant workers. Therefore, the problems of Indonesian migrant workers frequently occur in these two destination countries. In Saudi Arabia, Indonesian migrant workers are largely located in Riyadh and Jeddah, 225,453 (35%) and 415,586 (65%)

13 Tatang Budi Utama Razak, *supra* note 6.

14 Buchori & Amalia, *supra* note 4.

15 Tatang Budi Utama Razak, *supra* note 11.

16 Statement Migrant Day 2011: Pemerintah Masih Mengingkari Tanggung Jawab Perlindungan Buruh Migran, Migrant Care, *available at* <http://www.migrantcare.net/mod.php?mod=publisher&op=viewarticle>.

17 Gazafar Ali Khan, *supra* note 9.

respectively.¹⁸ Meanwhile in Malaysia, most migrant workers reside in Kuala Lumpur 620,817 (44%), in Penang 298,318 (21%), in Johor Bahru 202,352 (14%), in Kuching 254,111 (18 %) and in Kinabalu City 35,189 (3%).¹⁹ These two countries are the most popular destination for migrant workers because of cultural and religious reasons.²⁰

The number of closed cases in 2012 that were reported to the National Agency for Placement and Protection of Indonesian Migrant Workers was 2,714 cases. These included case involving unpaid wages (590), no communication (640), jobs not compatible with the employment contract (216), death in destination countries (164), disatisfied migrant workers (153), abusive treatment by employers (141), sickness (112), unsuccessful job placement (81), unfair termination (59), sexual harrasment (45), deduction of wages (45), and accidents in the workplace (33).²¹ Up to September 2012, of the 5,934 cases of Indonesian domestic migrant workers abroad, 3,484 cases were closed and the rest were in the processes of finalization.²² Many respondents indicated that the source of these problems was rooted within Indonesia itself, namely, the pre-departure process of labor migration.

In some cases, as soon as the migrant travels abroad, the attitude of the authorities appears to change as they determine that legal responsibility is transferred to the foreign employers and the destination countries. However, as with the destination countries, the home country should also be responsible for the migrant workers especially when they are injured in the foreign host country. Migrant workers deserve protections since the labor

18 Tatang Budi Utama Razak, *supra* note 11.

19 Tatang Budi Utama Razak, *supra* note 6..

20 Koesrianti, Paper presented at the 7th Asian Law Institute Conference: The Role of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers for Indonesia in Giving Protection to Its Migrant Workers (May 25, 2010). See also Pande Ketut Trimayuni, *Undocumented Women Indonesian Migran Workers Abroad: a Malaysia Case Study*, PPIUK (2007), http://ppiuk.org/archive/ejournalfolder/4/Undocumented_Women_Indonesian_Migrant_Workers_Abroad.pdf.

21 *Dalam Setahun Crisis Center BNP2TKI Selesaikan 2.714 Kasus TKI*, BADAN NATIONAL PENEMPATAN DAN PERLINDUNGAN TENAGA KERJA INDONESIA (June 27, 2012, 5:00 PM), <http://www.bnp2tki.go.id/read/6309/Dalam-Setahun-Crisis-Center-BNP2TKI-Selesaikan-2.714-Kasus-TKI>.

22 *Id.*

companies receive the benefits of migrant labor as much as the governments of the receiving countries along with the workers' home countries.

The entire process of migrant labor comprises of recruitment, preparation for migration, departure, employment, and return to Indonesia. With this process, the main problem for the protection of Indonesian migrant workers begins with the recruitment process in Indonesia. At least three reasons for this problem can be identified:

1. Poverty and education are the major reasons for migration. The majority of migrant workers who are sent to receiving states are unskilled and poor.
2. Migrant works have become commercial objects for recruiting agents as the more workers they are able to obtain, the more profit they gain. Therefore, many Indonesian migrant workers are recruited through dishonest claims made by brokers and middlemen. Work candidates often do not fully understand the scope of the work and are generally unaware of the destination countries which they are being sent to.
3. Migrant work is a very profitable business for some people and institutions including "persons" from government institutions and agencies that face "conflicts of interest" between them. In addition, these "conflicts of interest" lead to a weak and poor recruitment and job-placement process.

In sum, all of factors weaken the bargaining position of the Indonesian government with the receiving states in providing protection to migrant workers.

3. THE CHARACTERISTIC OF THE WOMEN'S MIGRANT DOMESTIC WORK

The International Convention on the Protection of the Rights of All Migrant Workers and the Members of Their Families (ICRMW)²³ defines the term "migrant worker" as any person who "is to be engaged, is engaged or

23 The International Convention on the Protection of the Rights of All Migrant Workers and the Members of Their Families, Dec. 18, 1990, 2220 U.N.T.S. 3 [hereinafter ICRMW]. It is the most comprehensive international treaty in the field of migration and human rights. It has been ratified by forty-one countries;

has been engaged in a remunerated activity in a State of which he or she is not a national.”²⁴ The ICRMW is an instrument of international law that is meant to protect migrant workers whether they are in regular or irregular situations.²⁵ The ICRMW is an attempt to ensure that a broad range of human rights (civil and political, and economic, social and cultural) is accessible to migrant workers. It should be noted that the group of people that are vulnerable to unfair treatment includes legal immigrants, asylum seekers, and refugees. One group, referred to as undocumented immigrants, is asylum seekers who are denied permanent residence permits, or people who overstayed or stayed in the destination countries longer than their visa allowed.²⁶ Overstayers are considered illegal migrants.

Most of the provisions of the ICRMW offer a more precise interpretation of human rights in the case of migrant workers, and establish a few new rights specific to the condition of migrants, such as the right to transfer remittances or to have access to information about the migration process.²⁷ In short, the ICRMW is a major step towards the protection of migrant workers' rights. This means that “everyone” referred to in human rights instruments “really means every human being, that non-citizens are covered and protected by most of the provisions of human rights instruments, and that these instruments also apply to immigration law . . . this may appear self-evident today. It surely was not . . . in the early 1970s.”²⁸

most of them are described as “sending countries” such as Mali, Philippines, and Sri Lanka. Indonesia ratified ICRMW on Apr. 12, 2012 by Law 6/2012.

- 24 *Id.* art. 2. Article 3(d) states that refugees and stateless persons are only included under the Convention if such application is provided in national legislation.
- 25 Regular situation refers to documented migrant workers while irregular situation refers to undocumented migrant workers.
- 26 Walter Deville, *The Right to Health Care for Vulnerable Population Groups in the Netherlands and in Europe*, in HUMAN RIGHTS AND BIOMEDICINE 87, 89 (Andre den Exter ed., 2010).
- 27 Paul de Guchteneire & Antoine Pecaud, *Introduction: the UN Convention on Migrant Workers' Right*, in MIGRATION AND HUMAN RIGHTS: THE UNITED NATIONS CONVENTION ON MIGRANT WORKERS' RIGHTS 1, 8 (Paul de Guchteneire et al. eds., 2009).
- 28 Kees Groenendijk, *Introduction to Irregular Migration and Human Rights: Theoretical, European, and International Perspectives* xvii, xix (Barbara Bogusz et al. eds., 2004).

Based on the qualification of jobs in destination countries, migrant workers are divided into formal and informal migrant workers.²⁹ Domestic migrant workers are one of the categories of informal workers that are similar to gardeners, plantation workers, construction employees, and transportation and services workers. The ICRMW excludes from the scope of its application a number of categories of workers³⁰ and is silent about domestic migrant workers.

It can be said that domestic work is an important occupation for millions of individuals, accounting for up to 10% of total employment in some countries.³¹ The trend over the past decades has been a growing prevalence of migrants amongst domestic workers. Women make up the overwhelming majority of these workers.³² However, for a long time, there has been an omission of explicit references to either domestic work or domestic workers in a broad range of national and international legal frameworks. In other words, there is no proper protection for domestic workers. Protections are further lacking when they work as housemaids in foreign countries. Being a woman worker is worse since they are subjected to additional exploitation and abuse.

Compared to domestic laborers who work in their own countries, domestic migrant workers are confronted with several human rights issues. Generally, migrant domestic workers are at heightened risk of certain forms of exploitation and abuse. Residing in foreign countries is the hardest

29 While formal workers are people who work in proper workplaces with permanent official contract arrangements, informal workers are people who work based on less formal contract arrangements. They can be freelancers or temporary laborer, and their activities and income are partially or fully outside government regulation, taxation, and observation.

30 See ICRMW, *supra* note 23, art. 3. They are international organizations employees, employee of co-operation programs, investors, refugees and stateless persons, students and trainees, and seafarers and workers on an offshore installation.

31 See International Labour Organization, *Report IV(1): Decent Work for Domestic Workers* (2009). There is no accurate data on the number of domestic workers throughout the world, partly due to the high incidence of undeclared domestic work and the fact that national statistics often do not count domestic workers as a distinct category. However, such available data shows that domestic work accounts for between 4 and 10% of total employment in developing countries and between 1 and 2.5% in industrialized countries.

32 *Id.*

experience for uneducated Indonesian female domestic migrant workers as they become a “nobody” once they arrive in the destination countries. The center of their vulnerability is isolation and dependence which can be described in the following:

- 1) an isolated life, far away from home and family, in a foreign land and surrounded by foreign language;
- 2) lack of basic support systems and unfamiliarity with the culture and national labor and migration laws;
- 3) dependence on their job and employer because of migration-related debt and legal status;
- 4) the practices of employment that restrict them from leaving their job;³³
- 5) the simple fact that the migrants' workplace may also be their only shelter; and
- 6) the family members' reliance on remittances that the migrant workers send back home.

A majority of those who are employed as domestic workers are women. It can be said that there are some additional risks for women migrant domestic workers, namely gender-based violence, ranging from sexual harassment to rape. The risks and vulnerabilities are further worsened for migrant domestic workers who are undocumented or in an irregular situation because they often risk deportation if they contact the state authorities to seek protection from an abusive employer. Thus, women domestic migrant workers have multiple risks for certain forms of exploitation and abuse because of the nature of domestic work as well as the capacity of their individual human resources. This is because usually those who want to do this type of work are less educated than those who are engaged in other types of work as it requires little schooling and no formal qualification.

33 For Indonesian migrant workers, the employment contract period usually lasts for two years. The domestic migrant workers cannot leave their workplace before this two-year contract ends. However, this contract can be renewed after the migrant workers go back to Indonesia.

The treatment of domestic workers would change in June 2011 since domestic work was recognized as work equal to other types of formal work when the International Labour Organization (ILO) adopted the historic Convention (No. 189) Concerning Decent Work for Domestic Workers in 2011 and accompanying Recommendation No. 201.³⁴ Convention No. 189 defines domestic work as “work performed in or for a household or households.” The work may include tasks such as, housing cleaning, cooking, washing and ironing clothes, taking care of children, elderly, or sick members of family, gardening, guarding a house, driving a family, and even taking care of household pets.

4. INDONESIA'S RESPONSIBILITY TO PROTECT

In this globalized world, millions of people work outside their country of origin including Indonesian migrant workers. Indonesia has sent formal and informal workers abroad to places such as Saudi Arabia, Hong Kong, Taiwan, Malaysia, and Singapore. If an Indonesian migrant worker is suffers a legal injury, this will incur responsibility of one state to another for the injuries it has caused.³⁵ It is a basic principle of international law that a state that causes an injury to a foreign citizen (national) is responsible to the national's state for the harm done, not to the national herself.³⁶ The rationale is that an injury to a state's national is an injury to that state.

To establish that a state is responsible for an injury caused to an alien or foreign business, there must be (1) “conduct consisting of an action or omission ... attributable to the State under international law;” and (2) the conduct must “constitute ... a breach of an international obligation of the

34 Convention (No. 189) concerning Decent Work for Domestic Workers, June 16, 2011 [hereinafter Convention No. 189]. The Recommendation provides practical guidance concerning possible legal and other measures to implement the rights and principles stated in the Convention without need for ratification by states.

35 Rachel Silvey, *Transnational Domestication: State Power and Indonesian Migrant Women in Saudi Arabia*, 23 *POLITICAL GEOGRAPHY* 245, 248 (2004).

36 EMMERLICH DE VATTEL, *THE LAW OF NATIONS* 156 (1758) “Whoever ill-treats a citizen indirectly injures the state, which must protect the citizen” cited in Lawrence Jahoon Lee, *Barcelona Traction in the 21th Century; Revisiting its Customary and Policy Underpinnings 35 years Later*, 42 *STANFORD JOURNAL OF INTERNATIONAL LAW* 237 (2006).

State.”³⁷ State governments are only responsible for the actions taken by their officials and are not responsible for the acts of private persons, insurrectionists, or rebels within their own territories as held in the *Home Missionary Society Case* (1920).³⁸ In this case, the state government was not found to be negligent or have acted in bad faith in suppressing the insurrection. In regard to the abuse toward migrant workers' rights, all states should respect, protect and fulfill workers' rights wherever they live, considering their contribution to states' development. This is relevant, given the fact that across the entire spectrum of migration — from recruitment to employment to return — the workers occasionally face exploitation and abuse. Therefore, not only does the protection to migrant workers apply when the migrants are actually working, but also during the entire process of their migration including preparation, departure, transit, and the entire period of stay and remunerated activity in the destination state as well as the return to their state of origin or the state of their habitual residence.

Basically, the sending state is responsible for the entire process of migration which is comprised of three stages: pre-departure, on-site job/employment, and the return home stage. Of these stages, the protection of migrant workers in the employment stage when the migrants are actually working is the most difficult task due to the fact that the workers are abroad or outside the jurisdiction of the sending states. However, this does not mean that the other two stages are less important than the employment stage as the capability and capacity of workers are enhanced thoroughly in those stages. It can be said that the success of migrant workers abroad fully depends on the pre-departure stage. The problems of migrant workers would decrease significantly if the sending state sent qualified workers abroad. Notably, of the total problems Indonesian migrant workers face abroad, around 80% of their problems originated from the pre-departure stage. In short, the inadequate protection of migrant workers abroad begins from the pre-departure phase which consists of recruitment, training, document handling, and related issues. It should be noted that female

37 Rep. of the Int'l Law Comm'n, 53d Sess., Apr. 23-June 1, July 2-Aug. 10, 2001, U.N. Doc. A/56/10; GAOR, 56th Sess., Supp. No.10 (2001).

38 U.N. OFFICE OF LEGAL AFFAIRS, REPORTS OF INTERNATIONAL ARBITRAL AWARDS: HOME FRONTIER AND FOREIGN MISSIONARY SOCIETY OF THE UNITED BRETHREN IN CHRIST (UNITED STATES) v. GREAT BRITAIN, at 42, U.N. Sales No. 1955.V.3 (2006).

domestic migrant workers are the biggest and most exploited group due to the scope of their work and the looseness of administrative recruitment caused by low educational requirements and the lack needing formal qualifications. The sending state's responsibility over the three stages of the migration process is described below.

The process of recruitment consist of elements such as job information, training, and document handling including employment contracts, and securing information on the destination countries. At this stage, vulnerable and unemployed female villagers are recruited by dishonest and unregulated agencies. In many cases, a "sponsor" or labor broker provides job information as well as manages of the recruitment process.³⁹ For many villagers in Indonesia⁴⁰ a job abroad is seen as a ticket out of poverty. Some of them often sell everything they or their families own and borrow heavily to pay unscrupulous labor brokers and recruitment agencies. The fee for brokers or sponsor is around nine billion IDR per person for arranging travel and the placement of a job abroad.⁴¹ As a consequence, many Indonesian migrant workers are trapped for months in debt bondage because of excessive fees and bribes. Most of them work as low-wage domestic workers abroad. They have to pay their debt when they are working abroad. They cannot have their earnings for at least the first six or eight months of their employment because they have to pay off their debt.

Currently, the government has launched Microfinance Credit (Kredit Usaha Rakyat, KUR) for Migrant Workers that has its purpose to help migrants cover the costs incurred during their transition.⁴² The credit scheme

39 Rusjdi Basalamah, Address at Strategi Peningkatan Kualitas Sistem Perekrutandan Pelatihan TKI, Lokakarya Nasional Perlindungan TKI di LuarNegeri (Mar. 24-25, 2010).

40 Many provinces in Indonesia are categorized as "kantong TKI" (pockets of migrant workers) in Indonesia, namely, East Nusa Tenggara, West Nusa Tenggara, West Java, East Java, Bali, Lombok, and Lampung.

41 Basalamah, *supra* note 39.

42 For example, concerning the Scheme adopted on Jan. 24, 2012, the Head of Regulations for BNP2TKI stated that the credit scheme for Singapore is IDR 10,933,000 with interest and an administrative fee, new migrant workers should pay IDR 14,336,000 which is calculated to equal eight-months' wage; while for currently residing migrant workers, it is IDR 5,448,000 with interest and an administrative fee for a total of IDR 7,168,000.

is designed based on the destination countries of the migrants. Accordingly, this scheme can appear to ease the burden of migrant workers, but it is unable to achieve its purpose because the amount of credit needed is still relatively high for migrant workers. Thus, the migrant workers need to stay abroad to pay off the debt with six to eight months of their wages. Furthermore, in order to get more candidates, brokers often manipulate identification documents.⁴³ As a consequence, most candidates are younger than the official requirement. They may be considered child laborers. This problem is difficult to eradicate due to the dishonesty of labor brokers and because it is an indirect consequence of the recruitment system by the agencies and private labor companies. Many villagers are trapped into human trafficking. The Indonesian government should cut this migration chain by optimizing the role of provincial governments in the process.

Another important issue is the handling of employment contracts. A majority of workers do not understand the substance of their contract because the contract documents, in many cases, are prepared by the agencies and given to the workers just before they take off to go to the destination countries. Therefore, there is no opportunity for them to carefully review the employment contract. Moreover, they cannot understand the substance of the contract because the contracts are usually in English. At this stage, there needs to be state intervention in mediating employment contracts abroad as a form of state responsibility to migrant workers.

Another process is the training program. Before going abroad for the job, the candidates have to attend training programs, namely language and skills training programs. In many cases, the training programs are held as a formality rather than a sincere effort to develop the candidates' skill in order to improve the quality of candidates.⁴⁴ Language skills and information on culture, law of the destination states, including the sponsorship system (*kafala*) are also important parts of this training.⁴⁵ Notably,

43 Documents that should be provided by the candidates are ID Card (KTP); Family Identification Card (Kartu Keluarga); birth certificate; and a letter from parents or husband stating their permission for the candidate.

44 Basalamah, *supra* note 39.

45 See Gwenann S. Manseau, *Contractual Solutions for Migrant Labourers: The Case of Domestic Workers in the Middle East*, 2 HUMAN RIGHTS LAW COMMENTARY 25 (2006), available at <http://www.nottingham.ac.uk/hrlc/documents/publications/hrlcommentary2006/migrantlabourers.pdf>. Sponsorship system or *Kafala* is a

Saudi Arabia has a different culture as well as law from Indonesia. Thus, all of these skills, training, and knowledge are critical for the survival of Indonesian migrant workers abroad.

5. CHALLENGES IN PROTECTING WOMEN MIGRANT WORKERS

The state responsibility of the sending state is important when migrant workers abroad face work-related problems or serious criminal offenses. In some receiving countries, many of them are unable to enjoy freedom of movement since their employers or brokers withhold their passports and wages. For example, Malaysian employers often withhold the passports of their migrant Indonesian housemaids for “security”.⁴⁶ Many of them work and live in sub-standard conditions when they work in destination countries. For many migrant workers, the hope of building a better life for their families soon fade when they realize that they must use the majority of their wages for loan repayment. While migrant workers basically are protected under the international law of human rights,⁴⁷ however, they are not allowed to form or join trade unions, so they cannot organize themselves to bargain collectively for better pay and conditions. They sometimes are physically abused or sexually exploited and can end up being trafficked into various forms of modern-day slavery. Access to justice for those who face such abuses is rarely available or affordable. Therefore, the intervention of the sending state to provide protection for migrant workers in receiving countries is critical.

sponsorship system officially used as recruitment system to find a temporary worker from abroad (usually for 2 years) involving the service of manpower recruitment agencies in Saudi Arabia.

- 46 Amnesty International, Malaysia Must End Abuse of Migrant Workers, at www.amnesty.org/en/news-and-updates/report/malaysia-must-end-abuse-migrant-workers-2010-03-24; *see also*, Lilian Budianto, Indonesia and Malaysia close to deal on Protection Migrant Workers, The Jakarta Post, 08 February 2010, under this 2010 deal, Malaysian employers have the right to hold employees’ passports while the workers are given identity cards issued by Malaysian authorities.
- 47 Report of the International Commission on Intervention and State Sovereignty: Responsibility to Protect, Canada, 2001, at 36; *see also* The International on The Protection of The Rights of All Migrant Workers and Their Members of their Families, Article 7 on Non-Discrimination with Respect to Rights.

The problems of Indonesian migrant workers are very complex and involve many elements of Indonesian bureaucratic government policies as well as the national immigration regulations of destination states. A majority of the cases involving Indonesian migrant workers have occurred in countries where the national labor law gives weak protection to migrant workers which leads to arbitrary conduct by employers and agencies towards them. In other words, a part of the protection that Indonesian migrant workers rely on is the national labor regulations of receiving states. Indonesia is able to conclude a bilateral agreement or Memorandum of Understanding (MOU) with the receiving state in order to give protection to their migrant workers who work in the receiving state. The Indonesian government can elaborate and provide for Indonesian migrant workers' rights in the MOUs, including the rights for sick-leave and vacations or other migrant workers' rights provided for in the ILO conventions. To give more protection to migrant workers abroad, the Indonesian government already has bilateral agreements or MOUs with the following nine countries: United Arab Emirates, Kuwait, South Korea, Taiwan, Malaysia, Qatar, Jordan, Hong Kong, and Japan.⁴⁸

Even though Indonesia has MOUs on migrant workers with destination states, these MOUs cannot directly give protection to migrant workers individually as a MOU cannot replace the national labor laws of destination states. For example, the minimum wage provision in the MOU cannot be materialized if the national labor law is enacted to give effect to the provision. Indeed, most MOUs are concern with and designed to provide standards for regulations and administrative procedures concerning placement and acceptance of migrant workers in receiving states and do not include protection for migrant workers.⁴⁹ For instance, if Indonesia intended to insert protection provisions in a MOU, this kind of protection is merely an indirect protection in the form of cooperation between Indonesia and destination states. However, the application of the MOU would still be limited especially when it conflicts with the labor law of destination states.

48 Roostiwati, Address at Perlindungan TKI di Luar Negeri, Perluasan Kesempatan Kerjadan Peningkatan Pelayanan Penempatan, Lokakarya Nasional Perlindungan TKI, Surabaya (Mar. 24, 2010).

49 Lisa Thomas, *Worker Protection*, TIME, July 28, 2009, [http://content.time.com/time/world/article/ 0,8599,1913134,00.html](http://content.time.com/time/world/article/0,8599,1913134,00.html).

The protection of Indonesian migrant workers can still be ensured by having a proper employment contract between the employer and migrant worker as the employee. So far, the contract is prepared by the agent since most migrant workers are less educated which can lead to weak protection for migrant workers. The circumstances are further complicated in Saudi Arabia where foreign workers should have employment contracts written in Arabic in order to be issued a work permit.⁵⁰

a. Diplomatic Protection of Sending States

In relation with the protection of migrant workers, sending states can intervene based on the principle of diplomatic protection, as an injury to a national of a state is an injury to the state itself.⁵¹ Diplomatic protection is the right of a state to espouse a claim on behalf of its nationals injured by the wrongful conduct of another state.⁵² The sending states, based on the law on the international responsibility of states for injuries to aliens, can make a claim to the defendant state. Although the receiving states “are not obliged to admit aliens to their territory . . . if they permit aliens to come, they must treat them in a civilized manner.”⁵³ Furthermore, Malanczuk explains that:

50 Manseau, *supra* note 45.

51 Alberto Alvarez-Jimenez, *Foreign Investors, Diplomatic Protection and the International Court of Justice's Decision on Preliminary Objections in the Diallo Case*, 33 NORTH CAROLINA JOURNAL OF INTERNATIONAL LAW & COMMERCIAL REGULATION 437, 438 (2008) (“[W]hoever ill-treats a citizen indirectly injures the State, which must protect the citizen.”) (quoting EMMERLICH DE Vattel, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW APPLIED TO THE CONDUCT AND TO THE AFFAIRS OF NATIONS AND SOVEREIGNS* VOL. III 136 (James Brown Scott ed., Charles Fenwick trans., 1916) (1758)).

52 Rep. of the Int'l Law Comm'n, 52nd Sess., Mar. 7, Apr. 20, 2000, U.N.Doc.A/CN.4/506 (2000). Article 1(1) of the draft articles on diplomatic protection states that “diplomatic protection means action taken by a State against another State in respect of an injury to the person or property of a national caused by an internationally wrongful act or omission attributable to the latter State.” *Id.*

53 PETER MALANCZUK, *AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 256 (Routledge 7th rev. ed. 1997). See also *Barcelona Traction, Light and Power Company, Ltd (Belg. v. Spain)*, 1964 I.C.J. 6 (July 24).

[F]ailure to comply with the minimum international standard 'engages the international responsibility' of the defendant state, and the national state of the injured alien may 'exercise its right of diplomatic protection', that is, may make a claim, through diplomatic channels, against the other state, in order to obtain compensation or some other form of redress.⁵⁴

The sending states should have a genuine link with the injured alien through nationality. The bond of nationality gives the sending state legal standing to exercise diplomatic protection on behalf of an injured national.⁵⁵ Thus, nationality is the basis of the legal interest in an indirect claim of the sending state.⁵⁶ In relation with this issue, the International Court of Justice in the *Nottebohm* Case (1955) stated that:

According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred . . . is in fact more closely connected with the population of the State conferring nationality than with that of any other State. Conferred by a State, it only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual's connection with the State which has made him its national.⁵⁷

However, it should be noted that "[o]nce a State has taken up a case on behalf of one of its subjects . . . the State is [the] sole claimant."⁵⁸ This is because the basic proposition of international law is that it is a state-oriented world system. Thus, it is only through the medium of the state that individuals

54 *Id.*

55 Phoebe Okowa, *Issues of Admissibility and the Law on International Responsibility*, INTERNATIONAL LAW 477 (Malcolm D. Evans ed., 2003)

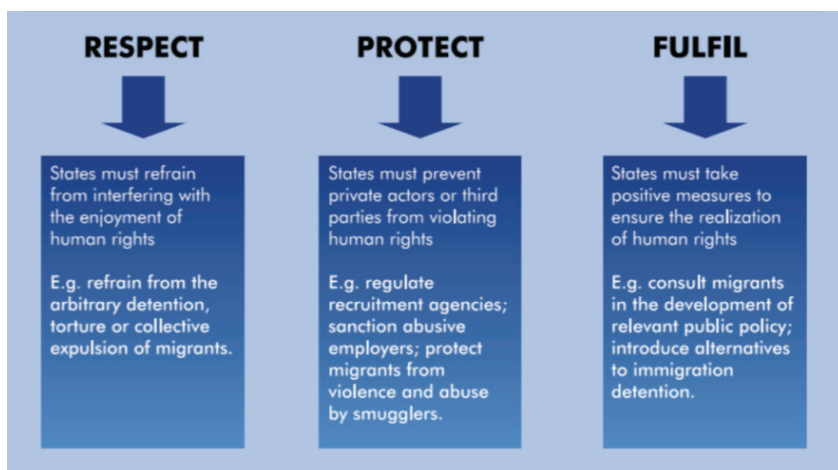
56 *Id.*

57 *Nottebohm* (Liech. v. Guat.), 1955 I.C.J. 3 (Apr. 6).

58 *Mavrommatis Palestine Concessions* (Greece v. Gr. Brit.), 1924 P.C.I.J. (ser. A) No.2 (Aug. 30) (stating that a claim on the international level is considered to be that of the state whose citizen has been mistreated by the defendant state).

may obtain the full range of benefits available under international law, thus nationality is the key.⁵⁹

Besides diplomatic protection, international human rights can be used as another means of giving protection to migrant workers in host countries. International human rights law protects individuals regardless of their nationality; indeed, it protects human beings as such. Accordingly, Indonesian female domestic migrant workers are protected by the Convention on the Elimination of All Forms of Discrimination against Women. Thus, under these norms, the sending states as well as receiving states are responsible for the protection of all migrant workers, indeed, all of the states should respect, protect and fulfill human rights obligations as illustrated below in the chart below detailing the scope of human rights obligations.⁶⁰



Referring to the objects of protection, international human rights differs from state responsibility, as reflected in the opinion of Buergenthal and Maier as follows:

The law of state responsibility protects individuals against violations of their rights only when their nationality is not that of the

⁵⁹ MALCOLM N. SHAW, *INTERNATIONAL LAW* 809 (2008).

⁶⁰ See United Nations Human Rights, *Migration and human rights: Improving Human Rights-Based Governance of International Migration* (2011), available at http://www.ohchr.org/Documents/Issues/Migration/MigrationHR_improvingHR_Report.pdf.

offending state; international human rights law protects individuals regardless of their nationality. The concept of nationality is irrelevant in human rights law because the individual is deemed to be the subject of these rights. Nationality is of vital importance however, under the law of state responsibility because here the injury to a national is deemed to be an injury to the state of his/her nationality.⁶¹

As human beings, domestic migrant workers should be protected by international human rights law just like other worker groups. Domestic work however is still undervalued. The people who work in this sector have low status in the community and are marginalized. Indonesia has sent around 650,000 domestic migrant workers abroad every year.⁶² Therefore, their protection has become crucial for the government. The government intends to decrease the number of domestic migrant workers over the years: indeed, for the last three years the numbers have gradually decreased.⁶³

b. Protection in the Employment Stage: Migrant Workers Abroad

The Indonesian government has adopted regulations and policies on the placement and protection of migrant workers, and established institutions to protect their rights. The main legal instrument for the protection of migrant workers is Law 39/2004⁶⁴ concerning the Placement and Protection of Indonesian Migrant Workers Abroad (Law 39), President Instruction 6/2006 concerning the Government Policies on Reformation the System of Placement and Protection Indonesian Migrant Workers, and BNP2TKI

61 THOMAS BUERGENTHAL & HAROLD G. MAIER, PUBLIC INTERNATIONAL LAW IN A NUTSHELL 115 (2006).

62 Ministry of Manpower and Transmigration, *The Ministry of Manpower and Transmigration of RI to Stop TKI Placement as Domestic Workers by 2017*, INDONESIA.GO.ID (2012), <http://www.indonesia.go.id/kementerian/kementerian/kementerian-tenaga-kerja-dan-transmigrasi/497-ketenagakerjaan/10279-kemnakertrans-tergetkan-hetikan-penempatan-tki-domestik-worker-tahun-2017.html>.

63 Buchori & Amalia, *supra* note 4.

64 Due to the shortage of provisions in the law on the protection migrant workers, it is now scheduled for an amendment in Parliament. It only has seven articles out of 109 articles that are concerned with protection compared to sixty-six articles regarding placement.

(“Agency”) was established by Government Regulation 81/2006. The Agency accordingly has the main responsibility “for implementing policies in the field of placement and protection of Indonesian workers in foreign countries in a coordinate and integrated manner” as stated in Article 95 of Law 39. Its purpose is to coordinate the various stakeholders involved in the migration chain process, namely, private labor Indonesian companies (PPTKIS), agencies abroad, and non-governmental organizations, Indonesian embassies abroad, as well as the host countries themselves. It is charged to cover, *inter alia*, recruitment, health check, training, departure, and in-country protection. It also should engage in cooperation with the Ministry of Manpower and Transmigration,⁶⁵ Ministry of Internal Affairs,⁶⁶ Ministry of Health,⁶⁷ Directorate General of Immigration (with Ministry of Law and Human Rights),⁶⁸ and Ministry of Foreign Affairs.⁶⁹ Based on this coordination and cooperation, the Agency will issue a Migrant Worker Card which is given to migrant workers just before they depart for destination countries (Kartu Tenaga Kerja Luar Negeri, KTLN).

The Indonesian government tries to utilize diplomatic channels to protect migrant workers through bilateral and multilateral agreements with the destination states. Indonesia has Mandatory Consular Notification agreements with seven destination countries. The existence of this agreement assures that the destination country will notify the Indonesian Embassy promptly when Indonesian nationals are injured.⁷⁰ Indonesia also has some government to government agreements. For example, the Indonesia-Japan agreement concerning the placement of nurses to Japan,

65 Ministry of Manpower and Transmigration is the leading government agency for the regulation of Indonesian migrant workers. Recruitment and placement are conducted by private agencies, which are licensed by the Ministry. The Ministry also monitors pre-departure training, a compulsory pre-departure briefing, and provide a limited number of labor attachés at Indonesian embassies abroad.

66 For issuing the ID card of candidates.

67 For medical checkup of the candidates.

68 For the issuance of the passport.

69 For the legal status of job orders, i.e., the Indonesian embassies in the destination states.

70 Lina Hastuti and Koesrianti, MCN sebagai Upaya Pemerintah Melindungi TKI di Luar Negeri (MCN as a Government Means to Protect Indonesian Migrant Workers Abroad), Research Report, unpublished, 2009

Indonesia-Timor Leste agreement for sending caregivers and midwives, and Indonesia-South Korea agreement concerning industries, manufacturing, agriculture, fisheries, and services.⁷¹ At the regional level, Indonesia is a party to the ASEAN Declaration on Migrant Worker 2007 that expresses the commitment of ASEAN member countries, both sending and receiving states, in fulfilling their obligations to provide protection to migrant workers from ASEAN member countries.⁷² At the international level, Indonesia has ratified the International Convention on the Protection of Rights of All Migrant Workers and Their Families.⁷³

There are many Indonesians who were jailed in destination countries for committing various crimes such as fraud, adultery, and sorcery. Indonesian migrant workers facing death sentences stood at 420, in five countries, with Malaysia accounting for the highest number at 351, 45 in Saudi Arabia, 22 in China, Singapore, and the Philippines with one each. Ninety-nine have already been sentenced to death.⁷⁴

In order to minimize the number of the migrant workers being sentenced to death, the government established the Task Force for Migrant Workers Facing Death Sentences, which has the responsibility to provide accurate data on problems relating to migrant workers as well as make suggestions to the governments. Based on the data collected and suggestions made, the government has arranged for high-level diplomacy under the direct command from the President and for providing legal aid for migrant workers. Between 2010 and 2012, the Saudi government pardoned more than 500 jailed Indonesian migrant workers.⁷⁵ In early 2011, follow-

71 Neneng Zubaidah, *Pemerintah Buka Peluang Penempatan TKI di 6 Negara*, SINDONEWS.COM, Jan. 31, 2013, <http://nasional.sindonews.com/read/713068/15/pemerintah-buka-peluang-penempatan-tki-di-6-negara-1359640258>.

72 ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers, Jan. 13, 2007, available at <http://www.asean.org/communities/asean-political-security-community/item/asean-declaration-on-the-protection-and-promotion-of-the-rights-of-migrant-workers-3>.

73 Indonesia has ratified this Convention by Act No. 6 in 2012.

74 Faisal Maliki Baskoro, *Indonesia's Migrant Workers Still Lacking Government Protection*, JAKARTA GLOBE (Dec. 19, 2012, 8:44 AM), <http://www.thejakartaglobe.com/archive/indonesias-migrant-workers-still-lacking-govt-protection>.

75 Edi Hardum, *Saudi Arabia Pardons 141 Jailed Migrant Workers From Indonesia*, JAKARTA GLOBE (Apr. 29, 2013, 8:30 PM), <http://www.thejakartaglobe.com/news/>

ing several reported cases of maltreatment and violent abuse and after an Indonesian worker was beheaded resulting from a conviction of murder of a Saudi employer, Indonesia stopped sending maids to Saudi Arabia.⁷⁶ The Kingdom of Saudi Arabia is the Middle East's largest market for Asian domestic helpers.⁷⁷ The recent data in the Ministry of Foreign Affairs indicated that in 2012 the number of Indonesian nationals who were sentenced to death stood at 121 cases, 74 were freed, and 219 were still in the process. From March 2013, there were 19 cases, 6 were freed, and 232 still in the process.⁷⁸

c. The Sending State Responsibility upon Return Home of Migrant Workers

Migrant domestic workers are still facing maltreatment upon their return home. They may encounter difficulties in reintegrating into the labor market of their home country since the type of work they engage in abroad does not match with the availability of employment at home. Also, migrant workers have difficulties adapting with society due to their prolonged absence from their home country. Migrant workers also have difficulties with their pensions and social security benefits when they retire. It is important to note that the money saved and remitted by migrant workers is put to productive use, and has contributed to job creation in sending countries. While returning Filipino migrant workers have access to a number of credit loans, their Indonesian counterparts have not been offered the same.

saudi-arabia-pardons-141-jailed-migrant-workers-from-indonesia.

76 Reyna Usman, Director General of Promotion and Placement of Workers, Ministry of Manpower and Transmigration (Direktorat Jenderal Pembinaan Penempatan Tenaga Kerja Kementrian Tenaga Kerja dan Transmigrasi RI), Proyeksi Reformasi Kebijakan dan Regulasi di Bidang Penempatan dan Perlindungan Tenaga Kerja Indonesia di Luar Negeri, Rapat Koordinasi Nasional (RAKORNAS) Perlindungan WNI/BHI dengan Seluruh Perwakilan RI dan Diaspora, Jakarta, 18 Agustus 2013, Indonesian Government issued a moratorium to Saudi Arabia on 1 August 2011.

77 Directorate of Protection Indonesian Citizens and Legal Entities Ministry of Foreign Affairs of Republic Indonesia, Peran Negara dalam Melindungi WNI di Luar Negeri: Permasalahan dan Langkah Langkah Strategis, Forum Komunikasi Kelitbangan, Makasar, 6 Desember 2011, The number of Indonesian migrant worker in Saudi Arabia was 555,813, Malaysia 347,989, Taiwan 150,768, *Id.*

78 Tatang Budi Utama Razak, *supra* note 11.

Many migrants are unable to seek remedies for violations of their rights by employers because their period of employment has been terminated and they are not entitled to stay longer. In many cases, migrant workers return to their home country with less compensation than they are due with no possibility of seeking full compensation and remedies. It is the responsibility of the government to seek a solution for returning migrant workers to sustain their financial security and benefits. Financial literacy training and soft loans can be used to overcome this problem as many migrant workers and their families are underserved by the formal financial services industry and possess limited levels of financial literacy.

d. The Decent Work for Domestic Workers Convention and Recommendation as a Direct Protection of Migrant Workers

The regulation of domestic workers will change dramatically due to the adoption of the ILO Convention on domestic workers. At the 100th session of the ILO Conference in June 2011, the ILO adopted Convention No. 189 and accompanying Recommendation 201.⁷⁹ The adoption of the Convention represents a key milestone on the path to the realization of decent work for domestic workers. Based on ILO research there are more than 53 million domestic workers in the world ages between 15 years old and above.⁸⁰

Convention No. 189, Article 21, paragraph 2 provides that the Convention shall come into force twelve months after the date on which the ratifications of two members have been registered with the Director-General.⁸¹ It received the two requisite ratifications (from Uruguay on June 4, 2012 and the Philippines on September 5, 2012) which will enable it to enter into force a year from the date that the second ratification was registered with the ILO's Director General.⁸² Therefore the Convention entered into force on September 5, 2013.

79 Convention No. 189, *supra* note 34.

80 Mark Tran, *ILO urges better pay and conditions for 53 million domestic workers*, THE GUARDIAN (Jan. 9, 2013), <http://www.guardian.co.uk/global-development/2013/jan/09/ilo-better-pay-domestic-workers>.

81 Convention No. 189, *supra* note 34, art. 21, § 2.

82 Until June 2013, there were seven countries that have ratified the Convention, namely, Bolivia, Italy, Mauritius, Nicaragua, Paraguay, the Philippines, and Uruguay. Indonesia has not yet ratified Convention No. 189.

Domestic work is defined broadly in Article 1 of Convention No. 189 as “work performed in or for a household or households.” The scope of domestic work includes a broad range of responsibilities, functions, and tasks, often invisible and undervalued, undertaken in and for a household.⁸³ Meanwhile, the domestic worker is defined as “any person engaged domestic work within an employment relationship.”⁸⁴ It clearly states that a person who performs domestic work only occasionally or sporadically and not on an occupational basis is not a domestic worker.⁸⁵

The Convention establishes that the fundamental principles and rights at work in relation to domestic workers are the following:

- (a) freedom of association and the effective recognition of the right to collective bargaining;
- (b) the elimination of all forms of forced or compulsory labor;
- (c) the effective abolition of child labor; and
- (d) the elimination of discrimination in respect of employment and occupation.⁸⁶

Furthermore, Convention No. 189 provides that domestic workers enjoy effective protection against all forms of abuse, harassment, and violence.⁸⁷ Also, the Convention stated that domestic workers, similar to workers generally, enjoy fair terms of employment as well as decent working conditions, and if they reside in the household, decent living conditions that respects their privacy.⁸⁸

The working hours of domestic work has been regulated in such way so that domestic workers have normal hours of work. They also can have overtime compensation, periods of daily and weekly rest and paid annual leave in accordance with national laws, regulations or collective agreements,

83 Adelle Blackett, *The Decent Work for Domestic Workers Convention and Recommendation*, 106 AMERICAN JOURNAL OF INTERNATIONAL LAW 778, 779 (2011).

84 Convention No. 189, *supra* note 34, art. 1.b Citation.

85 *Id.* art. 1.c Citation.

86 *Id.* art. 3, § 2.

87 *Id.* art. 5.

88 *Id.* art. 6.

taking into account the special characteristic of domestic workers.⁸⁹ This will change the customary expectation across jurisdictions that “servants” will constantly be available to their “masters” to perform all required duties “within the reasonable limits of their physical strength and moral welfare.”⁹⁰ Thus, domestic workers, just like other workers generally, will have normal hours of work, overtime compensation, right to a daily and weekly rest, and paid annual leave. This will give better protection for the rights and condition of domestic workers.

Unlike the common practice for domestic worker employment, Convention No. 189 states that the member state shall ensure that domestic workers are informed of the terms and conditions of their employment in written contracts in accordance with national laws with details of the terms. In relation to the migrant domestic worker, the Convention in Article 8 states as follows:

National laws and regulations shall require that migrant domestic workers who are recruited in one country for domestic work in another receive a written job offer, or contract of employment that is enforceable in the country in which the work is to be performed, addressing the terms and conditions of employment referred to in Article 7, prior to crossing national borders for the purpose of taking up the domestic work to which the offer or contract applies.⁹¹

Convention No. 189 further states that “Members shall take measures to cooperate with each other to ensure the effective application of the provisions of this Convention to migrant domestic workers.”⁹² This means that the administrative work for migrant workers should be completed in the sending state prior to their departure. The provisions of the Convention, once ratified, will empower domestic workers all over the world.

89 *Id.* art. 10.

90 Erna Magnus, *The Social, Economic, and Legal Conditions of Domestic Servants: I*, 30 *INTERNATIONAL LAW REVIEW* 190, 206 (1934).

91 Convention No. 189, *supra* note 34, art. 8.

92 *Id.*

5. CONCLUSION

The protection of Indonesian migrant domestic workers should be handled thoroughly and involve the commitments of all stakeholders concerned with the migration administrative process. The majority of workers that the Indonesian government has sent to foreign countries are domestic migrant workers. This has become the root problem for the protection of Indonesian migrant workers. Domestic work is undervalued, isolated, and deemed unimportant such that migrant workers are at a heightened risk of certain forms of exploitation and abuse. In addition, there is the omission of express references to either domestic work or domestic workers in a broad range of national and international regulations. Yet, domestic migrant workers make substantial financial contributions to sending states as they send remittances back home. Therefore, the protection of domestic migrant workers is indispensable. In order to protect migrant domestic workers abroad, the Indonesian government has established regulations and created institutions. However, it appears that the cooperation and coordination between these institutions are not strong enough to overcome the problems. Indeed, there are overlapping jurisdictions between them creating difficulties.

Accordingly, the sending state is responsible for the entire processes of migration for domestic workers beginning with recruitment to employment to their return when they become subject to exploitation and abuse. However, the protection of migrant workers in the employment stage is the most difficult because they are beyond the jurisdiction of the sending states. In this case, theoretically, Indonesia as a sending state can intervene based on the principle of state responsibility along with diplomatic protection so that migrant workers are under the protection of international human rights. The adoption of Convention No. 189 in 2011 has changed the treatment and condition of domestic workers all over the world. Indonesia should ratify this Convention as it will support the Indonesian government's effort to give protection to domestic migrant workers.

Judgment in Maritime Boundary Dispute between Bangladesh and Myanmar: Significance and Implications under International Law

*Abdullah Al Faruque*¹

1. INTRODUCTION

The legal concept of the international maritime boundary is firmly established in international law. But the process by which these boundaries are determined in concrete situations will always have a *sui generis* character.² As such, in their search for an appropriate solution, states are not obliged to reach their outcome by subjecting them to purely legal considerations.³ Rather, many relevant circumstances should be taken into account in delimiting a maritime boundary. The delimitation of a maritime boundary can be done through bilateral agreement or judicial settlement.

On March 14, 2012, in the case of *Bangladesh/Myanmar*,⁴ the Hamburg-based Law of the Sea Tribunal (ITLOS) delivered a historic judgment on the delimitation of the maritime boundary between Bangladesh and Myanmar.⁵ The Tribunal was asked to delimit three maritime boundar-

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2 GERARD J. TANJA, *THE LEGAL DETERMINATION OF INTERNATIONAL MARITIME BOUNDARIES* 306 (1990).

3 *Id.*

4 Dispute concerning Delimitation of the Maritime Boundary in the Bay of Bengal (Bangl. v. Myan.), Case No. 16, Order of Aug. 19, 2011, ITLOS Rep. 4, <http://www.itlos.org/index.php?id=108&L=1%25252F> [hereinafter ITLOS Case No. 16].

5 See D. H. Anderson, *International Decision: Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)*, in 106 *AMERICAN JOURNAL OF*

ies between Bangladesh and Myanmar: the territorial sea boundary, the single maritime boundary between the exclusive economic zones (EEZ) and continental shelves of the two states, and the boundary of the continental shelf beyond 200 nautical miles from the baselines of the two states.⁶ This dispute between Bangladesh and Myanmar was the first case before the ITLOS. This judgment has marked a distinctive and definitive legal achievement for Bangladesh. The dispute involved the delimitation of the territorial waters, exclusive economic zones and continental shelves of Bangladesh and Myanmar in the Bay of Bengal. The judgment also marks an important precedent that will be pertinent for resolving future maritime boundary disputes. The judgment is significant for Bangladesh for the following reasons.

First, the judgment bears great significance for Bangladesh. This is because its lawful claim on maritime zone has been recognized by the tribunal, which was previously disputed. Second, the long-standing dispute between the two countries has been resolved peacefully. Bangladesh always tried to settle the problem through bilateral negotiation; however, Myanmar was reluctant to settle it by bilateral negotiation or even by an international tribunal. Failing to reach an agreement through negotiations, Bangladesh opted to settle the dispute through a judicial means via a neutral third party. Amicable and peaceful settlement of the dispute by itself is a legal achievement for Bangladesh.

Third, a settled and demarcated maritime zone will definitely pave the way for Bangladesh to gain access to mineral resources in the maritime zone peacefully, which will accelerate its economic development. A long-standing dispute over maritime boundary delimitation with India and Myanmar remained a major stumbling block to exploration of these resources. Bangladesh had been deprived of her legitimate claim over maritime resources for a long time due to the uncertainty created by the absence of an agreed boundary. When there is no agreed boundary, exploration for hydrocarbon reserves can be delayed throughout a considerable area in and around the disputed maritime zones.

The overlapping claims of the disputing states necessitated a peaceful settlement for exploration of mineral resources in the demarcated mari-

INTERNATIONAL LAW 817 (2012).

6 ITLOS Case No. 16, *supra* note 4.

time zone. Such necessity stemmed from the fact that the Bay of Bengal has become a very important area for hydrocarbon reserves. It should be mentioned that when Bangladesh declared its 28 offshore blocks in the Bay of Bengal in 2008, and when it invited bidders to explore in the blocks, both Myanmar and India opposed vehemently to Bangladesh initiatives and as a result, most of the international oil companies stayed away from the bidding. Now after the ITLOS judgment, Bangladesh will be able to explore mineral resources within its maritime boundary without any controversy.

This article attempts to explore the main aspects of the judgment. It will also analyze the implications and significance of the judgment from the perspective of the law of the sea and the interest of the parties to the dispute. This article also highlights important case law on the issue.

2. HISTORY OF THE DISPUTE

Since 1974, Bangladesh had been in negotiations with Myanmar for delimitation of the maritime boundary.⁷ The negotiations continued almost for four decades, but both countries failed to reach an agreement. According to Alam, “the only success achieved through this long negotiation was an agreement in the form of ‘agreed minutes’ for delimitation of 12 nautical miles (nm) territorial seas from the mouth of the Naaf River signed on November 23, 1974. The agreement delimited the maritime boundary within 12 nautical miles on the basis of the equidistance method between St. Martin’s Island and Myanmar’s mainland.”⁸ As per the terms of the 1974 Agreed Minutes, signed by delegations of the two countries, Bangladesh

7 See M. Shah Alam & Abdullah Al Faruque, *The Problem of Delimitation of Bangladesh’s Maritime Boundaries with India and Myanmar: Prospects for a Solution*, 25 INTERNATIONAL JOURNAL OF MARINE AND COASTAL LAW 405 (2009); Jared Bissinger, *The Maritime Boundary Dispute between Bangladesh and Myanmar: Motivation, Potential Solutions and Implications*, 10 ASIA POLICY 203 (2010).

8 Khurshed Alam, *Judgment in the Bangladesh-Myanmar Maritime Delimitation Case: Significant Precedent in the Law of the Sea* (June 23, 2012) (unpublished thesis) (on file with Planning Academy, Nikhet, Dhaka).

permitted Myanmar's vessels free and unimpeded navigation through Bangladesh's waters around St. Martin's Island to and from the Naaf River.⁹

In 1974, Bangladesh enacted the Territorial Waters and Maritime Zones Act. Bangladesh is the first South Asian country to enact such a law.¹⁰ Bangladesh adopted the depth method for measuring the baseline, and declared 12 nm as territorial sea, 18 nm as contiguous zone, 200 nm as economic zone, and 350 nm as continental shelf from the baseline under this Act. However, India and Myanmar opposed the provisions on depth method baseline mentioned in the Act.

In 2001, Bangladesh ratified the United Nations Convention on the Law of the Sea 1982 (UNCLOS).¹¹ Bangladesh claimed a continental shelf up to the last point of the continental margin, which exceeds 200 nm.¹² In 2011, Bangladesh submitted its claim on the continental shelf to the Commission on the Limits of the Continental Shelf (CLCS), which is responsible for examining the claims by individual states to an outer continental shelf.

It should be mentioned that Bangladesh is tucked between Myanmar and India in the concave north coast of the Bay of Bengal.¹³ Apart from this, Bangladesh's own coast is concave in nature.¹⁴ As a result, if maritime delimitation is carried out by an equidistance line, Bangladesh would be virtually cut-off from the high sea and its maritime area would be confined to 130 nm as opposed to its claim for 200 nm EEZ and 350 nm.¹⁵ Bangladesh proposed an equitable solution of the dispute with Myanmar. But having failed to resolve the problem through bilateral negotiation, the Government of Bangladesh was compelled to go for judicial settlement of the dispute.¹⁶ In September 2009, Bangladesh initiated Arbitral proceedings. A Notice of Arbitration was issued on October 8, 2009 to Myanmar under Part XV

9 Moin Ghani, A 'Great Win' for Bangladesh, THE DAILY STAR (Mar. 27, 2012), <http://archive.thedailystar.net/newDesign/news-details.php?nid=227828>.

10 HARJEET ET AL., PENTAGON'S SOUTH ASIA DEFENCE AND STRATEGIC YEARBOOK 2010 134 (2009).

11 ITLOS Case No. 16, *supra* note 4, at 32.

12 *Id.*

13 Ghani, *supra* note 9.

14 ITLOS Case No. 16, *supra* note 4, at 276.

15 *Id.* at 458.

16 *Id.* at 1.

of the UNCLOS for delimitation of territorial sea, the exclusive economic zone and the continental shelf in accordance with international law.¹⁷ A few weeks later Myanmar deposited a “Declaration” under UNCLOS accepting the jurisdiction of the ITLOS to hear the dispute.¹⁸ Bangladesh itself then lodged a similar Declaration on December 12, 2009, initiated proceedings before the ITLOS on the next day, and withdrew the separate arbitral proceedings. Myanmar withdrew its Declaration in January 2010, presumably to prevent other proceedings being brought against it before the ITLOS.¹⁹ However, it was determined that this did not affect the jurisdiction of the ITLOS over the proceedings that had already commenced.²⁰

3. LAW APPLICABLE TO THE DISPUTE

The legal provisions that are applicable in the maritime delimitation are laid down in UNCLOS. According to Articles 3, 4, and 5 of UNCLOS, the territorial sea extends to 12 nm from the baseline and in the territorial sea, and the coastal state has full sovereign rights over the territorial sea similar to the rights that a state has over its land territory.²¹ According to Articles 55 and 57, the EEZ extends 200 nm from the baseline and an area beyond and adjacent to the territorial sea.²² In the EEZ, the coastal state has sovereign rights for exploring, exploiting, conserving and managing natural resources.²³ According to Article 76, the continental shelf is the seabed and the subsoil that extends from the coast throughout the natural prolongation of the land territory.²⁴ The outer limit of the continental shelf is either the outer edge of the continental margin, or to a distance of

17 *Id.*

18 *Id.* at 3.

19 *Id.* at 8.

20 *Id.* at 9.

21 United Nations Convention on the Law of the Sea, arts. 3, 4, 5, Dec. 10, 1982, U.N. Doc. A/Conf.62/422, *reprinted in* THE LAW OF THE SEA: OFFICIAL TEXT OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA WITH ANNEXES AND INDEX, U.N. Sales No. E.83V.5 (1983) [hereinafter UNCLOS].

22 *Id.* arts. 55, 57.

23 *Id.*

24 *Id.* art. 76.

200 nm from the baseline where the outer edge does not extend up to that distance.²⁵ Thus, continental shelf can extend much further than the EEZ depending on geographical circumstances.²⁶

Regarding delimitation of the territorial sea, Article 15 of UNCLOS provides for delimitation to be effected by the equidistance principle.²⁷ The equidistance line is the median line - every point of which is equidistant from the nearest points on the baseline of the adjacent or opposite States.²⁸ For delimitation of the EEZ and continental shelf up to 200 nm, Article 74 of UNCLOS states that delimitation shall be effected by agreement on international law to achieve an equitable solution, which is practically done by drawing a provisional equidistance line from the selected base points from the coastlines of the parties and then adjusting the line for relevant circumstances, if any, to ensure “equity”.²⁹ The proportionality test is applied in light of the ratio between the relevant coasts of the two States to achieve an equitable result.³⁰

4. SPECIAL GEOGRAPHICAL FEATURES OF THE MARITIME ZONE OF BANGLADESH

Many conflicting territorial claims arise from the tendency of states to expand by acquiring additional territory through creeping annexation. The conflicting claims should be resolved through negotiation and mutuality of interests.³¹ This becomes especially important when each delimitation problem involves a situation that has its own unique characteristics to be taken into account. India, Bangladesh, and Myanmar have many variations in their coastal configurations as well as in their geographical, geological, and topographical situations.³² The southern half of Bangladesh is the joint delta of three major rivers, namely the Ganges, the Brahmaputra, and

25 *Id.*

26 *Id.*

27 *Id.* art. 15.

28 *Id.*

29 *Id.* art. 74.

30 *Id.*

31 Alam & Al Faruque, *supra* note 7.

32 *Id.* at 409.

the Meghna.³³ These rivers run from the Himalayan Ranges to the Bay of Bengal through Bangladesh. The geomorphological features of Bangladesh's coastline create difficulties in fixing the baseline from which the maritime zones can be measured.³⁴ The coastline of Bangladesh has the following geographical characteristics: deltaic coastline, which is deeply indented; erosion and sedimentation continuously affect adjacent coastal waters; a highly unstable coastline is evident at low tide; navigable channels in the coastline change continuously, requiring frequent surveys and demarcation.³⁵

In practice, in determining maritime boundaries, geographical considerations play a predominant role. Other factors, such as economic, ecological, security, and geomorphological factors are taken into account, but are given relatively less weight.³⁶ Articles 74 and 83 of the UNCLOS contain no reference to the equidistance principle, which may be applied only insofar as it leads to an equitable solution.³⁷ A boundary that might be equitable for EEZ purposes may not be equitable for continental shelf purposes.³⁸ Because of the different considerations that are relevant to achieving an equitable solution in each case, such as, for example, the location of fish stocks in the case of the EEZ, and the geological characteristics, the seabed and the location of seabed mineral deposits in the case of the continental shelf, each maritime boundary dispute is unique.³⁹ The existing maritime dispute between Bangladesh and her neighbors is also unique and requires a solution on the basis of the application of equitable principles, taking into consideration a variety of factors.⁴⁰

Bangladesh has a concave coast.⁴¹ Countries with concave coasts require unconventional solutions.⁴² Therefore, per UNCLOS Article 15, rules for

33 *Id.*

34 *Id.*

35 *Id.* at 410.

36 *Id.*

37 *Id.*

38 *Id.*

39 *Id.*

40 *Id.*

41 *Id.*

42 *Id.*

special circumstances should be applied for delimitation of a maritime boundary.⁴³ The special geographical circumstances warrant that any delimitation whether agreed or determined by a third party, must result in an equitable solution.⁴⁴ Although in principle there is no limit to the factors relevant to the determination of such an equitable demarcation, there are some established criteria for such a demarcation.⁴⁵

5. THE EQUIDISTANCE VS. THE EQUITABLE APPROACH

It is well settled that application of the principle of equidistance, which is more formal and mechanical in nature, does not always ensure justice.⁴⁶ A median line based on the equidistance principle can be drawn on the basis of coastal geography and is controlled by the relevant points on the territorial sea baseline.⁴⁷ On the other hand, the equitable principle is more flexible and open-ended.⁴⁸ It is generally accepted that the median-line delimitation on the basis of the equidistance principle between opposite coasts results in an equitable solution, particularly if the coasts in question are nearly parallel.⁴⁹ On the other hand, in the case of adjacent coasts, the application of the equitable approach is usually employed for delimitation in order to ensure an equitable solution.⁵⁰ The UNCLOS and existing judicial decisions also endorse the equitable principle.⁵¹ Although the UNCLOS sets no criteria to be used to determine an equitable delimitation, existing state practice and judicial decisions suggest that the equitable principle of delimitation always takes relevant circumstances into consideration.⁵² The relevant circumstances can include any or all of the following: political, strategic and historical considerations; legal regime considerations; eco-

43 *Id.*

44 *Id.*

45 *Id.*

46 *Id.* at 417.

47 *Id.*

48 *Id.*

49 *Id.*

50 *Id.*

51 *Id.*

52 *Id.*

nomic and environmental considerations; other geographic considerations; the use of islands, rocks, reefs and low tide elevations; baseline considerations; geological and geomorphological considerations; proportionality of the area to be delimited including coastal front considerations; and different technical methods that could be employed.⁵³ However, amongst these relevant circumstances, special circumstances of coastal geography have a fundamental role in arriving at an equitable solution for maritime delimitation problems.⁵⁴ Thus, the application of the equitable principle should be warranted by the existence of special circumstances. In the *Anglo-French* case, the tribunal unambiguously stated:

[T]he appropriateness of the equidistance or any other method for the purposes of effecting an equitable delimitation is a function or reflection of the geographical and other relevant circumstances of each case. The choice of the method or methods of delimitation in any given case, whether under the 1958 Convention or customary law, has therefore to be determined in the light of those circumstances and of the fundamental norm that the delimitation must be in accordance with equitable principles.⁵⁵

As mentioned earlier, the existence of relevant circumstances is one of the factors considered by the courts in deciding on the basis of the title of the coastal state. Another factor is that a boundary line should not be drawn in such a way that encroaches on or cuts off areas that more naturally belong to one party than the other.⁵⁶ The concavity and/or convexity of the coast is considered as an important example of special or relevant circumstances in equitable delimitation.⁵⁷ For instance, maritime agreements between the Federal Republic of Germany and the Netherlands (1971), and Denmark and the German Democratic Republic (1988), where one coast is convex and the other concave; Colombia-Panama (1976), where convexities and concavities on the two coasts are different, and France-Spain (1974), are

53 VICTOR PRESCOTT ET AL., *THE MARITIME POLITICAL BOUNDARIES OF THE WORLD* 220-21 (2d ed. 2005).

54 *Id.* at 222.

55 *Id.* at 97.

56 ROBIN ROLF CHURCHILL & ALAN VAUGHN LOWE, *THE LAW OF THE SEA* 187 (3d ed. 1999).

57 Alam & Al Faruque, *supra* note 7, at 417.

based on the equitable principle.⁵⁸ It has also been observed in the *Libya/Malta* case:

[S]ince the equidistance line is based on a principle of proximity and therefore controlled only by salient coastal points, it may yield a disproportionate result where the coast is markedly irregular or markedly concave or convex. In such cases, the raw equidistance method may leave out of the calculation appreciable lengths of the coast, while at the same time giving undue influence to others merely because of the shape of the coastal relationships.⁵⁹

Bangladesh's delimitation problems qualify for the application of equity because of special circumstances. Bangladesh's mostly adjacent rather than opposite location of maritime borders, together with the concave, unstable, and broken nature of her coastline, her historical title in the Bay of Bengal and dependence of her coastal people on living and non-living resources of the sea—all these special circumstances and relevant factors support the basis of the claim of Bangladesh for the delimitation of maritime boundaries on the equitable principle.⁶⁰ In such a case, therefore, according to UNCLOS Article 74, "the equidistance principle is not applicable and the boundary lines in question are to be drawn by agreement between the parties on the basis of international law in order to achieve equitable solution taking into account the configuration of the coast, the length of the coast and other relevant factors."⁶¹

The principle of equitable demarcation is firmly rooted in the international law of the sea and emanates from the idea of uniqueness of each boundary. This uniqueness is the result of a great variety of geographical features of the continental shelf, which indicates that it is very difficult to posit any fixed rule governing the establishment of maritime boundaries

58 Prosper Weil, *Geographic Considerations in Maritime Delimitation*, in INTERNATIONAL MARITIME BOUNDARIES 115 (2014).

59 Continental Shelf (*Libya v. Malta*), Judgment, 1985 I.C.J. 13 (June 3).

60 M. Shah Alam, *Maritime Border Delimitation*, THE DAILY STAR, (Feb. 9, 2009), http://archive.thedailystar.net/newDesign/print_news.php?nid=74987.

61 Alam & Al Faruque, *supra* note 7, at 419-20.

between states.⁶² The idea of uniqueness of each boundary finds significant support in the jurisprudence of the ICJ and arbitral tribunals dealing with maritime boundary disputes. In the *Tunisia/Libya* case, the ICJ declared:

[C]learly each continental shelf case in dispute should be considered and judged on its own merits, having regard to its peculiar circumstances; therefore, no attempt should be made here to over conceptualize the application of the principles and rules relating to the continental shelf.⁶³

In the *Anglo-French Award*, the court of arbitration noted that: “the appropriateness of the equidistance method or any other method for the purpose of effecting an equitable delimitation is a function or reflection of the geographical and other relevant circumstances of each particular case.”⁶⁴

The ICJ and arbitral tribunals dealing with the delimitation of maritime boundaries have consistently held that the equidistance principle is not a mandatory rule of international law and that it does not enjoy any priority or preferential status.⁶⁵ In fact, the principle of equidistance has been unable to attract a consensus among members of the international community due to its rigidity.⁶⁶

6. DELIMITATION OF THE TERRITORIAL SEA

Regarding the delimitation of the territorial sea boundary, Bangladesh argued that the boundary had already been delimited in the Agreed Minutes of 1974 and 2008, signed by the two delegation heads during negotiations over maritime boundaries. However, Myanmar denied that any such binding agreement should be considered as a treaty. It was argued by Myanmar that the Agreed Minutes were no more than a record of a conditional understanding and were not intended to create legal obligations. The ITLOS

62 L. D. M. Nelson, *The Roles of Equity in the Delimitation of Maritime Boundaries*, 84 AMERICAN JOURNAL OF INTERNATIONAL LAW 837 (1990).

63 Continental Shelf (Tunis. v. Libya), Judgment, 1982 I.C.J. 18, 92, ¶ 132 (Feb. 24).

64 Anglo-French Continental Shelf Arbitration (Can. v. Fr.), 18 I.L.M. 397, 426, ¶ 97 (1979).

65 Alam & Al Faruque, *supra* note 7, at 421.

66 *Id.*

held that those Minutes did not constitute an agreement and accordingly proceeded to delimit the territorial sea.

As mentioned above, in the absence of any agreement between the states concerned, Article 15 of UNCLOS provides that the territorial sea boundary will be delimited on an equidistance principle unless it is necessary by reason of historical title or other special circumstances to delimit the territorial seas in another way.⁶⁷ As no party to the dispute raised the issue of historical title to any of the waters concerned, the ITLOS applied the equidistance principle in delimitation of territorial waters considering the base points used by the parties and recognized that Bangladesh has the right to a 12 nm territorial sea around St. Martin's Island.⁶⁸

In this regard, Myanmar has raised the issue of St. Martin's Island as a special circumstance in the context of the delimitation of the territorial sea and argued that St. Martin's Island should be totally ignored in such maritime formation.⁶⁹ But the ITLOS observed that the Island is situated within the 12 nm territorial sea limit from Bangladesh's mainland coast and concluded that the island should be given full effect in drawing the delimitation line of the territorial sea between the Parties.⁷⁰ Though the ITLOS observed that St. Martin's Island is a significant maritime feature by virtue of its size and population and the extent of the economic and other activities involved in it; nevertheless, it determined that there is no compelling reason that would justify treating the island as a special circumstance.⁷¹

Accordingly, the ITLOS drew the boundary of the territorial sea, which begins at the terminus of the land frontier in the mouth of the Naaf River, and runs generally southward, following the equidistance line between base points on St. Martin's Island and the mainland coast of Myanmar. This territorial water delimited by the ITLOS is almost identical to the boundary agreed in 1974 as argued by Bangladesh.⁷²

67 UNCLOS, *supra* note 21, art. 15

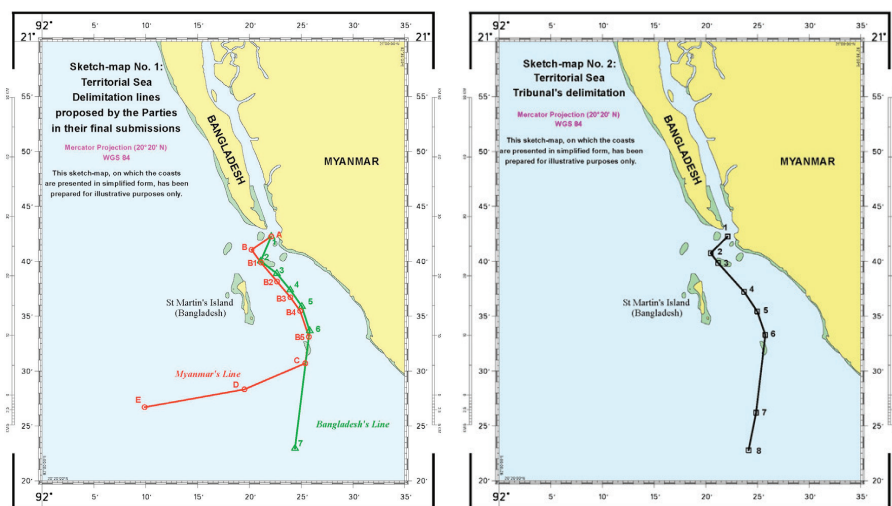
68 ITLOS Case No. 16, *supra* note 4, at ¶ 129.

69 *Id.* ¶¶ 131-32.

70 *Id.* ¶¶ 149-51.

71 *Id.* ¶¶ 151-52.

72 See JOINT DECLARATION OF JUDGES AD HOC MENSAB AND OXMAN ¶ 2, available at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/C16.decl.Mensab-Oxman.rev.E.pdf.



7. DELIMITATION OF EXCLUSIVE ECONOMIC ZONE

For delimitation of the EEZ boundary between the two states, Myanmar demanded the application of the equidistance principle for delimitation, while Bangladesh always sought to delimitate its maritime boundary on the basis of the application of the equitable principle.⁷³ It was anticipated that the delimitation of the EEZ boundary on the basis of the equidistance principle would result in the annexation of much of the sea area of Bangladesh by Myanmar.⁷⁴ Bangladesh would get only a tiny share in the Bay of Bengal, and it would be virtually cut-off from accessing the high sea if it was delimited on the equidistance principle. The Tribunal applied the equitable principle instead of equidistance to resolve the dispute.⁷⁵

It is widely recognized by international courts and tribunals that each delimitation problem involves a situation that has its own unique characteristics to be taken into account.⁷⁶ Special circumstances of coastal geography have a fundamental role in arriving at an equitable solution of

73 Abdullah Al Faruque, *ITLOS Judgment: A Clear Legal victory for Bangladesh*, THE DAILY STAR (Apr. 21, 2012), <http://archive.thedailystar.net/law/2012/04/03/index.htm>.

74 *Id.*

75 *Id.*

76 *Id.*

maritime delimitation problems.⁷⁷ As mentioned above, Bangladesh has a concave coast,⁷⁸ and countries with concave coasts require unconventional solutions.⁷⁹ Another factor is that a boundary line should not be drawn in such a way that encroaches on or cuts off areas that more naturally belong to one party than the other.⁸⁰ Special circumstances and relevant factors such as Bangladesh's mostly adjacent rather than opposite location of maritime borders, together with the concave, unstable, and broken nature of her coastline⁸¹ all support the basis of the claim of Bangladesh for the delimitation of maritime boundaries on the equitable principle.⁸²

Bangladesh argued that delimitation of the exclusive economic zone, continental shelf, and the area beyond 200 nm should be based on equitable principle.⁸³ Bangladesh did not identify any base points since it opposed the equidistance method.⁸⁴ In particular, Bangladesh stated that Myanmar's claimed equidistance line is inequitable because of the cut-off effect it produces.⁸⁵ Bangladesh argued that on account of the specific configuration of its coast and of the double concavity characterizing it, the Tribunal should apply the angle-bisector method in delimiting the EEZ and the continental shelf.⁸⁶ In its view, this method would eliminate the inequity associated with equidistance and lead to an equitable result.⁸⁷

On the other hand, Myanmar strongly argued for application of the equidistance method and told the ITLOS that the angle-bisector method advanced by Bangladesh would produce an inequitable result.⁸⁸ However, the ITLOS did not fully agree to all of the arguments of Bangladesh.⁸⁹ They

77 *Id.*

78 *Id.*

79 *Id.*

80 *Id.*

81 *Id.*

82 *Id.*

83 *Id.*

84 ITLOS Case No. 16, *supra* note 4, at ¶ 242.

85 *Id.* ¶ 216.

86 *Id.* ¶ 213

87 *Id.*

88 *Id.* ¶ 224.

89 *Id.* ¶¶ 261-4.

also rejected the arguments of Myanmar that there was no relevance for placing their suggested base points.⁹⁰ In contrast, Bangladesh had identified several possible relevant base points that were acceptable.⁹¹ The ITLOS added its own base points to lead to a more equitable provisional equidistance line.⁹² It accepted that it was necessary to adjust the equidistance line to take into account the concavity of the coast.

On this point, the ITLOS observed that the goal of achieving an equitable result must be the paramount consideration guiding the delimitation.⁹³ In this regard, the ITLOS adopted a three-stage approach. At the first stage it constructed a provisional equidistance line, based on the geography of the Parties' coasts and mathematical calculations.⁹⁴ At the second stage, after drawing the provisional equidistance line, it has made an adjustment so that the line produces an equitable result.⁹⁵ At the third and final stage, the ITLOS considered that the adjusted line should not result in any significant disproportion between the ratio of the respective coastal lengths and the ratio of the relevant maritime areas allocated to each Party.⁹⁶ In adjusting the provisional line, the ITLOS has considered relevant circumstances with a view to achieving an equitable solution.

At this point, Bangladesh highlighted three main geographical and geological features as relevant circumstances such the "concave shape of Bangladesh's coastline," location of St. Martin's Island and the Bengal depositional system as a proof of natural prolongation of the landmass of Bangladesh.⁹⁷ Myanmar contended that relevant circumstances did not exist that may lead to an adjustment of the provisional equidistance line.⁹⁸ But the ITLOS observed that the coast of Bangladesh is manifestly

90 *Id.* ¶ 264.

91 James Harrison, *Judgment in Bangl.-Myan. Maritime Boundary Dispute*, INT'L L. OBSERVER (Mar. 14, 2012, 1:15 PM), <http://www.internationallawobserver.eu/2012/03/15/judgment-in-bangladesh-myanmar-maritime-boundary-dispute>.

92 *Id.*

93 ITLOS Case No. 16, *supra* note 4, at ¶ 235.

94 *Id.* ¶ 240.

95 *Id.*

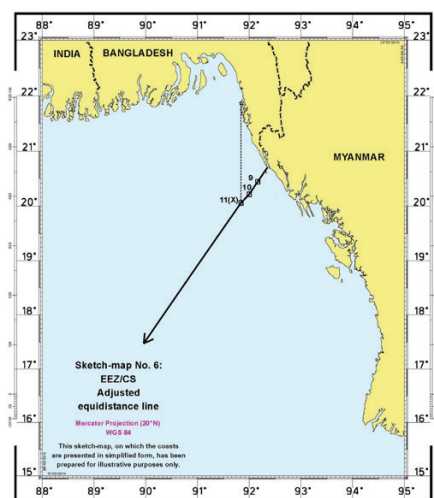
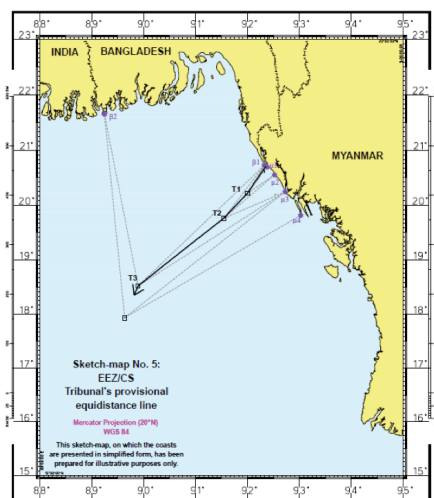
96 *Id.*

97 *Id.* ¶ 276.

98 *Id.* ¶ 289.

concave,⁹⁹ and further noted that on account of the concavity of the coast in question, the provisional equidistance line it constructed produces a cut-off effect on the maritime projection of Bangladesh.¹⁰⁰ Therefore, the ITLOS adjusted the line to achieve an equitable solution.¹⁰¹ However, the ITLOS did not consider St. Martin's Island and the Bengal depositional system as relevant circumstances.¹⁰²

Another important point is that the ITLOS decided that in relation to the delimitation of the EEZ and continental shelf, a single maritime boundary should be drawn.¹⁰³



8. DELIMITATION OF CONTINENTAL SHELF BEYOND 200 NM

Bangladesh claimed that the ITLOS has jurisdiction to delimit the continental shelf beyond 200 nm.¹⁰⁴ Myanmar objected claiming that the ITLOS has no such jurisdiction to do so. The tribunal considered first whether it had jurisdiction to delimit the continental shelf boundary beyond 200

⁹⁹ *Id.* ¶ 291.

¹⁰⁰ *Id.* ¶ 293.

¹⁰¹ *Id.*

¹⁰² *Id.* ¶ 265.

¹⁰³ *Id.* ¶¶ 180–81.

¹⁰⁴ *Id.* at 41.

nm.¹⁰⁵ The ITLOS found that it had jurisdiction to delimit the continental shelf beyond 200 nm.¹⁰⁶ Secondly, the tribunal pondered, if it had such jurisdiction, whether it was appropriate to exercise that jurisdiction.¹⁰⁷ According to UNCLOS, a state's continental shelf may extend beyond 200 nm only if certain geological and geomorphological criteria set out in Article 76 are fulfilled. The ITLOS decided that it was appropriate and competent to delimit the continental shelf beyond 200 nm as both the parties claimed overlapping entitlements to the continental shelf beyond 200 nm.

Myanmar's argument that Bangladesh's continental shelf cannot extend beyond 200 nm was rejected by the ITLOS. The ITLOS recognized that Bangladesh has a maritime zone up to 200 nm from its baseline and has also an entitlement to the continental shelf beyond 200 nm.¹⁰⁸ The ITLOS recognized that both Bangladesh and Myanmar have entitlements to a continental shelf extending beyond 200 nm.¹⁰⁹ The ITLOS observed that the concavity of the Bangladesh coast would be a relevant circumstance for the purpose of delimiting the continental shelf even beyond 200 nm.¹¹⁰ This is the first time that any tribunal has exercised its jurisdiction in delimiting the continental shelf beyond 200 nm. However, the Tribunal did not take into account geological and geomorphological circumstances such as natural prolongation as relevant factor argued by Bangladesh in delimitation.

The ITLOS decided that the boundary between the parties' overlapping continental shelves beyond 200 nm should be a continuation of the single maritime boundary until it reached the area where the rights of third States might be affected.¹¹¹ Thus, the adjusted equidistance line extending beyond 200 nm indicated by the ITLOS does not have a terminus point. The ITLOS noted that it will continue "until it reaches the area where the rights of third party States may be affected."¹¹² Usually, the limit of the

105 *Id.* at 45.

106 *Id.* ¶¶ 360-63.

107 *Id.* ¶ 371.

108 *Id.* ¶ 449.

109 *Id.*

110 *Id.* ¶¶ 461-462.

111 *Id.* ¶ 462.

112 *Id.*

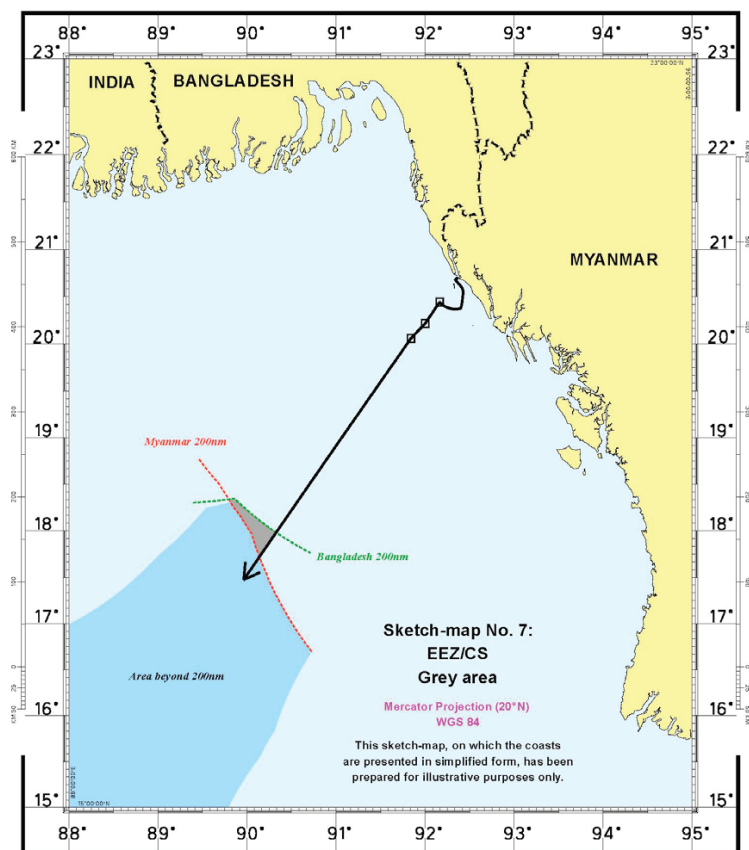
outer edge of the continental margin could be 350 nm from the coast. The ITLOS distinguished between its own role to “delimit” the continental shelf and the UN CLCS, a separate body established under UNCLOS. In other words, the ITLOS did not define the terminus of the continental shelf, leaving it to the CLCS. The final and binding outer limit of the shelf must be established by a coastal state on the basis of the recommendation of the Commission.¹¹³

9. ACCESS TO GREY AREA

According to Churchill, “grey zones” are liable to occur whenever a single maritime boundary is not an equidistance line and especially where such a line is extended to form the boundary of the continental shelf beyond 200 nm.¹¹⁴ The recognition of the tribunal that both countries have a continental shelf beyond 200 nm resulted in a small “grey area,” which is within 200 nm of Myanmar’s coast, but not on the Bangladesh side of the delimitation line. This “grey area” is a place where Bangladesh’s outer continental shelf claims overlaps with Myanmar’s 200 nm EEZ. In this “grey area,” the ITLOS gave Myanmar the right to use the water column whereas the right of seabed, within the EEZ of Myanmar, was granted to Bangladesh. The ITLOS called upon each party to exercise its rights in this grey area with due regard for the rights and duties of the other, following the principle in Article 56 of the UNCLOS. This “grey area” was not delimited by the ITLOS. After considering the difficulties it presented, the ITLOS noted that there existed many ways for the parties to reach a cooperative agreement on this limited area, indicating a joint development or unitization. However, the ITLOS provided Bangladesh access to this grey area.

113 *Id.* ¶ 379.

114 CHURCHILL, *supra* note 56, at 137-52.



10. DISPROPORTIONALITY TEST

For the purpose of the delimitation of the exclusive economic zone and the continental shelf, the relevant coast of the Parties is a significant factor. In this regard, the ITLOS considered that, for the purpose of determining any disproportionality in respect of areas allocated to the Parties, the relevant area should include maritime areas subject to overlapping entitlements of the Parties to the present case.¹¹⁵

Regarding the issue of relevant coasts in determining delimitation of maritime zones, Bangladesh argued that its entire coast is relevant.¹¹⁶ Myan-

¹¹⁵ *Id.* ¶ 493.

¹¹⁶ *Id.* ¶ 186.

mar opposed this argument.¹¹⁷ Bangladesh measures its relevant coast as 421 km.¹¹⁸ Regarding Myanmar's relevant coast, Bangladesh argued that it extends from mouth of the Naaf River up to Cape Bhiff.¹¹⁹ Myanmar on the other hand argued that the coasts of Bangladesh in the Meghna estuary do not constitute the relevant coast.¹²⁰ Myanmar measured the relevant coast for Bangladesh as only 364 km and 740 km for its own.¹²¹ The proportion was approximately 1:2 in favor of Myanmar.

However, the Tribunal decided the relevant coast on its own and accepted Bangladesh's argument to consider the Meghna estuary as part of the relevant coast.¹²² The Tribunal calculated the size of the relevant area to be approximately 283,471 square km.¹²³ Taking the whole coast of Bangladesh as relevant, the Tribunal held that the length of the relevant coast of Bangladesh is 413 km,¹²⁴ while that of Myanmar is 587 km.¹²⁵ The ratio of the length of the relevant coasts of the Parties is 1:1.42 in favor of Myanmar.¹²⁶ The ITLOS noted that its adjusted delimitation line allocates approximately 111,631 square km of the relevant area to Bangladesh and approximately 171,832 square km to Myanmar.¹²⁷

Then, the ITLOS checked whether the adjusted equidistance line has caused a significant disproportion by reference to the ratio of the length of the coastlines of the Parties and the ratio of the relevant maritime area allocated to each Party.¹²⁸ The ITLOS found that this ratio does not lead to any significant disproportion in the allocation of maritime areas to the

117 *Id.* ¶ 188.

118 *Id.* ¶ 187.

119 *Id.* ¶ 192.

120 *Id.* ¶¶ 188–89.

121 *Id.* ¶¶ 190, 197.

122 *Id.* ¶ 200.

123 *Id.* ¶ 496.

124 *Id.* ¶ 202.

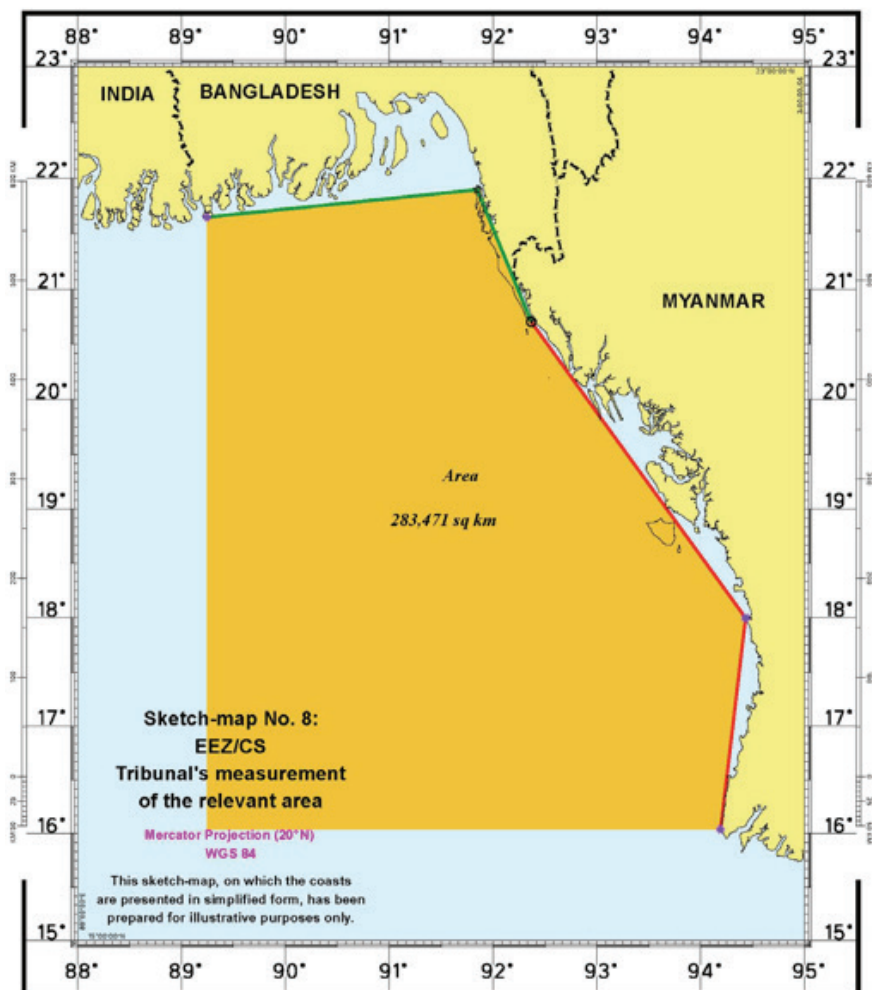
125 *Id.* ¶ 204.

126 *Id.* ¶ 498.

127 *Id.* ¶ 499.

128 *Id.* ¶ 240.

Parties relative to the respective lengths of their coasts.¹²⁹ According to the ITLOS rather, this ratio produced an equitable solution.¹³⁰



¹²⁹ *Id.* ¶ 499.

¹³⁰ *Id.*

11. CONCLUSION

This judgment has made a landmark precedent in the history of the law of the sea. The judgment sets significant precedents on the following three important issues of maritime boundary delimitation: it represents a settled case law of international courts and tribunal regarding delimitation of single maritime boundaries, and for the first time, an international tribunal or court has delimited a continental shelf boundary beyond 200 nm and considered the issue of the “grey area.”¹³¹ It established a single maritime boundary starting from the agreed terminus of the land boundary and delimiting the territorial sea, the EEZ and continental shelf of both parties. While the Tribunal applied the equidistance principle to delimit the territorial sea, it applied mainly an equitable method to delimit the EEZ and continental shelf both within and beyond 200 nm. In terms of more specific points of judgment, it can be gleaned that although the ITLOS has rejected some of the arguments of Bangladesh, such rejection did not affect substantially what Bangladesh wanted from the judgment. In fact, Bangladesh received a greater share in the Bay of Bengal through the judgment, which was not otherwise possible through bilateral negotiation. On the other hand, Myanmar also received a much larger share of the “relevant area” in the maritime zone. In this way, the judgment created a “win-win” result for both states.

The judgment establishes defined boundaries for both parties to the disputes, which will eventually enable them to explore natural resources. From Bangladesh’s perspective, this judgment will undoubtedly have great persuasive value in the resolution of the dispute between Bangladesh and India on maritime delimitation, which is currently pending before the Permanent Court of Arbitration in The Hague. It should be mentioned that Bangladesh instituted separate proceedings in its arbitration against India under Annex VII of the UNCLOS to settle its maritime boundary with the latter.

Currently, international tribunals try to apply a coherent interpretation of previous judgments on the same issue in order to avoid fragmentation and to achieve unity in international law. It is expected this judgment will be followed consistently by other tribunals to avoid fragmentation of legal principles. According to one commentator, the significance of the judgment

131 CHURCHILL, *supra* note 56, at 138.

transcends the interests of the two states as it is likely that many of the arguments employed by the Tribunal will apply equally to resolve other law of the sea disputes.¹³² Furthermore, through its judgment the ITLOS represented an expedient alternative to the other forums of disputes such as the ICJ or arbitration for the settlement of maritime disputes.¹³³

Last but not the least, the judgment resolved a dispute amicably which is a positive development for the region.

132 Samuel J. Zeidman, *Sittin' on the Dhaka the Bay: the Dispute Between Bangladesh and Myanmar and Its Implication for the International Tribunal for the Law of the Sea*, 50 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 442 (2012).

133 *Id.* at 484.

NOTE

The Fukushima Daiichi Nuclear Power Plant Accident: A Provisional Analysis and Survey of the Government's International & Domestic Response: Verification and the Road to Recovery in 2012

*Kanami Ishibashi*¹

This report is a follow-up to a short note in the 2011 *Asian Yearbook of International Law* on the legal developments resulting from the Fukushima Daiichi Nuclear Power Plant accident in 2011.² On 23 July 2012, the final report of the Investigation Committee on the Accident at the Fukushima Nuclear Power Stations was submitted to the Prime Minister. This final report is a supplement to the provisional report referred to in the 2011 volume.

The final report concludes that there were seven major problems in the response to the accidents as follows:

- (1) Tokyo Electric Power Company's (TEPCO) response to the accident and damage to the plant;
- (2) Responses to the accident by the government and other bodies;
- (3) Measures to prevent the spread of damage;
- (4) Accident prevention measures and emergency preparations;

1 Associate Professor, Tokyo University of Foreign Studies.

2 Kanami Ishibashi, *The Fukushima Daiichi Nuclear Power Plant Accident: A Provisional Analysis and Survey of the Government's International and Domestic Response*, 17 *ASIAN YEARBOOK OF INTERNATIONAL LAW* 149-157 (2011), available at http://www.dilaoundation.org/uploads/1/1/2/8/11284804/asybil_vol17_149-157.pdf.

- (5) Nuclear safety regulatory bodies' responses;
- (6) TEPCO competence; and
- (7) Compliance with international practices such as IAEA safety standards.

To prevent such accidents in the future, the report found that it was necessary to do the following: establish fundamental and effective disaster preventive measures; find out how to respond to complex disasters; change attitudes towards risk; focus on the disaster victims' point of view; create a sense of urgency within administrative agencies and TEPCO; create a government crisis management system; improve information and risk communication; and establish a culture of safety critical for saving lives. The Committee concluded that further investigation into the causes of the accident and resulting damage was necessary.

The Committee also recommended establishing: basic safety measures and emergency protocols; safety measures regarding nuclear power generation; nuclear emergency response systems; damage prevention and mitigation; compliance with international practices and relevant organizations; and continued investigation into the causes of the accident and resulting damage.

Prime Minister Noda accepted this final report and promised to make efforts to avoid future accidents by fully adhering to the report. The Committee ceased its mission and was dissolved.

Shortly thereafter, the Nuclear Regulation Authority (NRA) was established by the Act for the Establishment of the Nuclear Regulation Authority (Act No. 47 of June 27, 2012). Article 3 of the Act describes the mission of NRA as follows:

The mission of the Nuclear Regulation Authority shall be to use nuclear energy (the mission shall include affairs concerning refining activities, fabricating and enrichment activities, interim storage activities, reprocessing activities and waste disposal activities concerning nuclear energy, as well as regulations on reactors, and affairs concerning regulations for implementing safeguards based on international commitments, and other regulations for ensuring the peaceful use of nuclear energy) for the purpose of contributing to the protection of the life, health, and property of citizens and the preservation of the environment and national security of Japan.

The Committee is expected to control all nuclear energy related processes in an integrated way, from use to disposal of nuclear substances. It is also noteworthy that such control is expected to contribute to the protection of life, health and property, the environment, and the national security of Japan.

DE FACTO NATIONALIZATION OF TEPCO AND THE INDEPENDENCE OF THE NRA

The Committee was established pursuant to Article 3 of the National Government Organization Act, which ensures independence from the Government and electricity companies which have vested interests, though the Chairman is appointed by the Prime Minister (Art. 7(1)). Such a provision for independence is significant since TEPCO, which operated the Fukushima Nuclear Power Plants, was *de facto* nationalized on 31 July 2012. The Nuclear Damage Compensation Facilitation Corporation, which was established by the Nuclear Damage Compensation Facilitation Corporation Act (Act No. 94 of August 10, 2011) invested a trillion yen in TEPCO and obtained 50.11% of the voting share (at present) and 75.84% of the total stock including non-voting share, which would be converted to voting shares if TEPCO fails to recover and rebuild its business. The government will cease to hold shares by deciding that TEPCO manages itself.

SHUTDOWN OR RESTART OF OTHER NUCLEAR FACILITIES

On 5 May 2012, Tomori Nuclear facilities shut down for periodic review, bringing all its nuclear power plants to a halt. Such shutdowns have never happened since 1970.

The government tried to reactivate the nuclear power station. The first activation was carried out in Ohi Nuclear power station, which is located in Fukui prefecture and has been owned by the Kansai Electric Power Company since the Fukushima Nuclear Power Plant Accidents occurred. According to a press report, “The restarting of reactor No. 3 at the Ohi nuclear plant was ordered two weeks ago by Prime Minister Yoshihiko Noda, in a decision that has spurred growing public protests.”³ The govern-

3 Martin Fackler, *In Japan, First Reactor Is Restarted Since Quake*, N.Y. TIMES, July 1, 2012, available at <http://www.nytimes.com/2012/07/02/world/asia/japan->

ment believes that if the Ohi Nuclear power stations are not reactivated, there might be a power shortage in the Kansai area, particularly in summer, when people need more electricity for air conditioning.⁴

However, there was strong opposition to the reactivation. Local residents (189 plaintiffs) sought an injunction before the Fukui District Court to prevent the government from restarting the Ohi nuclear power station in November 2012,⁵ since they believed that safety was not yet ensured.

restarts-a-nuclear-reactor.html?_r=1.

- 4 Yoshihiko Noda, Japan Prime Minister, Press Conference by Prime Minister Yoshihiko Noda (June 8, 2012), *available at* http://japan.kantei.go.jp/noda/statement/201206/08kaiken_e.html. The Prime Minister stated as follows:

I would like to share my thoughts directly with the people of Japan on the resumption of Units 3 and 4 of Oi [sic] Nuclear Power Station. [...]

As we approach the summer, when electricity demand is at its peak, the time is coming upon us to make a conclusion. To protect the lives of the people – this was my one and only criteria in making a judgment on this issue that has split public opinion in two. My conviction is that it is the ultimate responsibility of the Government to protect the lives of the people.

In addition, he explained the necessity of activating the Ohi nuclear power plant as follows:

In order to lead prosperous and decent lives, cheap and stable electricity is indispensable. Japanese society will not be able to function if there is a decision to permanently halt nuclear power generation, which has accounted for approximately 30% of our total electricity supply, or if nuclear power generation remains halted.

If this were a matter of saving electricity by a few percentage points, then perhaps we could somehow manage if everyone pooled their efforts. However, Kansai's electricity supply-demand gap of as high as 15% is a level that was not experienced even in eastern Japan last year, and realistically, I believe it is a huge hurdle to overcome.

- 5 See *Greenpeace, Outline of Judgment on Claim for Injunction on Operation of No. 3 and No. 4 Units at Ohi Nuclear Power Plant Fukui District Court, May 21 2014*, *available at* http://www.greenpeace.org/japan/Global/japan/pdf/Ohi_ruling_gpj.pdf. A detailed analysis of this judgment and its possible effects on Japanese nuclear energy policy will be conducted in the following 2014 yearbook (vol. 20).

RELATED ENACTMENTS TOWARDS RECOVERY FROM THE NUCLEAR ACCIDENT AND PROGRESS OF AND COMPENSATION TO THE VICTIMS

As described in my earlier note in the 2011 *Yearbook*, two fundamental laws, the Basic Act on Reconstruction in response to the Great East Japan Earthquake and the Act for Establishment of the Reconstruction Agency, were enacted in 2011. Accordingly, in early 2012, the Reconstruction Agency was established as the successor to the “Reconstruction Headquarters in Response to the Great East Japan Earthquake,” which coordinated initial response efforts in the immediate aftermath of the disaster.⁶ The government also enacted several important laws for reconstruction and support for the victims: the Act for Special Measures Concerning the Reconstruction and Recovery of Fukushima (Act No. 25 of March 30, 2012), the Act for the Establishment of the Nuclear Regulation Authority (Act No. 47 of June 27, 2012),⁷ and the Nuclear Accident Child Victims’ Support Law (Act No. 48 of June 27, 2012).

The Act for Special Measures Concerning the Reconstruction and Recovery of Fukushima provides that special measures should be taken for the reconstruction and recovery of the Fukushima area that was exposed to the radiation, including the termination of evacuation of original residents (Art. 7-17), exemption of tax (Art. 18, 19), support for industries (Art. 53-37), and the generation of new employment on site (Art. 67, 68).

The Act for Establishment of the Nuclear Regulation Authority is the basis for establishing the NRA, whose mission has already been described above. The Act authorizes the NRA to exercise huge and comprehensive power over not only supervision on any measures related to the Fukushima Nuclear Power plants, but also the setting up of new safety standards for the operation of other nuclear power plants in Japan, by examining nuclear power plant facilities and manuals for operation and risk management in cases of emergencies, and investigating their compliance with the safety

6 Reconstruction Agency of Japan, *available at* <http://www.reconstruction.go.jp/english/topics/about-us.html>.

7 Act for the Establishment of the Nuclear Regulation Authority, Act No. 47, *translated in* Extra Official Gazette of June 27, 2012, *available at* <http://www.nsr.go.jp/data/000067231.pdf>.

standard as conditions for operating that facility.⁸ More importantly, the NRA is required to “integrally govern affairs for developing and implementing measures necessary for ensuring safety in the use of nuclear energy based on established international criteria (such affairs shall include those concerning refining activities, fabricating and enrichment activities, interim storage activities, reprocessing activities and waste disposal activities concerning nuclear energy, as well as regulations on reactors, and those concerning regulations for implementing safeguards based on international commitments, and other regulations for ensuring the peaceful use of nuclear energy)” (Art. 1) and it is expected to coordinate its policy and measures with that of IAEA. To be certain, there are several Conventions under the initiative of the IAEA and the NRA has submitted the National Report under the Convention on Nuclear Safety⁹ and Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management to the IAEA,¹⁰ which demonstrates a form of coordination with IAEA.

The Nuclear Accident Child Victims’ Support Law provides—bearing in mind that children (either born and unborn (children in the womb)) are especially vulnerable to the effects of radiation—for ensuring medical care, support for school attendance, ensuring food safety at home and in schools, maintenance of physical and mental health, and support for children living separate from their families (Art. 8). It obliges the government to take necessary measures, including the reduction or exemption of medical costs for child victims (Art. 13). This Act not only addresses children but also victims in general, although the extent of protection for adults is weaker than that for children. For example, it provides support for victims who plan to return to their original residence (Art. 10) and requires the government to take necessary measures to supply medical care for all victims. This is understandable as children are among the most

8 NUCLEAR REGULATION AUTHORITY OF JAPAN, REGULATORY REQUIREMENT, available at <https://www.nsr.go.jp/english/regulatory/index.html>.

9 NUCLEAR REGULATION AUTHORITY OF JAPAN, CONVENTION ON NUCLEAR SAFETY: NATIONAL REPORT OF JAPAN, available at <http://www.nsr.go.jp/english/cooperation/conventions/CNS.html>.

10 NUCLEAR REGULATION AUTHORITY OF JAPAN, JOINT CONVENTION ON THE SAFETY OF SPENT FUEL MANAGEMENT AND ON THE SAFETY OF RADIOACTIVE WASTE MANAGEMENT, <http://www.nsr.go.jp/english/cooperation/conventions/JC.html>.

vulnerable victims. It is also important to support all the victims to protect the vulnerable in the community.

On the other hand, there are several cases that have been brought to court by some victims who were not satisfied with the government's efforts. For example, the victims who were forced to resettle in other areas took legal action against TEPCO seeking compensation for forced resettlement and for the loss of land, house, other properties and their hometown.¹¹ A victim also sued TEPCO seeking compensation for his wife's death, in that she committed suicide by self-immolation, after suffering from forced resettlement and depression due to the loss of home and so on.¹² Moreover on 5 March 2012, 42 shareholders sued the directors of TEPCO in a form of a shareholder lawsuit for 5,500 billion yen in damages.¹³ On 21 December 2012, eight American sailors who suffered from exposure to radiation during decontamination work known as "Operation Tomodachi" sued TEPCO in the US federal court (San Diego) for compensation concerning the disclosure of information relevant to risks.¹⁴

It is expected that such lawsuits might increase in the following years. This, and the results of the above lawsuits, will be discussed in the next volume of the *Yearbook*.

OPERATION TO ELIMINATE OR MITIGATE THE EFFECTS OF RADIATION: EFFORTS TO INTRODUCE THE NEW ALPS SYSTEM

It is critical to eliminate or reduce the level of radiation at the site of Fukushima Nuclear Power Plant. One approach is using the so-called SARRY

11 Japanese Compensation Judgment, available at http://media.wix.com/ugd/47f753_761ace2122a5490baf1a5b9318a2080a.pdf.

12 Kyung Lah, *Husband of Fukushima Suicide Victim Demands Justice*, CNN, June 21, 2012, available at http://edition.cnn.com/2012/06/20/world/asia/japan-fukushima-suicides/index.html?hpt=ias_t2.

13 Jaclyn Belczyk, *Japan Power Company Shareholders File Record Lawsuit over Fukushima Nuclear Crisis*, JURIST, Mar. 5, 2012, available at <http://jurist.org/paperchase/2012/03/japan-power-company-shareholders-suing-over-fukushima-nuclear-crisis.php>.

14 Tom Watkins and Lateef Mungin, *U.S. Navy Sailors Sue Japan over Nuclear Accident*, CNN, Dec. 29, 2012, available at <http://edition.cnn.com/2012/12/28/world/asia/japan-fukushima-lawsuit/>.

(simplified active water retrieval and recovery) system, which is a simplified active water retrieval and recovery system and uses zeolite to absorb cesium isotopes and reduce radiation levels to 1 millionth. This approach was used to eliminate radiation-contaminated water, but a drawback is that it only removes cesium from the contaminated water.¹⁵

The system is inadequate because it can only deal with one substance, cesium. Therefore, in 2012, a new system called ALPS (Advanced Liquid Processing System) was developed and activated to purify the contaminated water. ALPS can retrieve and absorb 62 radionuclides to the extent of meeting safety standards provided by law,¹⁶ although even the water treated by the ALPS must be kept in water storage tanks.

While ALPS was expected to complement SARRY, its full-scale operation did not happen in 2012 since the storage container for the radioactive waste extracted from the contaminated water was not strong enough. Therefore, in 2012, the SARRY system continued to serve as the main method for treating the contaminated water.

However, depending only on SARRY to treat contaminated water is inadequate because even treated water contains radioactive substance, such as extremely toxic strontium. Several incidents of radioactive water leaking from the Fukushima Daiichi Nuclear Power Plant occurred during 2012, including cases in February, March, April, August, and November. In all of these cases, there were spills of contaminated water which contained highly concentrated strontium.

In the February and March cases, it was found that some contamination flowed into the sea. In particular, in March, 120 tons of contaminated water flowed from the joint section of pipes which is used for the treatment

15 Kazuaki Nagata, TEPCO Makes Little Headway in Decontaminating Water, *THE JAPAN TIMES*, Aug. 5, 2011, *available at* <http://www.japantimes.co.jp/news/2011/08/05/national/tepcu-makes-little-headway-in-decontaminating-water/#.VPRDnWdEjY8>.

16 For further details on ALPS, *see* TOKYO ELECTRIC POWER COMPANY, MULTI-NUCLIDE REMOVAL EQUIPMENT CONFIRMATORY TESTING, INSTALLATION AND CHARACTERISTICS OF RADIOACTIVE WASTE, *available at* http://www.tepco.co.jp/en/nu/fukushima-np/roadmap/images/m120625_01-e.pdf.

of contained water. Eighty liters of this water, with a very high concentration of strontium, leaked into the sea through the trench.¹⁷

In the November case, there was no leakage into the surrounding sea. But a new problem came to light regarding the shortage of tanks to contain the treated water. Since even treated water still contains high toxic strontium, it must be stored under strictly controlled conditions. However, the surrounding underground water nearby the Fukushima Daiichi Nuclear Power Plant flowed into the facilities and mixed with the contaminated water, so that the volume of contaminated water which needs to be treated is increasing on a daily basis and is beyond the capability of the SARRY system and tanks to treat and store. To deal with this problem, wells were made to pump up the underground water in order to reduce the surrounding underground water and prevent it from flowing into the facilities and mixing with the contaminated water.¹⁸

CONCLUSION

In 2012, there was certainly some progress in the investigation of the Fukushima Daiichi Nuclear Power Plant accident and enactments of laws necessary for recovery. In particular, it is notable that from the tragic lessons learned, a new organization, the NRA, which is independent from the government and electricity companies, was established to supervise any measures dealing with accidents. As described above, the NRA is required to play an active role in the safety operations of nuclear power plants and comply with international standards; its mission is very important in terms of the implementation of international law.

However, whether or not the huge and comprehensive authority of the NRA is utilized properly in a way that the law originally intended requires examination. If the NRA loses its independence from the government or

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- 17 福島第一汚染水120t漏れる…海へ一部流出か [Leakage of Contaminated Water at Fukushima Daiichi Nuclear Power Plant; Partially Spilled into the Surrounding Sea?], (Japanese) YOMIURI SHIMBUN, Mar. 26, 2012, *available at* <http://www.yomiuri.co.jp/feature/TO000303/20120326-OYT1T01018.html>.
 - 18 井戸掘削工事始まる 汚染水発生量抑制へ対策 [Making Wells to Reduce Contaminated Water Caused by Mixture with the Surrounding Underground Water], TOKYO SHIMBUN, Nov. 24, 2012, *available at* <http://www.tokyo-np.co.jp/article/feature/nucerror/condition/list/CK2012112402000159.html>.

electricity companies, this could have tremendous effects on the whole structure of Japanese nuclear policy, including the decommissioning of existing nuclear reactors. Actually, apart from the aftermath of accidents, it is becoming unrealistic for Japan to decommission all the nuclear power plants and, in fact, in 2012, two reactors in the Ohi Nuclear Power Plant were reactivated despite huge public protest. At the time this decision was made, the NRA was neither operational nor in a position to have a leading role. However, it remains unclear whether the NRA can play a decisive role in such future cases where there is no consensus concerning the safety of nuclear facilities.

Further verification of the role of the NRA and the guarantee of nuclear safety in Japan, especially in terms of international standards under the IAEA Conventions, will be analyzed in the following comment which is to be included in the following 2013 volume of this *Yearbook*.

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 2012. New data are preceded by a reference to the most recent previous entry in the multilateral treaties section of the *Asian Yearbook of International Law*. In case no new data are available, the title of the treaty is listed with a reference to the last Volume containing data on the treaty involved. For the purpose of this section, states broadly situated west of Iran, north of Mongolia, east of Papua New Guinea and south of Indonesia will not be covered.

NOTE:

- Where no other reference to specific sources is made, data were derived from *Multilateral Treaties Deposited with the Secretary-General*, <https://treaties.un.org/pages/ParticipationStatus.aspx>
- Where reference is made to the Hague Conference on Private International Law (HcCH), data were derived from http://www.hcch.net/index_en.php?act=conventions.listing
- Where reference is made to the International Atomic Energy Agency (IAEA), data were derived from <http://ola.iaea.org/ola/treaties/multi.html>
- Where reference is made to the International Civil Aviation Organization (ICAO), data were derived from <http://www.icao.int/secretariat/legal/pages/treatycollection.aspx>
- Where reference is made to the International Committee of the Red Cross (ICRC), data were derived from [http://www.icrc.org/IHL.nsf/\(SPF\)/party_main_treaties/\\$File/IHL_and_other_related_Treaties.pdf](http://www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf)
- Where reference is made to the International Labour Organization (ILO), data were derived from <http://www.ilo.org/ilolex/english/convdisp1.htm>

1 Compiled by Dr. Karin Arts, Professor of International Law and Development at the International Institute of Social Studies of Erasmus University Rotterdam (ISS), based in The Hague, The Netherlands.

- Where reference is made to the International Maritime Organization (IMO), data were derived from <http://www.imo.org/About/Conventions/StatusOfConventions/Documents/Status%20-%202013.pdf>
- Where reference is made to the Secretariat of the Antarctic Treaty, data were derived from http://www.ats.aq/devAS/ats_parties.aspx?lang=e
- Where reference is made to the United Nations Educational, Scientific and Cultural Organization (UNESCO), data were derived from http://portal.unesco.org/en/ev.php-URL_ID=12025&URL_DO=DO_TOPIC&URL_SECTION=-471.html
- Where reference is made to WIPO, data were derived from <http://www.wipo.int/treaties/en>
- Reservations and declarations made upon signature or ratification are not included.
- Sig. = Signature; Cons. = Consent to be bound; Eff. date = Effective date; E.i.f. = Entry into force; Min. age spec. – Minimum age specified; Rat. = Ratification or accession.

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ANTARCTICA

(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

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<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Tajikistan		14 Aug 2012

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.

Second Protocol for the Protection of Cultural Property in the Event of Armed Conflict, 1999: see Vol. 13 p. 263.

Convention for the Safeguarding of the Intangible Cultural Heritage, 2003: see Vol. 17 p. 164.

Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 1970

(Continued from Vol. 12 p. 235)

(Status as provided by UNESCO)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Kazakhstan		9 Feb 2012

Convention concerning the Protection of the World Cultural and Natural Heritage, 1972

(Continued from Vol. 17 p. 164)

(Status as provided by UNESCO)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Singapore		19 Jun 2012

Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 2005

(Continued from Vol. 16 pp. 158)

(Status as provided by UNESCO)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Indonesia		12 Jan 2012

DEVELOPMENT MATTERS

Charter of the Asian and Pacific Development Centre, 1982: see Vol. 7 pp. 323-324.

Agreement to Establish the South Centre, 1994: see Vol. 7 p. 324.

Amendments to the Charter of the Asian and Pacific Development Centre, 1998: see Vol. 10 p. 267.

**Multilateral Agreement for the Establishment of an International
Think Tank for Landlocked Developing Countries, 2010**

(Continued from Vol. 17 p. 165)

Entry into force: not yet

<i>State</i>	<i>Sig.</i>	<i>Cons</i>
Laos	27 Sep 2011	26 Sep 2012

DISPUTE SETTLEMENT

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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**

(Continued from Vol. 15 p. 159)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Timor Leste		21 Sep 2012

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.

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.

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.

**Convention on Wetlands of International Importance
especially as Waterfowl Habitat, 1971**

(Continued from Vol. 16 p. 160)

<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
Bhutan		7 May 2012

Amendment to the Montreal Protocol, 1992

(Continued from Vol. 17 p. 167)

<i>State</i>	<i>Cons.</i>
Nepal	18 May 2012

Amendment to the Montreal Protocol, 1997

(Continued from Vol. 17 p. 167)

<i>State</i>	<i>Cons.</i>
Myanmar	30 Jan 2012
Nepal	18 May 2012

Amendment to the Montreal Protocol, 1999

(Continued from Vol. 16 p. 162)

<i>State</i>	<i>Cons.</i>
Myanmar	30 Jan 2012
Nepal	18 May 2012

**International Convention on Civil Liability for
Bunker Oil Pollution Damage, 2001**

(Continued from Vol. 17 p. 167)

(Status as provided by IMO)

<i>State</i>	<i>Cons.</i>	<i>E.i.f.</i>
Iran	21 Nov 2011	21 Feb 2012

FAMILY MATTERS

Convention on the Recovery Abroad of Maintenance, 1956: see Vol. 11 p. 249.

Convention on the Law Applicable to Maintenance Obligations Towards Children, 1956: see Vol.6 p. 244.

Convention on the Conflicts of Law Relating to the Form of Testamentary Dispositions, 1961: see Vol. 7 p. 327.

Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 1962: see Vol. 8 p. 178.

Convention on the Law Applicable to Maintenance Obligations, 1973: see Vol. 6 p. 244.

Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, 1993: see Vol. 17 p. 168.

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

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**World Health Organization Framework Convention on
Tobacco Control, 2003**

(Continued from Vol. 17 p. 168)

<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
Uzbekistan		15 May 2012

HUMAN RIGHTS, INCLUDING WOMEN AND CHILDREN

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Convention on the Nationality of Married Women, 1957: see Vol. 10 p. 274.

Convention against Discrimination in Education, 1960: see Vol. 16 p. 164.

International Covenant on Economic, Social and Cultural Rights, 1966:
see Vol. 14 p. 231.

International Covenant on Civil and Political Rights, 1966: see Vol. 16 p. 165.

International Convention on the Elimination of All Forms of Racial Discrimination, 1966: see Vol. 8 p. 179.

Optional Protocol to the International Covenant on Civil and Political Rights, 1966, see: Vol. 15 p. 219.

Convention on the Elimination of All Forms of Discrimination against Women, 1979: see Vol. 11 p. 250.

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.

Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, 1999: see Vol. 17 p. 170.

Amendment to article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination, 1992, see Vol. 12 p. 242.

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984

(Continued from Vol. 16 p. 165)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Laos	21 Sep 2010	26 Sep 2012

Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, 1989

(Continued from Vol. 16 p. 165)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Mongolia		13 Mar 2012

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990

(Continued from Vol. 17 p. 170)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Indonesia	22 Sep 2004	31 May 2012

Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 2000

(Continued from Vol. 16 p. 165)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Indonesia	24 Sep 2001	24 Sep 2012
Malaysia		12 Apr 2012

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. 17 p. 170)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Indonesia	24 Sep 2001	24 Sep 2012
Malaysia		12 Apr 2012
Myanmar		16 Jan 2012

Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 2002

(Continued from Vol. 14 p. 232)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Philippines		17 Apr 2012

Convention on the Rights of Persons with Disabilities, 2008

(Continued from Vol. 17 p. 170).

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Afghanistan		18 Sep 2012
Cambodia	1 Oct 2007	20 Dec 2012
Singapore	30 Nov 2012	

Optional Protocol to the Convention on the Rights of Persons with Disabilities, 2008

(Continued from Vol. 16 p. 166)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Afghanistan		18 Sep 2012

International Convention for the Protection of All Persons from Enforced Disappearance, 2010

(Continued from Vol. 16 p. 166)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Thailand	9 Jan 2012	

HUMANITARIAN LAW IN ARMED CONFLICT

International Conventions for the Protection of Victims of War, I-IV, 1949: see Vol. 11 p. 252.

Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1977, see: Vol. 12 p. 244.

Protocol III Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem, 2005: see Vol. 17 p. 171.

Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1977

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<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Philippines	12 Dec 1977	30 Mar 2012

INTELLECTUAL PROPERTY

Convention for the Protection of Literary and Artistic Works, 1886 as amended 1979: see Vol. 12 p. 244.

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.

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.

Multilateral Convention for the Avoidance of Double Taxation of Copyright Royalties, 1979: see Vol. 6 p. 252.

Trademark Law Treaty, 1994: see Vol. 15 p. 222.

Patent Law Treaty, 2000: see Vol. 17 p. 172.

Convention for the Protection of Industrial Property, 1883 as amended 1979

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(Status as provided by WIPO)

<i>State</i>	<i>Party</i>	<i>Latest Act to which State is Party</i>
Brunei	17 Feb 2012	Stockholm

**Madrid Union Concerning the International Registration of Marks,
including the Madrid Agreement 1891 as amended in 1979, and the
Madrid Protocol 1989**

(Continued from Vol. 16 p. 168)

(Status as provided by WIPO)

<i>State</i>	<i>Party</i>	<i>Latest Act to which State is Party</i>
Laos	14 Mar 2012	Paris

**International Convention for the Protection of Performers, Producers
of Phonograms and Broadcasting Organizations, 1961**

(Continued from Vol. 15 p. 221)

(Status as provided by WIPO)

<i>State</i>	<i>Cons. (deposit)</i>
Kazakhstan	30 Mar 2012

**Convention for the Protection of Producers of Phonograms against
Unauthorized Duplication of Their Phonograms, 1971**

(Continued from Vol. 12 p. 245)

(Status as provided by WIPO)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Tajikistan		16 Nov 2012

WIPO Performances and Phonograms Treaty, 1996

(Continued from Vol. 17 p. 172)

(Status as provided by WIPO)

<i>State</i>	<i>Cons.</i>
Malaysia	27 Dec 2012

WIPO Copyright Treaty, 1996

(Continued from Vol. 15, p. 222)

(Status as provided by WIPO)

<i>State</i>	<i>Party</i>
Malaysia	27 Dec 2012

Singapore Treaty on the Law of Trademarks, 2006

(Continued from Vol. 17 p. 172)

(Status as provided by WIPO)

<i>State</i>	<i>Cons.</i>
Kazakhstan	5 Sep 2012

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.

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.

Statute of the International Criminal Court, 1998: see Vol. 16 p. 171.

International Convention for the Suppression of the Financing of Terrorism, 1999: see Vol. 15 p. 224.

Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organized Crime, 2000: see Vol. 15 p. 224.

Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention Against Transnational Organized Crime, 2001: see Vol. 17 p. 174.

International Convention for the Suppression of Acts of Nuclear Terrorism, 2005: see Vol. 16 p. 172.

**Convention for the Suppression of Unlawful Acts Against the
Safety of Maritime Navigation, 1988**

(Continued from Vol. 16 p. 171)

(Status as provided by IMO)

<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
Laos	20 Mar 2012	18 Jun 2012

**Protocol for the Suppression of Unlawful Acts Against the Safety of
Fixed Platforms Located on the Continental Shelf, 1988**

(Continued from Vol. 16 p. 171)

(Status as provided by IMO)

<i>State</i>	<i>Cons. (Deposited)</i>	<i>E.i.f.</i>
Laos	20 Mar 2012	18 Jun 2012

**United Nations Convention Against
Transnational Organized Crime, 2000**

(Continued from Vol. 17 p. 174)

<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
Vietnam	13 Dec 2000	8 Jun 2012

**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. 17 p. 175)

<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
Vietnam		8 Jun 2012

United Nations Convention Against Corruption, 2003

(Continued from Vol. 17 p. 175)

<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
Myanmar	2 Dec 2005	20 Dec 2012

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: see Vol. 17 p. 176.

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. 17 p. 176)

(Status as provided by the HcCH)

<i>State</i>	<i>Cons.</i>	<i>E.i.f.</i>
Uzbekistan	25 Jul 2011	15 Apr 2012

LABOUR

Forced Labour Convention, 1930 (ILO Conv. 29): see Vol. 15 p. 226.

Freedom of Association and Protection of the Right to Organise Conven-
tion, 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.

Worst Forms of Child Labour Convention, 1999 (ILO Conv. 182): see Vol. 16 p. 174.

Employment Policy Convention, 1964 (ILO Conv. 122)

(Continued from Vol. 8 p. 186)

(Status as provided by the ILO)

<i>State</i>	<i>Rat. registered</i>
Vietnam	11 Jun 2012

Minimum Age Convention, 1973 (ILO Conv. 138)

(Continued from Vol. 17 p. 177)

(Status as provided by the ILO)

<i>State</i>	<i>Rat. registered</i>	<i>Min. age spec.</i>
Turkmenistan	27 Mar 2012	16

Promotional Framework for Occupational Safety and Health Convention (ILO Conv. 187), 2006

(Continued from Vol. 16 p. 175)

(Status as provided by the ILO)

<i>State</i>	<i>Rat. registered</i>
Malaysia	7 Jun 2012
Singapore	11 Jun 2012

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

Convention relating to the Status of Stateless Persons, 1954: see Vol. 17 p. 178.

Convention on the Physical Protection of Nuclear Material, 1980: see Vol. 12 p. 252.

Optional Protocol to the Vienna Convention on Diplomatic Relations concerning Acquisition of Nationality, 1961: see Vol. 6 p. 265.

Optional Protocol to the Vienna Convention on Consular Relations concerning Acquisition of Nationality, 1963: see Vol. 8 p. 187.

NUCLEAR MATERIAL

Convention on Civil Liability for Nuclear Damage, 1963: see Vol. 17 p. 179.

Joint Protocol Relating to the Application of the Vienna Convention (and the Paris Convention on Third Party Liability in the Field of Nuclear Energy), 1980: see Vol. 6 p. 265.

Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, 1986: see Vol. 17 p. 179.

Convention on Supplementary Compensation for Nuclear Damage, 1997: see Vol. 16 p. 265.

Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management, 1997: see Vol. 17 p. 180).

Protocol to Amend the 1963 Convention on Civil Liability for Nuclear Damage, 1997: see Vol. 17 p. 180.

Convention on the Physical Protection of Nuclear Material, 1980

(Continued and corrected from Vol. 12 p. 252)

(Status as provided by IAEA)

<i>State</i>	<i>Sig.</i>	<i>Cons. (deposit)</i>
Laos		29 Sep 2010
Vietnam		4 Oct 2012

Convention on Early Notification of a Nuclear Accident, 1986

(Continued from Vol. 17 p. 179)

(Status as provided by IAEA)

<i>State</i>	<i>Sig.</i>	<i>Cons. (deposit)</i>
Cambodia		5 Apr 2012

Convention on Nuclear Safety, 1994

(Continued from Vol. 12 p. 252)

(Status as provided by IAEA)

<i>State</i>	<i>Sig.</i>	<i>Cons. (deposit)</i>
Cambodia		5 Apr 2012

Amendment to the 1980 Convention on the Physical Protection of Nuclear Material, 2005

(Continued from Vol. 17 p. 180)

(Status as provided by IAEA)

<i>State</i>	<i>Sig.</i>	<i>Cons. (deposit)</i>
Vietnam		3 Nov 2012

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 relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, 1994: see Vol. 17 p. 182.

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. 16 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

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)

(Status as provided by IMO)

<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)

(Status as provided by IMO)

<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.

TELECOMMUNICATIONS

Constitution of the Asia-Pacific Telecommunity, 1976: see Vol. 13 p. 280.

Convention on the International Maritime Satellite Organization (INMARSAT), 1976 (as amended): see Vol. 8 p. 193.

Amendment to Article 11, Paragraph 2(a), of the Constitution of the Asia-Pacific Telecommunity, 1981: see Vol. 8 p. 193.

Amendments to articles 3(5) and 9(8) of the Constitution of the Asia-Pacific Telecommunity, 1991: see Vol. 9 p. 298.

Agreement establishing the Asia-Pacific Institute for Broadcasting Development, 1977: see Vol. 10 p. 287.

Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, 1998: see Vol. 15 p. 232.

Amendments to the Agreement establishing the Asia-Pacific Institute for Broadcasting Development, 1999: see Vol. 10 p. 288.

Amendments to the Constitution of the Asia-Pacific Telecommunity, 2002: see Vol. 13 p. 280.

TREATIES

Vienna Convention on the Law of Treaties, 1969: see Vol. 12 p. 258.

Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, 1986: see Vol. 6 p. 280.

WEAPONS

Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Warfare, 1925: see Vol. 6 p. 281.

Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, 1963: see Vol. 6 p. 281.

Treaty on the Non-Proliferation of Nuclear Weapons, 1968: see Vol. 11 p. 262.

Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof, 1971: see Vol. 6 p. 282.

Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, 1972: see Vol. 13 p. 281.

Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques, 1976: see Vol. 12 p. 258.

Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed Excessively Injurious or to have Indiscriminate Effects, and Protocols, 1980: see Vol. 11 p. 263.

Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 1993: see Vol. 12 p. 259.

Comprehensive Nuclear Test Ban Treaty, 1996: see Vol. 12 p. 259.

Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, 1997: see Vol. 13 p. 281.

Amendment of Article 1 of the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed Excessively Injurious or to have Indiscriminate Effects, 2001: see Vol. 12 p. 259.

Convention on Cluster Munitions, 2008: see Vol. 16 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.

STATE PRACTICE RAPPORTEURS

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Air Law

PHILIPPINES

CONVENTION OF INTERNATIONAL CIVIL AVIATION – TAX EXEMPTIONS

***Commissioner of Internal Revenue v. Pilipinas Shell Petroleum Corporation* [G.R. No. 188497. 25 April 2012]**

Pilipinas Shell Petroleum Corporation is engaged in the business of processing, treating and refining petroleum for the purpose of producing marketable products and the subsequent sale thereof. It filed with the Bureau of Internal Revenue a formal claim for refund or tax credit in the total amount of P28,064,925.15, representing excise taxes it allegedly paid on sales and deliveries of gas and fuel oils to various international carriers during the period October to December 2001. Subsequently, a similar claim for refund or tax credit was filed covering the period January to March 2002 in the amount of P41,614,827.99. Again, another formal claim for refund or tax credit in the amount of P30,652,890.55 covering deliveries from April to June 2002 was filed.

No decision on the claims was taken, so Pilipinas Shell filed petitions for review before the courts. The Supreme Court states that the Solicitor General argues that the obvious intent of the law is to grant excise tax exemption to international carriers and exempt entities as buyers of petroleum products and not to the manufacturers or producers of said goods. Excise tax on petroleum products attached to the said goods before their sale or delivery to international carriers, as in fact Pilipinas Shell averred that it paid the excise tax on its petroleum products when it “withdrew petroleum products from its place of production for eventual sale and delivery to various international carriers as well as to other customers.”

Among others, the Court held that in the case of international air carriers, the tax exemption granted under the Tax Code is based on “a long-standing international consensus that fuel used for international air services should be tax-exempt.” Furthermore, the provisions of the 1944 Convention of International Civil Aviation or the Chicago Convention, which form binding international law, requires the contracting parties not to charge duty on aviation fuel already on board any aircraft that has

arrived in their territory from another contracting state. The exemption of airlines from national taxes and customs duties on a range of aviation-related goods, including parts, stores and fuel is a standard element of the network of bilateral “Air Service Agreements.” A resolution of the International Civil Aviation Organization expanded the provision as to similarly exempt from taxes all kinds of fuel taken on board for consumption by an aircraft from a contracting state in the territory of another contracting State departing for the territory of any other State. The tax exemption now generally applies to fuel used in international travel by both domestic and foreign carriers. However, on reasons relating to a strict construction of domestic law when it comes to tax exemptions, the Court denied Pilipinas Shell’s claims for tax refund or credit.

Aliens

CHINA

VISA – EUROPEAN UNION – MUNICIPAL LAW

72-hour Visa-Free Travel to Beijing and Shanghai for Foreign Nationals from 45 Countries

The State Council approved the application from the Beijing municipal government on April 28, 2012, allowing foreigners of 45 countries to stay in Beijing without a Chinese visa for 72 hours. This measure entered into force on 1 January 2013. It also applies to Shanghai. Those 45 countries are: 31 European Union countries (Austria, Belgium, Bulgaria, the Czech Republic, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Russia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Ukraine and the United Kingdom), 6 American countries (Argentina, Brazil, Canada, Chile, Mexico and the United States) and 8 Asian and Oceanian countries (Australia, Brunei, Japan, Qatar, New Zealand, Singapore, South Korea and the United Arab Emirates).¹

1 外国人72小时过境免签常遇问题解答, GENERALKONSULAT DER VOLKSREPUBLIK CHINA IN HAMBURG, <http://www.fmprc.gov.cn/ce/cgham/chn/lsw/t1067995.htm>.

**EXIT AND ENTRY – ADMINISTRATIVE ACT – VISA –
WORK PERMIT – PUBLIC SECURITY**

Act on Administration of Exit and Entry Adopted

On June 30, 2012, the 27th Session of the Standing Committee of the 11th NPC adopted the Act on Administration of Exit and Entry. This Act defines “exit” as the leave from inland China to other countries or regions, from inland China to Hong Kong Special Administrative Region, Macau Special Administrative Region, or from mainland China to Taiwan region. “Entry” is defined as entry from other countries or regions to inland China, from Hong Kong Special Administrative Region or Macau Special Administrative Region to inland China, or from Taiwan region to mainland China. “Alien” is defined as any person without Chinese nationality (article 89).

This Act is applicable to the exit and entry of Chinese citizens, the entry and exit of aliens, the residence of aliens in China and border examination of exit and entry of transport vehicles. This Act provides that subject to approval by the State Council, the Ministry of Public Security and the Ministry of Foreign Affairs may, depending on the needs of the administration of exit and entry, make rules on human bodily biological identification information including fingerprints reserved at exit and entry. If foreign governments have special provisions on the administration of issuing visas to, and exit and entry of, Chinese citizens, the Chinese government may, depending on the circumstances, take corresponding reciprocal measures (article 7).

No visa will be issued to an alien if one of the following circumstances applies: he or she (1) has been deported or repatriated, and the time of forbidding entry has not expired; (2) has a serious mental disorder, infectious tuberculosis or any other infectious disease which may cause serious danger to public health; (3) may endanger China’s national security and interest, damage social public order or commit any violation of law and crimes; (4) deceitfully applies for visa or is unable to afford the stay in China; (5) is unable to provide the relevant documents required by the visa organs; (6) any other circumstance for which the visa organs consider it not proper to issue visa. No reason would be given for the refusal to issue a visa (article 21).

No alien is allowed to enter China if one of the following circumstances is found: (1) he or she does not hold a valid exit and entry certificate, or

refuses to accept or escape from border examination; (2) one of the circumstances in article 21 (1)–(4) of this Act is found; (3) he or she may commit any activity inconsistent with the type of visa; (4) any other circumstance for which laws or regulations forbid the entry. No reason would be given by the border examination organs to those who are refused to enter (article 25).

No alien is allowed to exit if one of the following circumstances applies: (1) he or she has been convicted and sentenced but the sentence has not yet been carried out; or he or she is a criminal defendant or suspect, except in the case of transfer of the convicted persons in accordance with the relevant agreement concluded between China and foreign States; (2) he or she is not approved for exit by the people's court due to involvement in an on-going civil case; (3) he or she is not approved for exit by the relevant organs of the State Council or provincial governments for not paying remuneration to labourers; (4) other circumstances under which laws or administrative regulations forbid the exit (article 28).

No alien who stays or resides in China shall commit any activity inconsistent with the reason for his or her stay and residence; every alien shall exit before the time of stay or residence expires (article 37).

Any alien who works in China shall obtain work permit and residence certificate for work in accordance with relevant regulations. No unit or individual shall employ an alien without work permit or residence certificate for work (article 41).

Illegal work is present if an alien commits any of the following activities: (1) works in China without work permit or residence certificate for work; (2) works in China beyond the scope of work permit; (3) foreign students work in China in violation of regulations on teaching assistance, beyond the scope of the position or limitation of hours (article 43).

If an alien is applying for refugee status, he or she may stay in China by virtue of the temporary identity certificate issued by the public security organs during the period of identification. If refugee status is granted, he or she may stay and reside in China by virtue of the refugee identity certificate issued by the public security organs (article 46).²

2 *Exit and Entry Administration Law of the People's Republic of China*, BUREAU OF EXIT AND ENTRY ADMINISTRATION OF THE MINISTRY OF PUBLIC SECURITY, <http://www.mps.gov.cn/n16/n84147/n84181/3837123.html>.

KOREA

**CONSCIENTIOUS OBJECTOR – FREEDOM OF CONSCIENCE
– RELIGIOUS BELIEF – DUTY OF MILITARY SERVICE -
INTERNATIONAL COVENANT ON CIVIL AND
POLITICAL RIGHTS ARTICLE 18**

[2010No425, 2011No115 (Joinder), 2011No903 (Joinder) April 18, 2012]

Facts

The Defendants who are Jehovah's Witnesses refused to participate in homeland reserve forces training as conscientious objectors.

Legal Issues

Whether conscientious objection is protected under the Constitution of the Republic of Korea Article 6, Section 1 that incorporates International treaties, especially the International Covenant on Civil and Political Rights Article 18.

Judgment

The Court ruled that the Establishment of Homeland Reserve Forces Act did not violate the freedom of conscience as following:

The Act at issue in this case has a justified legislative intent to maintain homeland reserve forces by enforcing reserve forces training to fulfill military duty in a fair manner of sharing the burden of military service. Ultimately, the Act fulfills national security assurance that is legally protected right under the Constitution. In addition, the Act is an appropriate mean to fulfill the legislative intent because the Act forces the duty of reserve forces training by imposing penalty to those who fail to participate in the training. . . . Thus, the conscience objectors should be punished under the Act. Nonetheless, the public interests the Act pursues are the fundamental interest of national security and bearing fair burden of duty of military service that are the preconditions for existence of nation and all freedoms. Thus, conscience objection, by refusing to fulfill the duty of the reserve force training, is asking for exception to the duty of training that every person bears. Consequently, for the fairness in bearing burden to fulfill the duty of military service, making exception will have a great ripple effect on other people and the society as a whole. Therefore, the Act at issue cannot be

regarded as having lost the balance of legally protected right when the defendants are punished in violation of this Act.

The court also ruled about whether conscience objection is generally approved international regulation and whether the International Covenant on Civil and Political Rights is relevant to the Act at issue as following:

It is difficult to conclude that our country's accession to the International Covenant on Civil and Political Rights in April 10, 1990 would automatically recognize the right of conscience objection or bring the legally binding effect on recognizing conscience objection in military service. In addition, there is no expressed International human rights treaty that deals with conscience objection. Although there are some countries including European countries that acknowledge the conscience objection, it does not lead us to conclude that there is an international customary law that generally recognizes one. Accordingly, in our country, conscience objection cannot be accepted as an International regulation. Therefore, punishment of conscience objectors in the reserve force training under the Act at issue does not violate the Constitution Article 6 Section 1 that declares the principle of respect for international law. (See the decision of the Constitutional Court on 2007 HUNBA 12, 2009 HUNBA 103 (Joinder) in August 30, 2011.)

In conclusion, the court ruled that refusing to participate in the reserve force training, even if such objection is based on the freedom of conscience and the religious beliefs, is not a lawful reasoning. Thus, the court ruled that the defendants' arguments have no merit.

**IMMIGRATION CONTROL LAW - CONVENTION RELATING TO THE
STATUS OF REFUGEES – PROTOCOL RELATING TO THE STATUS OF
REFUGEES - SUFFICIENT EVIDENCE PROVING FEAR OF
HOMELAND PERSECUTION**

[2010Du274484 April 26, 2012]

Facts

The Plaintiff from Ivory Coast applied for admission as Refugee when he entered Korea but the Minister of Justice declined his application. The original judgment found that there is no sufficient evidence that the plaintiff is under the danger of persecution. This case ruled that the original judg-

ment was legally wrong in finding the probability of persecution and had misunderstanding on the method and the measure to find the probability.

Legal Issues

How to make decision on the credibility of statements in a refugee application on the sufficient evidence of fear of persecution that is required for a refugee application.

Judgment

According to the Immigration Control Law Article 2, Section 3 and Article 76, Section 1, the Convention Relating to the Status of Refugees Article 1, and the Protocol Relating to the Status of Refugees Article 1, the Minister of Justice should give refugee status as defined in the Convention to the foreigners present in the Republic of Korea who has sufficient evidence of fear of being persecuted for the reasons of race, religion, nationality, membership of particular social group or political opinion who cannot be protected by his or her country or does not want the protection from that country. In addition, in principle, the foreigner who applies for the refugee status should prove the 'fear of persecution with sufficient evidence.' However, depending on the special circumstance of the applicant, the Minister cannot demand the refugee to objectively prove every single factual argument. If the statements are consistent and persuasive, and if it is reasonable to decide that the statements are credible as related to taking the following factors as a whole, the Minister shall find the sufficient evidence. The factors to consider are: the course of entry to Korea; period taken to apply for refugee status after entry; the details about refugee application; the situation in the applicant's country; the applicant's subjective degree of fear; the political, social, and cultural circumstance in the region the applicant resided; and the general degree of fear the people in that region have. (See Supreme Court decision on 2007 DU 3930, July 24, 2008).

However, the Supreme Court ruled that although details in the plaintiff's statements are not consistent and some of them are not coherent with the evidence he presented, it is difficult to reject the credibility of the whole factual arguments. In addition, considering all the different matters, the court ruled that if the plaintiff is deported back to his country, it is reasonable to conclude that there is a possibility of persecution based on his race or political activities and that it is hard to expect protection from his country.

When examining the refugee applicant's statement about experience of persecution, the counselor should not wholly deny the credibility of the statements when he finds small inconsistency in details or slight exaggerations. In addition, the counselor should consider the possibility that such exaggerations and inconsistency resulted from psychological trauma from the real persecution, emotional instability due to the applicant in needy circumstance, limitation on memory as time passed, or difference in the linguistic sense from our country due to different cultural and historical background. Thus, the counselor needs to assess the core of the statements with overall consistency and credibility. Especially, if the applicant is a female claiming for serious persecution, the counselor should take consideration of the possibility and specialty of the statements when assessing the credibility. In addition, based on above mentioned assessment, if the applicant's factual arguments on the past persecution are reasonable, unless his or her country's situation has changed drastically to have clearly eradicated the possibility of the persecution, the counselor should find that there is sufficient evidence of the fear of persecution, which is the requirement for refugee application.

PHILIPPINES

NON-ADVERSARIAL PROCEDURE TO DETERMINE ELIGIBILITY OF PROTECTION FOR REFUGEES, STATELESS PERSONS – ACCEPTANCE OF REFUGEES WHEN NOT OPPOSED TO THE PUBLIC INTEREST – PERSONS WITHOUT NATIONALITY – ADHERENCE TO UN CONVENTIONS

Establishing the Refugee and Stateless Status Determination Procedure

In 2012, the Department of Justice issued Department Circular No. 058 to establish a refugee and stateless status determination procedure. The Philippines has acceded to the 1951 UN Convention Relating to the Status of Refugees, its 1967 Protocol, and the UN Convention Relating to the Status of Stateless Persons. Under Commonwealth Act No. 613, also known as "the Philippine Immigration Act of 1940," refugees for religious, political, or racial reasons may be admitted to the Philippines for humanitarian reasons and when not opposed to the public interest. The immigration law also allows admission of persons without nationality as immigrants.

The circular reasoned that it is essential to strengthen the procedure to determine eligibility of protection for refugees and establish a procedure to determine eligibility of protection for stateless persons consistent with the above treaties. It set out definitions consistent with the treaties and established a Refugee and Stateless Persons Protection Unit in the Legal Staff of the Department of Justice (Sec. 1, Sec. 5). The objective is to establish a fair, speedy and non-adversarial procedure to facilitate identification, treatment, and protection of refugees and stateless persons consistent with the laws, international commitments and humanitarian traditions and concerns of the Philippine Republic (Sec. 2).

What follows are some of the highlights of the procedure. The procedure is governed by the basic principles of preservation and promotion of family unity; non-detention on account of being stateless or refugee; non-deprivation of status and non-discrimination in the application of the treaties; *non-refoulement*, especially during the pendency of the application of the applicant and/or his/her dependents; and non-punishment of the applicant and/or his/her dependents on account of illegal entry or presence, provided they present themselves without delay to authorities and/or shows good cause for illegal entry or presence (Sec. 3). The procedure is administrative in nature and priority is given to refugee status determination (Sec. 8). The burden of proof is shared (Sec. 9), and applicants are given rights (Sec. 10). An unfavorable decision may be requested for reconsideration (Sec. 13), and an applicant may seek judicial review of a decision or resolution (Sec. 20). Under certain conditions, a refugee or stateless person may be removed from Philippine territory (Sec. 30). The procedure also covers processes related to exclusion, cancellation, revocation, and cessation of refugee status.

ASEAN

INDONESIA

ASEAN – HOST COUNTRY AGREEMENT

Presidential Regulation No. 99 of 2012 on the Ratification Agreement between the Government of the Republic of Indonesia and the Association

of Southeast Asian Nations (ASEAN) on Hosting and Granting Privileges and Immunities to the ASEAN Secretariat

In Phnom Penh, Cambodia, on April 2, 2012, the Government of the Republic of Indonesia has signed an agreement with ASEAN concerning hosting and granting privileges and immunities to the ASEAN Secretariat. This agreement is later ratified by Presidential Regulation No. 99 of 2012 in Jakarta, on November 17, 2012, by the President of the Republic of Indonesia, Susilo Bambang Yudhoyono, and placed on the statute book in Jakarta, on November 19, 2012 by Ministry of Law and Human Rights, Amir Syamsudin. At the time of the enactment of this Presidential Regulation, the former Presidential Regulation ratifying the Agreement between the Government of Indonesia and the ASEAN relating to the Privileges and Immunities of the ASEAN Secretariat (Presidential Regulation No. 9 of 1979) is revoked and declared invalid. According to the Agreement, ASEAN have the juridical capacity under Indonesian laws to enter into contracts; acquire and dispose of movable and immovable properties in accordance with the laws and regulations of Indonesia; and institute and defend itself in legal proceedings. For that purpose, the Secretary-General, Deputy Secretaries-General or any member of the Staff of the Secretariat, authorized by the Secretary-General, in accordance with ASEAN rules shall represent ASEAN.

DISPUTE SETTLEMENT – ASEAN MECHANISM ON NON-COMPLIANCE RULES

Instrument of Incorporation of the Rules for Reference of Non-Compliance to the ASEAN Summit to the Protocol to the ASEAN Charter on Dispute Settlement Mechanisms

Referring to the Protocol to the ASEAN Charter on Dispute Settlement Mechanisms (Protocol) which was signed on April 8, 2010 but has not entered into force, and Rules for Reference of Non-Compliance to the ASEAN Summit which was adopted by the ASEAN Foreign Ministers in Phnom Penh, Cambodia, on April 2, 2012, Indonesia and other ASEAN Member States have agreed that the Rules for Reference of Non-Compliance to the ASEAN Summit, which is Annex of the Instrument, shall be incorporated as Annex 6 to the Protocol. Article 2 of the Instrument states that the Instrument enters into force upon signature, which was on April 2, 2012.

There is no need of ratification of this Instrument. Consequently, Annex 6 to the Protocol shall apply upon the entry into force of the Protocol. Indonesia has been ratified the Instrument through Presidential Regulation No. 71 of 2014.

ASEAN – RATIFICATION – DIPLOMATIC IMMUNITY – PRIVILEGES

Presidential Regulation No. 20 of 2012 on Ratification of Agreement on the Privileges and Immunities of the Association of Southeast Asian Nations (Regulation 20/2012)

Regulation 20/2012 was enacted to ratify the Agreement on the Privileges and Immunities of the ASEAN that has been signed in Cha-am Hua Hin, Thailand on October 25, 2009. The Agreement itself contains that ASEAN and the property and assets of ASEAN shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity and the premises of ASEAN shall be inviolable. The property and assets of ASEAN shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action. Furthermore, the property and assets of ASEAN shall be exempt from all direct taxes, customs duties and prohibitions and restrictions on imports and exports

ASEAN – ASEAN DECLARATION ON HUMAN RIGHTS – RECOGNITION OF THE DECLARATION

ASEAN Declaration on Human Rights, November 18, 2012

Indonesia signed the ASEAN Declaration on Human Rights on November 18, 2012 in Phnom Penh, Cambodia. There is no need for ratification of this Declaration. The Parties, through the Declaration, have agreed on the general principles as its scope regarding the civil and political rights; economic, social and cultural rights; right to development; right to peace; and cooperation in the promotion and protection of human rights. ASEAN human Rights Declaration is a commitment of ASEAN Member States in establishing a framework for human rights cooperation in the region and contributes to the ASEAN community building process. In Indonesia, domestic Human Rights Commission has been established since 1993 and has been dealing with many human rights cases in the past 20 years.

Arbitration

INDIA

SCOPE AND APPLICABILITY SECTION 2(2) OF INDIAN ARBITRATION AND CONCILIATION ACT, 1996 – UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION – ENFORCEMENT OF ARBITRAL AWARDS

Bharat Aluminium Company v. Kaiser Aluminium Technical Service, Inc. [Supreme Court of India, 6 September 2012 <http://JUDIS.NIC.IN>]

Facts

This case dealt with the interpretation and application of Section 2(2) in Part I of the Indian Arbitration and Conciliation Act, 1996 (Indian Act) which, *inter alia*, provided that “[t]his Part shall apply where the place of arbitration is in India.” Part I of Indian Act provided for various aspects of conduct of arbitration within India. Part II provided for the recognition and enforcement of arbitration awards, and it applied to both national and international arbitrations. For more than a decade, Indian courts, particularly the Indian Supreme Court, considered the scope and application of Section 2 (2) to arbitrations held not only in India as per Part I of the Indian Act but also to those arbitrations held outside India. The Indian Supreme Court in *Bhatia International v. Bulk Trading S.A & Another* (2002) SCC 105 considered the scope of Section 2(2) of the Indian Act and held that Part I would also apply to all arbitrations held out of India, unless the parties by agreement, express or implied, exclude all or any of its provisions. The decision of this case was followed in *Venture Global Engineering v. Satyam Computer Services Ltd. & Another* (2008) (1) Scale 214. However, there were differences among judges about the interpretation and scope of applicability of Section 2(2) of the Indian Act, and therefore, it was taken before the Constitution bench of the Supreme Court for the purpose of obtaining a conclusive interpretation.

There were several cases involving arbitration proceedings that were pending before the various courts within India under the Indian Act. So, a conclusive interpretation on the scope of Section 2(2) was crucial. Five legal questions were placed before the court, and these were: (a) what is meant by the place of arbitration as found in Sections 2(2) and 20 of the

Arbitration Act, 1996?; (b) what is the meaning of the words “under the law of which the award is passed” under Section 48 of the Arbitration Act, 1996 and Article V(1)(e) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention)?; (c) does Section 2(2) bar the application of Part I of the Arbitration Act, 1996 (Part I for brevity) to arbitrations where the place is outside India?; (d) does Part I apply at all stages of an arbitration, i.e., pre-, during, and post-stages of the arbitral proceedings, in respect of all arbitrations, except for the areas specifically falling under Parts II and III of the Arbitration Act, 1996 (Part II and Part III)?; and (e) whether a suit for preservation of assets pending an arbitration proceeding is maintainable?

Judgment

The Court noted the arguments that the Indian Arbitration and Conciliation Act, 1996 had been based on the Model Law on International Commercial Arbitration as adopted by the United Nations Commission on International Trade Law (UNCITRAL) in 1985. The Court also noted the arguments that the Indian Act had not “adopted or incorporated the provisions of Model Law” and that it had merely “taken into account” the Model Law.³ It was further argued that the Indian Act had not adopted the territorial criterion/principle completely, and party autonomy had been duly recognized.

The Court briefly outlined the history and evolution of arbitration as a mechanism in India. It stated,

Resolution of disputes through arbitration was not unknown in India even in ancient times. Simply stated, settlement of disputes through arbitration is the alternate system of resolution of disputes

3 References were also made to earlier jurisprudence of the Indian Supreme Court, namely, *Konkan Railway Corporation Ltd & Another v. Rani Construction Pvt. Ltd. and SBP & Co. v. Patel Engineering Ltd. & Another*. In these cases, it was emphasized that, in fact, the Arbitration Act, 1996 differed from the UNCITRAL Model Law on certain vital aspects. It was pointed out that one of the strongest examples was the omission of the word “only” in Section 2(2), which occurred in corresponding Article 1(2) of the Model Law. The absence of the word “only” in Section 2(2) clearly signified that Part I should compulsorily apply if the place of arbitration was in India. It did not mean that Part I would not apply if place of arbitration was not in India.

whereby the parties to a dispute get the same settled through the intervention of a third party. The role of the court is limited to the extent of regulating the process. During the ancient era of Hindu Law in India, there were several machineries for settlement of disputes between the parties. These were known as *Kulani* (village council), *Sreni* (corporation) and *Puga* (assembly). Likewise, commercial matters were decided by Mahajans and Chambers. The resolution of disputes through the panchayat was a different system of arbitration subordinate to the courts of law. The arbitration tribunal in ancient period would have the status of panchayat in modern India. The ancient system of panchayat has been given due statutory recognition through the various Panchayat Acts subsequently followed by Panchayati Raj Act, 1994. It has now been constitutionally recognized in Article 243 of the Constitution of India.⁴

The Indian Arbitration Act of 1940 presented several difficulties. Arbitration proceedings were challenged in the courts without exception. In this context, the Court narrated the emerging international scenario with specific reference to recognition and enforcement of arbitral awards. The Court stated,

4 Referring to the evolution of the Indian law on Arbitration, the court noted, “The first Indian Act on Arbitration law came to be passed in 1899 known as Arbitration Act, 1899. It was based on the English Arbitration Act, 1899. Then came the Code of Civil Procedure, 1908. Schedule II of the Code contained the provisions relating to the law of Arbitration which were extended to the other parts of British India. Thereafter the Arbitration Act, 1940 (Act No.10 of 1940) (hereinafter referred to as the “1940 Act”) was enacted to consolidate and amend the law relating to arbitration. This Act came into force on 1st July, 1940. It is an exhaustive Code in so far as law relating to the domestic arbitration is concerned. Under this Act, Arbitration may be without the intervention of a Court or with the intervention of a Court where there is no suit pending or in a pending suit. This Act empowered the Courts to modify the Award (Section 15), remit the Award to the Arbitrators for reconsideration (Section 16) and to set aside the Award on specific grounds (Section 30). The 1940 Act was based on the English Arbitration Act, 1934. The 1934 Act was replaced by the English Arbitration Act, 1950 which was subsequently replaced by the Arbitration Act, 1975. Thereafter the 1975 Act was also replaced by the Arbitration Act, 1979. There were, however, no corresponding changes in the 1940 Act. The law of arbitration in India remained static.”

Difficulties were also being faced in the International sphere of Trade and Commerce. With the growth of International Trade and Commerce, there was an increase in disputes arising out of such transactions being adjudicated through Arbitration. One of the problems faced in such Arbitration, related to recognition and enforcement of an Arbitral Award made in one country by the Courts of other countries. This difficulty was sought to be removed through various International Conventions. The first such International Convention was the Geneva Protocol on Arbitration Clauses, 1923, popularly referred to as "the 1923 Protocol". It was implemented w.e.f. 28th July, 1924. This Protocol was the product of the initiative taken by the International Chamber of Commerce (ICC) under the auspices of the League of Nations. The 1923 Protocol sought to make arbitration agreements and arbitration clauses in particular enforceable internationally. It was also sought to ensure that Awards made pursuant to such arbitration agreements would be enforced in the territory other than the state in which they were made. The 1923 Protocol proved to be inadequate. It was followed by the Geneva Convention on the execution of Foreign Arbitrated Awards, 1927 and is popularly known as the "Geneva Convention of 1927". This convention was made effective on 25th July, 1929. India became a signatory to both the 1923 Protocol and the 1927 Convention on 23rd October, 1937. It was to give effect to both the 1923 Protocol and 1927 Convention that the Arbitration (Protocol and Convention) Act, 1937 was enacted in India. Again a number of problems were encountered in the operation of the 1923 Protocol and the 1927 Geneva Convention. It was felt that there were limitations in relation to their fields of application. Under the 1927 Geneva Convention a party in order to enforce the Award in the Country of an origin was obliged to seek a declaration in the country where the arbitration took place to the effect that the Award was enforceable. Only then could the successful party go ahead and enforce the Award in the country of origin. This led to the problem of "double exequatur," making the enforcement of arbitral awards much more complicated. In 1953 the International Chamber of Commerce promoted a new treaty to govern International Commercial Arbitration. The proposals of ICC were taken up by the United Nations Economic Social Council. This in turn led to the adoption of the convention on the Recognition and Enforcement of Foreign Arbitral Awards at New York in 1958 (popularly known as the New York Convention). The New York Convention is an improvement on the Geneva Convention of 1927. It provides for a much more simple and effective method of recognition and

enforcement of foreign arbitral awards. It gives much wider effect to the validity of arbitration agreement. This convention came into force on 7th June, 1959. India became a State Signatory to this convention on 13th July, 1960. The Foreign Awards (Recognition and Enforcement) Act, 1961 was enacted to give effect to the New York Convention. Thus prior to the enactment of the Arbitration Act, 1996, the law of Arbitration in India was contained in the Protocol and Convention Act, 1937, the Arbitration Act, 1940 and the Foreign Awards (Recognition and Enforcement) Act, 1961. There were no further amendments in the aforesaid three acts. Therefore, it was generally felt that the arbitration laws in India had failed to keep pace with the developments at the international level.

New Arbitration Law based on the UNCITRAL Model Law was introduced in India in 1996 to bring in a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations.⁵ The Court also noted and outlined the context in which UNCITRAL Model Law was adopted in 1985. According to the Court:

Internationally, the Arbitration Law developed in different countries to cater for the felt needs of a particular country. This necessarily led to considerable disparity in the National Laws on arbitration. Therefore, a need was felt for improvement and harmonization as National Laws which were, often, particularly inappropriate for resolving international commercial arbitration disputes. The explanatory note by the UNCITRAL Secretariat refers to the recurring inadequacies to be found in outdated National Laws, which included provisions that equate the arbitral process with Court litigation and fragmentary provisions that failed to address all relevant substantive law issues. It was also noticed that “even most of those laws that appear to be up-to-date and comprehensive were drafted with domestic arbitration primarily, if not exclusively, in mind.” It further mentions that “while this approach is understandable in view of the fact that even today the bulk of cases governed by arbitration law would be of purely domestic nature, the unfortunate consequence is that traditional local concepts are imposed on international cases and the needs

5 The Arbitration Act, 1996 is divided into four parts. Part I which is headed “Arbitration;” Part II which is headed “Enforcement of Certain Foreign Awards;” Part III which is headed “Conciliation” and Part IV being “Supplementary Provisions.”

of modern practice are often not met.” There was also unexpected and undesired restrictions found in National Laws, which would prevent the parties, for example, from submitting future disputes to arbitration. The Model Law was intended to reduce the risk of such possible frustration, difficulties or surprise. Problems also stemmed from inadequate arbitration laws or from the absence of specific legislation governing arbitration which were aggravated by the fact that National Laws differ widely. These differences were frequent source of concern in international arbitration, where at least one of the parties is, and often both parties are, confronted with foreign and unfamiliar provisions and procedures. It was found that obtaining a full and precise account of the law applicable to the arbitration is, in such circumstances, often expensive, impractical or impossible.

Decision

Comparing Indian law and the UNCITRAL Model Law, the Court noted that the word “only” was conspicuously missing from Section 2(2) which was included in Article 1(2) of the UNCITRAL Model Law. This indicated, the Court noted, that applicability of Part I would not be limited to arbitrations which took place within India. Referring to the UNCITRAL preparatory notes and contextualizing it with the 1996 Indian Act, the Court observed:

It was felt necessary to include the word “only” in order to clarify that except for Articles 8, 9, 35 & 36 which could have extra territorial effect if so legislated by the State, the other provisions would be applicable on a strict territorial basis. Therefore, the word “only” would have been necessary in case the provisions with regard to interim relief etc. were to be retained in Section 2(2) which could have extraterritorial application. The Indian legislature, while adopting the Model Law, with some variations, did not include the exceptions mentioned in Article 1(2) in the corresponding provision Section 2(2). Therefore, the word “only” would have been superfluous as none of the exceptions were included in Section 2(2).

The Court concluded, after referring to the notes prepared by the UNCITRAL Secretariat on this issue, that “the omission of the word ‘only,’ would show that the Arbitration Act, 1996 has not accepted the territorial principle. The Scheme of the Act makes it abundantly clear that the territorial principle, accepted in the UNCITRAL Model Law, has been adopted by the Arbitration Act, 1996.” The Court, for these reasons, did not support the

conclusion reached in *Bhatia International* and *Venture Global Engineering* that Part I would also apply to arbitrations that did not take place in India. The Court also noted that the India was not the only country to drop the word “only” as provided in the UNCITRAL Model Law. Switzerland and the United Kingdom, the Court pointed out, had dropped this reference to “only.” The Court, accordingly, concluded,

We are of the considered opinion that the Arbitration Act, 1996 has accepted the territoriality principle which has been adopted in the UNCITRAL Model Law. Section 2(2) makes a declaration that Part I of the Arbitration Act, 1996 shall apply to all arbitrations which take place within India. We are of the considered opinion that Part I of the Arbitration Act, 1996 would have no application to International Commercial Arbitration held outside India. Therefore, such awards would only be subject to the jurisdiction of the Indian courts when the same are sought to be enforced in India in accordance with the provisions contained in Part II of the Arbitration Act, 1996. In our opinion, the provisions contained in Arbitration Act, 1996 make it crystal clear that there can be no overlapping or intermingling of the provisions contained in Part I with the provisions contained in Part II of the Arbitration Act, 1996.⁶

INDONESIA

ARBITRATION – CASE BEFORE ICSID CONCERNING CLAIM FROM CHURCHILL MINING

Presidential Regulation No. 78 of 2012 on the Assignment of Minister of Law and Human Rights, Minister of Internal Affairs, Attorney General, and Head of Capital Investment Coordinating Board as Legal Counsel of the President of the Republic of Indonesia in Handling Arbitration Claim in the International Centre for Settlement of Investment Disputes

6 The Court also explained further that, “The judgment in *Bhatia International* (*supra*) was rendered by this Court on 13th March, 2002. Since then, the aforesaid judgment has been followed by all the High Courts as well as by this Court on numerous occasions. In fact, the judgment in *Venture Global Engineering* (*supra*) has been rendered on 10th January, 2008 in terms of the ratio of the decision in *Bhatia International* (*supra*). Thus, in order to do complete justice, we hereby order, that the law now declared by this Court shall apply prospectively, to all the arbitration agreements executed hereafter.”

with regards to the Claim of Churchill Mining to the Government of the Republic of Indonesia

In preparing the proceeding at the International Centre for Settlement of Investment Disputes (ICSID) with regards to Churchill Mining claim against Indonesian Government, Presidential Regulation No. 78 of 2012 assigns the Minister of Law and Human Rights, Minister of Internal Affairs, Attorney General, and Head of Capital Investment Coordinating Board as the Legal Counsel Team of Indonesia, coordinated by the Minister of Law and Human Rights. In this case, they have the powers to designate the constituent subdivision, the local government of Kutai Timur as a party to arbitration process in ICSID; to declare that ICSID does not have the power or the jurisdiction to settle the dispute resulting from a decision of Indonesian administrative court; to appoint an arbiter who will represent Indonesian Government in ICSID arbitration forum; to appoint legal counsel to be positioned as Assistant Team; and to form a Supporting Team. In carrying out its duty, the Legal Counsel Team coordinates with the Coordinating Minister for Political, Law, and Security Affairs, Minister of Foreign Affairs, Minister of Finance, and Regent of Kutai Timur.

PHILIPPINES

ARBITRATION – ENFORCEMENT OF AN ARBITRAL AWARD – APPLICABILITY OF THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS AND THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION

***Tuna Processing, Inc. v. Philippine Kingford, Inc.* [G.R. No. 185582. 29 February 2012]**

In 2003, Kanemitsu Yamaoka (licensor), co-patentee of U.S. Patent No. 5,484,619, Philippine Letters Patent No. 31138, and Indonesian Patent No. ID0003911 (“Yamaoka Patent”), and five Philippine tuna processors, namely, Angel Seafood Corporation, East Asia Fish Co., Inc., Mommy Gina Tuna Resources, Santa Cruz Seafoods, Inc., and respondent Kingford (sponsors/licensees) entered into a memorandum of agreement (MOA). The parties also executed a supplemental MOA and an agreement to amend the MOA. The licensees withdrew from Tuna Processing, Inc. (TPI) and

reneged on their obligations. TPI submitted the dispute for arbitration before the International Center for Dispute Resolution in the State of California, United States, and won against the respondent.

TPI filed a petition to enforce the award. The lower court dismissed the petition on the ground that it lacked legal capacity to sue in the Philippines. The petitioner counters, however, that it is entitled to seek for the recognition and enforcement of the subject foreign arbitral award in accordance with Republic Act No. 9285 (Alternative Dispute Resolution Act of 2004), the Convention on the Recognition and Enforcement of Foreign Arbitral Awards drafted during the United Nations Conference on International Commercial Arbitration in 1958 (New York Convention), and the UNCITRAL Model Law on International Commercial Arbitration (Model Law), as none of these specifically requires that the party seeking for the enforcement should have legal capacity to sue. The Supreme Court held that inasmuch as the Alternative Dispute Resolution Act of 2004, a municipal law applied. It did not see the need to discuss compliance with international obligations under the New York Convention and the Model law since they both already formed part of the law.

A foreign corporation not licensed to do business in the Philippines has legal capacity to sue under the provisions of the Alternative Dispute Resolution Act of 2004. Among others, the Court reasoned that the law provides that the opposing party in an application for recognition and enforcement of the arbitral award may raise only those grounds that were enumerated under Article V of the *New York Convention*. Assuming that the lower court correctly observed that the *Model Law*, not the *New York Convention*, governs the subject arbitral award, petitioner may still seek recognition and enforcement of the award in Philippine court, since the *Model Law* prescribes substantially identical exclusive grounds for refusing recognition or enforcement. Other arguments of respondent were disposed of as unmeritorious.

Criminal Law

BANGLADESH

FORCED LABOUR – INTERNATIONAL COOPERATION FOR THE SUPPRESSION OF HUMAN TRAFFICKING – CROSS-BORDER INVESTIGATION – TRANSNATIONAL ORGANISED CRIME

The Human Trafficking Deterrence and Suppression Act 2012 (Act 3 of 2012) – enacted for combating trafficking and to provide for provisions in line with international instruments dealing with human trafficking as an organized crime – relied on the UN Human Trafficking Protocol, 2000 and also complied with the SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution 2002, and the UN Convention against Transnational Organized Crime 2000.

On 20 February 2012, Bangladesh Parliament enacted the Prevention and Suppression of Human Trafficking Act 2012 (hereafter PSHT Act) to provide for a legal regime to combat human trafficking effectively, whether internal or cross-border, and to protect trafficking victims. The Act of 2012 is indeed an attempt to enact anti-trafficking provisions at par with the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children 2000 (Palermo Protocol), which is not ratified by Bangladesh though. The Act also seems to be informed of the SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution 2002, and the UN Convention against Transnational Organized Crime 2000,⁷ ratified by Bangladesh. In particular, the obligations prescribed in SAARC anti-trafficking Convention have been accommodated in the PSHT Act, although the Act does not cite the instrument.

The preamble of the PSHT Act of 2012 clearly says that its aim is to provide for provisions against the transnational organised crime of human trafficking and for the protection of trafficking victims in line with the globally agreed standards.

7 Ratified on 13 July 2011. The PSHT Act is also informed of other instruments such as CEDAW and CRC that provide obligations to combat trafficking in women and children.

Accordingly, the definition of human trafficking provided in section 3 of the Act of 2012 largely draws upon the definition in the Human Trafficking Protocol 2000. According to section 3,

1. “Human trafficking” means the selling or buying, recruiting or receiving, exporting or transferring, sending or confining or harbouring of any person, either inside or outside of the territory of Bangladesh, for the purpose of sexual exploitation or oppression, labour exploitation or any other form of exploitation⁸ or oppression by means of –
 - a) threat or use of force; or
 - b) deception or abuse of his or her socio-economic or environmental or other types of vulnerability; or
 - c) giving or receiving money or benefit to procure the consent of a person having control over him or her.⁹

According to section 3(2), if any child is trafficked, the Prosecution will not have to prove whether the trafficked-child was threatened or forced/coerced or abducted or kidnapped or deceived while trafficking occurred, or whether the victim had consented or not.

In addition, the *Explanation* to section 3 further provides that, if any person with a criminal intention induces or helps any other person to move or emigrate for work or service and with the knowledge that such other person would be put into exploitation or exploitative labour conditions, then the first-mentioned person shall be guilty of human trafficking. The section applies whether the victim has migrated within the country or to a foreign country.

Salient features of the PSHT Act 2012 can be surmised as follows:

- a) Under section 6(2), the punishment for the offence of human trafficking committed not as an organized crime is imprisonment for life or a rigorous imprisonment of any other term being not below five years, and also a fine of minimum of taka 50,000 (taka fifty

8 For the purpose of § 3, ‘exploitation’ has been defined in § 2(15) of the Act, which includes a number of forms such as exploitation through prostitution, forced labour or debt-bondage, or exploitation through fake marriage and so on.

9 Unofficial English translation. Cf this with Article 3 of the UN Trafficking Protocol of 2000.

thousand). When the trafficking offence is committed by several members of any organized criminal group, according to section 7, the punishment (for each member of the group) is the death penalty or an imprisonment for life or a rigorous imprisonment of a minimum of seven years along with a fine of minimum of taka 500,000.

- b) To provoke, instigate, conspire or attempt to commit an offence, or to knowingly allow one's property to be used in the commission of or facilitation for committing any such offence, or to receive, cancel, conceal, remove, or take possession of any document for the said purpose is a punishable offence according to section 8(1). The punishment is imprisonment for a minimum of three years to a maximum of seven years, and a fine of minimum of 20,000 taka.¹⁰
- c) Section 9 criminalises independently the act of engaging others in "forced labour", while sections 11 - 13 provide for certain ancillary offences relating to the prostitution and keep brothels with a view to stopping the demand-side of human trafficking.
- d) The Act applies extra-territorially irrespective of where the trafficking offence is committed, if the victims or the perpetrators are Bangladeshi nationals (sec. 5).
- e) The Act establishes a specialist Tribunal for the prompt trial of trafficking offences, with wide powers being assigned. The Tribunal can record evidence beyond the court premises, award civil compensation in addition to fines, issue protective measures for the protection of victims including control order attaching conditions while granting bail to the accused, and may admit as evidence electronically-held materials or witness statements including those obtained in a foreign country (secs. 21-22, 28 to 30).

10 According to § 8(2), if anyone abets an offence under the PSHT Act including the offence of human trafficking, he or she shall be liable to a punishment equal to the one provided for the offence abetted.

- f) The Act empowers the Tribunal to freeze and confiscate the assets of the offender (the trafficker), and lays down that such assets seized may be used to support the victims of trafficking (sec. 27).
- g) The Police may initiate preventive searches or inquiry, and may conduct cross-border investigation (secs. 19-20), while international cooperation for the suppression of human trafficking including the conclusion by the Government of bilateral mutual legal assistance treaties is envisaged in section 41. It further requires public-private partnership regarding the prosecution of traffickers and the rescue, repatriation, and rehabilitation of victims (sec. 32).
- h) The Act provides detailed provisions for the protection of victims including the identification, rescue, repatriation, rehabilitation, and reintegration into society of trafficking victims. It contains provisions requiring measures for the establishment of more protective homes, for reimbursement of the reasonable costs incurred by the victims and witnesses, and for legal aid and court-ordered compensation (secs. 32-40).
- i) The Act mandates special protection to women, children and persons who lack adequate working capacity (secs. 25-26, 20, 32, & 38), and requires strict adherence by all concerned to privacy and dignity of the victims. There is also a protection against re-victimisation of the victim and a guarantee of the victim's right to information.
- j) It provides for the creation of a central Anti-Trafficking Fund (sec. 42) for the wider protection of trafficking victims and also envisages the establishment of an Anti-Human-Trafficking Authority for the implementation of the Act.

**BILATERAL OR MULTILATERAL TREATY – MONEY-LAUNDERING –
MUTUAL LEGAL ASSISTANCE – EXTRA-TERRITORIAL INJUNCTION**

The Prevention of Money Laundering Act 2012 (Act 5 of 2012) – a n Act that maintains standards articulated in international instruments namely the International Convention for the Suppression of the Financing of Terrorism 1999 and the United Nations Convention against Corruption 2003.

Bangladesh Parliament enacted *the Prevention of Money Laundering Act 2012*, which came into force on 20 February 2012, to provide for the rules to prevent and criminalize money laundering.¹¹ The Act builds on previous enactments, but heralds a novel improvement in that it now seeks to prevent the financing of terrorism by countering money laundering. As such, although the Act does not specify this in the preamble or anywhere else in the text, it is basically enacted to legislate modern provisions commensurate with a number of international instruments including the International Convention for the Suppression of the Financing of Terrorism 1999, and the United Nations Convention against Corruption 2003 (UNCAC) (both are acceded by Bangladesh respectively on 26 August 2005 and on 27 February 2007).¹² The Prevention of Money-laundering Act 2012 establishes a link between measures to combat corruption and the anti-money laundering regimes it introduces.

The Act of 2012 criminalises the act of money laundering (sec. 4), and defines money laundering in an inclusive fashion in section 2(a).¹³ The punishment for the offence of money laundering (or for an attempted offence or for abetment) is an imprisonment, which may extend to 12 years, but shall not be less than four years. In addition to imprisonment, the offender shall be liable to a fine of taka 10,000,00 or double the amount

11 It repealed the *Prevention of Money Laundering Act 2009*.

12 The UNCAC is one of the most comprehensive anti-corruption instruments, criminalising money-laundering (Art. 23). The Convention provides provisions for dealing with the proceeds of corruption (Art. 14).

13 Money-laundering has been defined as money or property sent or preserved abroad in breach of the existing law of the country, the money that has not been sent back to the country after being due to be so remitted, and the money that has been unduly overpaid abroad.

that has been laundered, whichever is greater. The property in respect of which the offence has been committed is subject to be confiscated in favour of the state (sec. 4).

Certain financial institutions are obliged to take actions to prevent money laundering. These institutions are banks, non-banking financial institutions, insurance companies, money-exchangers, any company or institution dealing in the remittance of money and any other institution doing business with the approval of Bangladesh Bank, the central bank of the country. Under section 25, these reporting institutions, have a duty to:

- (i) maintain and preserve complete information of their clients,
- (ii) preserve, for a minimum period of 5 years, all information of a closed account of any client,
- (iii) send the above information to the Bangladesh Bank as and when required by the central bank, and
- (iv) report *suo motu* to the Bangladesh Bank any account if suspected to be engaged in money laundering.

Section 25 (2) provides that, a breach of this obligation may lead to the imposition by the Bangladesh Bank of a penalty of maximum taka 25,00,000 and of a minimum of taka 50,000. Additionally, the license of the recalcitrant institution or that of any of its branch or both may also be cancelled by the central bank or by the licensing authority (sec. 25 (2)).

Section 23 provides for functions and obligations for the central bank. The section has imposed a duty on the Bangladesh Bank to suppress and prevent money laundering, a duty that is facilitated by a power of inspection of banks, power to request information as to any suspect transaction, to stop the operation of any bank account in which any laundered money is reasonably suspected to be deposited. The Bangladesh Bank is mandated, among other things, to monitor and scrutinize the information maintained and supplied by the reporting institutions, to restrict the operation of any account suspected to be engaged in money laundering, and to call for information and so on.

The Act further requires that the Bangladesh Bank will establish a Bangladesh Financial Intelligence Unit (BFIU), to which government and

autonomous bodies/entities may, upon requisition or on their own, supply necessary information. The BFIU may share information under its disposal with other law-enforcing agencies (sec. 24).¹⁴

The offence of money laundering is to be investigated by the Anti-Corruption Commission (ACC) or by an officer of any other investigating agency duly authorized by the ACC (sec. 9(1)). The special court¹⁵ is empowered to try the offence of money laundering and other allied offences, but it take cognizance of an offence only upon an approval of the ACC (sec. 12). The special court is empowered to issue injunctions freezing and attaching property connected with the commission of money-laundering offence, whether the property is situated within the country or in a foreign land (secs. 10 & 24).¹⁶ It can also confiscate the property in respect of which the offence has been committed. Its judgments are appealable to the High Court Division of the Supreme Court (sec. 22).¹⁷

Section 26 enables the Government to enter into any bi-lateral or multilateral treaty for carrying out the objectives of the Act, that is, to exchange mutual legal assistance with other countries for investigating or prosecuting the offences of money laundering. The BFIU is accordingly empowered to receive from or render to Financial Intelligence Units of other countries any assistance.

14 A Financial Intelligence Unit (FIU) has already been installed as a wing at the central bank's Anti-Money Laundering Department. The FIU provides and collects information to or from other FIUs by virtue of bilateral arrangements.

15 This is the Court of Special Judge established under § 3 of the Criminal Law (Amendment) Act 1958 as an anti-corruption court.

16 § 16 gives a right of appeal against a freezing or/and attachment order.

17 § 15 deals with the return of freezed/attached property. §§ 17-18 lay down provisions relating to confiscation of property and about how to deal with or return confiscated property, while § 19 provides for appeal against an order of confiscation.

**TREATIES AND CONVENTIONS – STRENGTHENING LEGAL TOOLS
TO COMBAT PORNOGRAPHY –
PROTECTION OF CHILDREN FROM PORNOGRAPHY**

The Pornography Control Act 2012 (Act 9 of 2012) – Act contains standards provided in the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 2000.

The Pornography Control Act 2012 (Act 9 of 2012), which came into force on 8 March 2012, has been enacted to prevent degradation of social and moral values in the Bangladeshi society. This law is indeed a protective legislation that seeks to protect women and children from pornography and similar sex-based offences. The child has been defined as a person who has not attained the age of sixteen (sec. 2(e)).¹⁸

Although there is no direct indication in the Preamble of this statute, the Act seems to have enacted provisions in line with the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.¹⁹ The Act can be seen as an effort to comply with the observations on Bangladesh of the CRC Committee made earlier.

The definition of pornography includes production and dissemination of visual documentary, audio-visual materials, graphics, books, periodicals, leaflets, cartoons, sculpture, and imaginary statue that uses indecent dialogue or pictures, body movement, naked dances, and similar activities that may create sexual appeal/sensation (sec. 2(c)).²⁰

Salient provisions of the Act are:

- (a) The Act criminalises the production, marketing, preservation, supply, and buying, selling or dissemination of any pornographic item (sec. 4). Causing public nuisance by displaying pornography (sec. 8(4)), commercial and non-commercial dealing with

18 This age is less than the age of 18 prescribed in the Child Rights Convention.

19 Adopted and opened for signature, ratification and accession by the General Assembly resolution A/RES/54/263 of 25 May 2000. Entered into force on 18 January 2002. Ratified by Bangladesh on 6 September 2000.

20 Unofficial English Translation of the Act is used.

pornography in any manner or advertising of the place where pornography is available are also punishable offences (sec. 8(5)).

- (b) If any persons gets involved in producing pornography or if any person forces any other person (man, woman, or child) to engage in the production of pornography or if any person records any video or shots any naked picture of any other person, with or without the consent of the participant/victim, he or she will be punished with a rigorous imprisonment of 7 years and with a fine of taka maximum two hundred thousand (sec. 8(1)).
- (c) The Act provides for punishment for causing harm to social reputation or personal integrity of any person or for causing mental torture to him/her or for taking any monetary or other undue advantage by blackmailing through pornography of any person. The punishment is a rigorous imprisonment for a term which may extend to five years and a fine which may extend to taka 2,00,000 (sec. 8(2)).
- (d) It further criminalises the use of internet, websites, or any other electronic devices such as the mobile phones to disseminate pornography. The penalty is 5 years and a fine of taka maximum two hundred thousand (sec. 8(3)). Notably, it provides for severe punishment for the use of children for the production/dissemination/supply of pornography as well for dealing in any way with child pornography, by prescribing an imprisonment of 10 years and a fine of taka not exceeding five hundred thousand (sec. 8(6)).

INDONESIA

CRIMINAL LAW – LAW ENFORCEMENT – MUTUAL LEGAL
ASSISTANCE COOPERATION – RATIFICATION**Act No. 3 of 2012 on Ratification of the Agreement between the Government of the Republic of Indonesia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China Concerning Mutual Legal Assistance in Criminal Matters (Act 3/2012)**

The developments in science and technology, particularly in the fields of transportation, communication, and information, has resulted in a cross-country relationship as if it indefinitely so as to facilitate the mobilization of people and the movement of goods from one country to another can be done quickly.²¹ Concern about the emergence of cross-jurisdictional criminal act is inevitable. One of the mitigation and treatment efforts is cooperation between countries both bilaterally and multilaterally. The Government of the Republic of Indonesia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China agreed on mutual legal assistance cooperation and has been signed on April 3rd, 2008 in Hong Kong. The aim of this agreement is to enhance the effectiveness of cooperation in the prevention and combating of crime, especially transnational crime, approval mutual legal assistance in criminal matters must consider the general principles of international law which focuses on the principles of respect for state sovereignty and the rule of law, equality and mutual benefit, and refer on the principle of dual criminality.²²

The scope of the legal assistance that could be possibly given upon this agreement are namely taking evidence from both countries; giving the information, notes, and evidence; investigation or identification on person or good; giving the documents; and execution of search and seizure requests; regulation for people who provide the evidence on assistance in

21 Indonesia, *Act No. 3 of 2012 on Ratification of Agreement Between the Government of the Republic of Indonesia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China Concerning Mutual Legal Assistance in Criminal Matters*, *State Gazette of Republic of Indonesia* Year 2012 No. 85, Supplement to State Gazette of Republic of Indonesia Number 5301, Preamble, para 2.

22 *Id.* para 5.

investigation, prosecution or criminal proceedings; tracking, detention, seizure, confiscation and return of result of crime; other necessary legal assistance by the Requesting Party according to the agreement and Requesting Party's law. The limitation of this agreement apply on legal assistance related to politic and military crime, *nebis in idem*, not a dual criminality; the reasons could or possibly harm the security and the Requesting Party; related to the confidentiality of bank and financial bodies or related to fiscal matters; or the execution of legal assistance could harm the ongoing criminal proceedings in the Requesting Party.

Diplomatic and Consular

CHINA

PRIVILEGES – LIBYA – LIBYA CRISIS – VIENNA CONVENTION ON DIPLOMATIC RELATIONS

Inviolability of personnel and property of diplomatic missions

On February 7, 2012, a Foreign Ministry spokesperson made a statement on the assault by protesters against the Chinese Embassy in Libya.

China has expressed strong concerns over the assault against the Chinese Embassy in Libya and lodged representations to the Libyan side. In accordance with the Vienna Convention on Diplomatic Relations and other relevant international law, the receiving state has the duty to ensure the inviolability of personnel and property of diplomatic missions of the sending state. We urge the Libyan side to take concrete and effective measures to prevent any recurrence of such incidents and ensure the safety of Chinese personnel and institutions in Libya.²³

23 *Foreign Ministry Spokesperson Liu Weimin's Regular Press Conference on February 7, 2012*, GENERALKONSULAT DER VOLKSREPUBLIK CHINA IN FRANKFURT AM MAIN, http://frankfurt.china-consulate.org/det/f_yrth/t903639.htm.

US-CHINA RELATIONS – EMBASSY**The CHEN Guangcheng incident**

On May 2, 2012, a Foreign Ministry spokesperson made a statement on CHEN Guangcheng's entering the US Embassy in China.

According to our knowledge, Chen Guangcheng, a native of Yinan county, Shandong Province, entered the US Embassy in China in late April, and left of his own volition after a six-day stay. It should be pointed out that the US Embassy in China took Chen Guangcheng, a Chinese citizen, into the Embassy via abnormal means, with which China expresses strong dissatisfaction. The US move is interference in China's internal affairs, which is completely unacceptable to China. The US Embassy in China has the obligation to abide by relevant international laws and Chinese laws, and should not engage in activities irrelevant to its duties.

China demands the US to apologise for that, carry out a thorough investigation into the incident, deal with those responsible, and promise not to let similar incidents happen again. China noted that the US has expressed the importance it attaches to China's demands and concerns, and promised to take necessary measures to prevent similar incidents. The US side should reflect upon its policies and actions, and take concrete actions to maintain the larger interests of China-US relations.

China emphasises that China is a country under the rule of law, and every citizen's legitimate rights and interests are protected by the Constitution and laws. Meanwhile, every citizen has the obligation to abide by the Constitution and laws.²⁴

US-CHINA RELATIONS – PUBLIC SECURITY – POLITICAL RIGHTS**The WANG Lijun case**

On 17–18 September 2012, the Intermediate People's Court of Chengdu, Capital of Sichuan Province held a trial of Mr. WANG Lijun, former Vice Mayor and Chief of the Public Security Bureau of Chongqing, one of the

24 *Foreign Ministry Spokesperson Liu Weimin's Remarks on Chen Guangcheng's Entering the US Embassy in China*, OFFICE OF THE COMMISSIONER OF THE MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE'S REPUBLIC OF CHINA IN MACAO SPECIAL ADMINISTRATIVE REGION, <http://www.fmcoprc.gov.mo/eng/gsxwfb/fyrth/t928382.htm>.

four municipalities directly under the State Council. Among others, he was charged with the crime of defection under Article 109 of the Chinese Criminal Code as he fled into the Consulate General of the USA in Chengdu on February 6, 2012 and stayed there for one day. On September 24, 2012, he was convicted of the crime of defection, as well as other crimes, including the crime of bending the law for selfish ends or twisting the law for favours, the crime of abusing powers and the crime of taking bribery. He was then sentenced to 15 years of imprisonment. Mr. Wang did not lodge an appeal.

Article 109 of the Chinese Criminal Code provides that “any State functionary who, while discharging his official duties at home or abroad, leaves his post without permission and defects to another country, which endangers the security of the People’s Republic of China, shall be sentenced to fixed-term imprisonment of not more than five years, criminal detention, public surveillance or deprivation of political rights; if the circumstances are serious, he shall be sentenced to fixed-term imprisonment of not less than five years but not more than 10 years”.²⁵

RECOGNITION – LIBYA – LIBYAN CRISIS – POLITICAL TRANSITION PROCESS

ESTABLISHMENT OF THE NEW LIBYAN GOVERNMENT – CHINESE SUPPORT ON NEW LIBYAN GOVERNMENT

On November 2, 2012, Foreign Ministry Spokesperson Hong Lei made a statement on the establishment of the new Libyan government. He said:

Libya’s General National Congress recently voted through the make-up of the new government. China welcomes this development which represents a step forward in Libya’s political transition process. As a friendly country to Libya, we wish Libya an early realisation of lasting peace, stability, prosperity and development. We stand ready to work together with Libya for the continuous advancement of China-Libya friendly relations and cooperation.²⁶

25 在法律的天平上--王立军案件庭审及案情始末, XINHUA (Sept. 19, 2012), http://news.xinhuanet.com/legal/2012-09/19/c_113136404.htm.

26 *Foreign Ministry Spokesperson Hong Lei’s Remarks on the Establishment of the New Libyan Government*, MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE’S REPUBLIC OF CHINA, http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2535_665405/t985417.shtml.

**RECOGNITION – SELF-DETERMINATION – PALESTINE –
INDEPENDENT STATEHOOD**

Statement by China at the Third Committee of the 67th Session of the General Assembly

On November 5, 2012, a Chinese representative made a statement at the Third Committee of the 67th Session of the General Assembly on Agenda Items 67(a)–(b) and 68: Elimination of Racism and Right of People to Self-determination. Regarding Palestine, she said:

China has consistently supported the just cause of Palestine in regaining its legitimate national rights and realising its right to self-determination and to independent statehood. We support Palestine's membership in international organisations including the United Nations. We hope that the international community will have a stronger sense of responsibility and urgency regarding the Middle East Peace Process and work actively to facilitate negotiations in the interest of peace to resolve disputes through political talks, with a view to achieve lasting peace and stability in the Middle East at an early date.²⁷

KOSOVO – RECOGNITION

UN Security Council debate on Kosovo – Questions of Kosovo must be dealt with within the framework of Resolution 1244

On November 27, 2012, a Chinese representative made a statement at the UN Security Council debate on Kosovo:

China has always called for full respect for the sovereignty and territorial integrity of Serbia. The question of Kosovo must be dealt with within the framework of resolution 1244 (1999). It is up to the parties concerned to find an acceptable solution through dialogue and negotiations.²⁸

27 *Statement by Ms. SHEN Siwei of the Chinese Delegation at the Third Committee of the 67th Session of the General Assembly on Agenda Item 67(a, b) & 68: the Elimination of Racism and Right of Peoples to Self-determination*, MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE'S REPUBLIC OF CHINA, <http://www.china-un.org/eng/hyfy/t985990.htm>.

28 *Statement by Ambassador Li Baodong at the Security Council Debate on Kosovo*, MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE'S REPUBLIC OF CHINA, <http://www.china-un.org/eng/hyfy/t985990.htm>.

INDONESIA

CONSULAR RELATIONS – AGREEMENT ON FRIENDSHIP AND COOPERATION WITH AFGHANISTAN

Agreement between the Government of the Republic of Indonesia and the Government of the Islamic Republic of Afghanistan on Friendship and Cooperation.

This Agreement has been signed and enacted in Bali, November 9th, 2012. This Agreement has been ratified by both Parties through Presidential Regulation of the Republic of Indonesia Number 125 of 2014 and Diplomatic Note of the Islamic Republic of Afghanistan Number 3622 on February 8th, 2014. The Agreement has been enacted for 5 (five) years and could be extended as agreed upon the Parties.

The scope of this Agreement is focusing on political cooperation; economic and trade cooperation; and academic and cultural cooperation. In the field of political cooperation both Indonesia and Afghanistan have agreed to develop the contact and communication, supporting the bilateral, regional and international dialogue; supporting the regional security cooperation, solidarity within the regional citizens and government; preserve the active cooperation between diplomatic agencies from Indonesia and Afghanistan. In the economic and trade cooperation, Indonesia and Afghanistan have agreed to promote the sustainable partnership in economic and trade relationship; and strengthen the cooperation between both Parties in financial and trade transaction. In academic and cultural cooperation, both Parties have agreed to support, promote, and strengthen the academic, research, training, cultural and tourism within Indonesia and Afghanistan.

PHILIPPINES

CONSULAR MATTERS – CONSULAR AGREEMENT BETWEEN THE REPUBLIC OF THE PHILIPPINES AND THE PEOPLE’S REPUBLIC OF CHINA

Philippine Senate Resolution No. 82, 8 May 2012

China and the Philippines signed the consular agreement on 29 October 2009. The consular post may be established with the consent of the receiving State. It applies to mainland China, the Hong Kong Special Administrative Region, and the Macao Special Administrative Region.

Under the agreement, the determination of the seat of the consular post, its classification and consular district, and other changes related thereto, shall be through consultation between the sending and receiving States. The parties mutually undertake to accord full facilities for the performance of the functions of a consular post and extend privileges and immunities to consular officers and their families. The Philippine President ratified it on 31 March 2011 and accordingly submitted it to the Senate for concurrence.

SINGAPORE

DIPLOMATIC RELATIONS – ESTABLISHMENT – REPUBLIC OF TOGO

On 18 June, Singapore’s Ministry of Foreign Affairs announced that it had established diplomatic relations with the Republic of Togo with effect from 15 June 2012.

DIPLOMATIC AND CONSULAR IMMUNITY – ATTACK ON US EMBASSY IN BEGANZI – CONDEMNATION

Ministry of Foreign Affairs’s Statement in Reponse to the Aattack on the US Consulate in Libya, 18 Sep 2012

In response to media queries regarding the attack on the US Consulate in the eastern Libyan city of Benghazi on 11 September 2012, which resulted in the deaths of the United States Ambassador to Libya and three other US diplomatic staff, the MFA Spokesman said:

Singapore strongly condemns the violent attacks on the US Consulate in Benghazi that resulted in the tragic deaths of Ambassador

Christopher Stevens and his colleagues. We express our deepest condolences and sympathies to the families and friends of the victims in their time of grief. The properties of foreign diplomatic missions and safety of foreign diplomatic staff should always be protected and guaranteed under the 1961 Vienna Convention on Diplomatic Relations.

In response to further media queries on the film “Innocence of Muslims”, the MFA Spokesman said:

Singapore also strongly condemns the video, “Innocence of Muslims”, which denigrates Islam. The video is highly offensive to Muslims and Singapore deplores the actions of the makers of this insensitive video. Freedom of speech must be balanced with respect for religious sensitivities. At the same time, extreme acts by individuals should be dealt with in a calm and rational manner, and can never provide the excuse for any acts of violence.

Environmental Law

BANGLADESH

ENDANGERED SPECIES OF WILD FAUNA AND FLORA – CITES – WILDLIFE

The Wildlife (Conservation and Security) Act 2012 (Act 30 of 2012) – an Act that complies with the provisions of the Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973 (CITES), the Convention on the Conservation of Migratory Species of Wild Animals 1979 and the Convention on Biological Diversity 1992.

Bangladesh Parliament enacted this important legislation in 2012 which came into force on 10 July 2012 by repealing the Wildlife (Preservation) Order 1973.²⁹

Although there is no direct indication in this Act of 2012, the Act in effect seems to have been informed of provisions of the Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973

29 President's Order No. 23 of 1973.

(CITES),³⁰ the Convention on the Conservation of Migratory Species of Wild Animals 1979,³¹ and the Convention on Biological Diversity 1992.³²

The Act recognises the State's constitutional duty to preserve and safeguard the natural resources, bio-diversity, wetlands, forests and wild life,³³ and provides a legal regime for the conservation and management of wildlife in Bangladesh as well as for the preservation and security of bi-diversity, forests, and wildlife (Preamble of the Act).³⁴

Salient provisions of the Wildlife Conservation Act of 2012 are:

- (a) Sections 3 & 4 provide provisions respectively for the formation of a Wildlife Advisory Board with experts on bio-diversity, forestry and wildlife preservation and a scientific committee. The functions of the Advisory Board are, for example, to (i) evaluate and advise on measures for the development and preservation of forestry, wild animals and bio-diversity, and (ii) to advise the government on various development projects relating to the preservation and development of bi-diversity, forestry, and wildlife. On the other hand, section 5 gives the duty of overall management of wildlife and of ensuring their safety to some designated government officials such as the Chief Warden, Warden, Chief Conservator of Forest and so on.
- (b) Section 6 prohibits the hunting or killing of any wild-life and the capturing or uprooting of any plant described in the schedule of the Act except in accordance with the terms of a licence or permit, while section 10 provides provisions for the issue of permit, on certain specified grounds such as the scientific research, for col-

30 Ratified on 20 November 1981.

31 Bangladesh acceded to this Convention on Feb. 18, 1982, and it entered into force for the country on 1 December 2005.

32 Bangladesh ratified the Convention on May 3, 1994.

33 See article 18A of the Constitution of the People's Republic of Bangladesh.

34 § 2 of the Act (unofficial English translation of the text) provides for definitions of wild-life sanctuary, eco-park, eco-tourism, wet-land, bio-diversity, and wild-life and so on.

lecting, possessing or transporting any wild animal or its part, meat, trophy or incomplete trophy.

- (c) Section 11 enjoins the Warden to register any wild animal or its part or trophy collected or conserved by any person living within his territorial jurisdiction.
- (d) Section 12 restricts the sale or transfer of any wild animals or its part, meat, trophy or incomplete trophy (as well as any flora/plants described in the schedule or any product made therefrom) except without having a registration-certificate under this law.
- (e) Sections 13, 17, 18, 19, 20, 22, & 23 authorise the government to declare any part of the forest as sanctuary, national park, community conservation area, safari park, eco-park, flora park, wild-life reproduction centre, landscape zone, corridor, buffer zone, core zone, special bio-diversity preservation area, closed forest, and as an area of national tradition, or to declare any plant as memorandum tree or a sacred tree.
- (f) Section 14 spells out a number of activities that are prohibited within and with regard to wildlife sanctuary, with sanctions for the breach thereof (sec. 35). Section 14 prohibits, for example, intrusion into the wildlife sanctuary or putting therein any dumping, alien or invasive plants and so on.
- (g) Section 16 provides for the management of wildlife sanctuary, while section 21 introduces the system of co-operative/participatory management, laying down provisions for the management of sanctuaries with the help of the Forest Department, people of ethnic race residing in the forest and local people. The objective is to ensure appropriate usage, preservation and administration of natural resources.
- (h) The Act criminalises the killing of tigers and elephants except in the cases when a person is attacked by those animals and

there remains an imminent threat to life.³⁵ Causing the death of panthers, bears, sambar deer, crocodiles, whales, or dolphins is also a punishable offence under section 37. Section 38 (1) & (2), provides for the penalty for killing any birds or migratory birds as described in schedule 2 of the Act as well as for dealing in the preserved birds or their meat or trophies. The punishment is one year in prison and a fine of taka maximum one hundred thousand, which will be doubled in case of repeated offence.

- (i) Of other penal provisions, most notable is section 34 which provides that, if any person uses, counterfeits or alters any sign registered under section 11, or sells or buys, or exports/imports any wild animal or its part, meat, trophy or any product or any forest produce to any person other than the person having a license or permit under the Act, he will be punished with an imprisonment of one year and with a fine of taka maximum fifty thousand.³⁶
- (j) If any person assists or abets any person to commit an offence and the offence is committed pursuant to such assistance or abetment, he will be punished with the same penalty as is prescribed for the main offence (sec. 41).

INDIA

PROTECTION OF ENDANGERED SPECIES- CONVENTION ON BIODIVERSITY – PUBLIC TRUST DOCTRINE – INTER-GENERATIONAL EQUITY – ENVIRONMENTAL PROTECTION ACT, 1986

***T.N.Godavarman Thirumulpad v. Union of India & Others* [Supreme Court of India, 13 February 2012 <http://JUDIS.NIC.IN>]**

Facts

The Court in this case was concerned with the question whether sandalwood (*Santalum album* Linn) regarded as an endangered species, be

35 *Id.* § 36.

36 If the offence is repeated, the imprisonment will be of three years and the fine will be a maximum of two hundred thousand taka. *Id.* § 34. See also § 39 that prescribes penalties for the violation of §§ 6, 10, 11 and 12 of the Act.

declared as a “specified plant” within the meaning of Section 2 (27) and be included in the Schedule VI of The Wild Life (Protection) Act, 1972. The Court decided to examine this issue after going through various international conventions on this issue. Besides this, all unlicensed sandalwood oil industries were also sought to be brought within the purview of the order of the Court dated 30 December 2002 by which the Supreme Court had ordered the closure of all unlicensed saw mills, veneer, and plywood industries in the country. The Court also noted that there was consensus among all major sandalwood growing States and the Union of India (through its Ministry of Environment and Forests) that the export of sandalwood would be of serious threat and might lead to the extinction of the species.

References were also made to the anthropocentric and ecocentric approach, and it was also noted that anthropocentric approach would depend upon the instrumental value of life forms to human beings while ecocentric approach stressed on the intrinsic value of all life forms. Stress was laid on how the bio-diversity law departed from the traditional anthropocentric character of environmental law and that our Constitution recognizes ecocentric approach by obliging every citizen to have compassion for all living creatures, so also the preamble to Act. The Court also noted that public trust doctrine developed in *M.C. Mehta v. Kamalnath* 1997 (1) SCC 388 was based largely on anthropocentric principles, and the precautionary and polluter-pay principle, affirmed by the Supreme Court in *Vellore Citizens Welfare Forum v. Union of India and others* 1996 (5) SCC 647, were also rooted in anthropocentric principle since they too depended on harm to humans as a pre-requisite for invocation of those principles. The Court also noted the principle of sustainable development and inter-generational equity, and stated that they too pre-suppose the higher needs of human beings and lay down that exploitation of natural resources must be equitably distributed between the present and future generation. The Court also noted the view that these principles would be of no assistance when a Court is called upon to decide as to when a species had become endangered, or the need to protect irrespective of its instrumental value.

The Court referred to the Biological Diversity Act, 2002 which was enacted by the Parliament with the object of conserving biological diversity, sustainable use of its components, and for fair and equitable sharing of the benefits arising out of utilization of genetic resources. Biological diversity,

the Court pointed out, included all the organisms found on our planet viz., the plants, animals, and microorganisms. Environmental Protection Act, 1986, enacted by the Parliament, empowered the Central Government under Section 3 to take such measures for the purpose of protecting and improving the quality of environment. The Court noted that,

When we examine all those legislations in the light of the constitutional provisions and various international conventions like Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973 (CITES), the Convention of Biological Diversity 1992 (CBD) evidently, there is a shift from environmental rights to ecological rights, though gradual but substantial. Earlier, the Rio Declaration on Earth Summit asserted the claim “human beings are the center of concern.” U.N. Conference on Environment and Development (UNCED-1992), was also based on anthropocentric ethics, same was the situation in respect of many such international conventions that followed.

Referring to its own jurisprudence,³⁷ the Court observed:

The principle of sustainable development and inter-generational equity too pre-supposes the higher needs of humans and lays down that exploitation of natural resources must be equitably distributed between the present and future generations. Environmental ethics behind those principles were human need and exploitation, but such principles have no role to play when we are called upon to decide the fate of an endangered species or the need to protect the same irrespective of its instrumental value.

The Court noted that the above principle had its roots in India, much before it was thought of in the Western world, and it pointed out that Isha-Upanishads (as early as 1500 – 600 B.C) taught us the following truth: “The universe along with its creatures belongs to the Lord. No creature is superior to any other. Human beings should not be above nature. Let no one species encroach over the rights and privileges of other species.”

37 The public trust doctrine in *M.C. Mehta v. Kamalnath* (1997) 1 SCC 388 laid down that all humans had equitable access to natural resources—treating all natural resources as property, not life. That principle also had its roots in anthropocentric principle. Precautionary principle and polluter-pays principles were affirmed by the Court in *Vellore Citizens Welfare Forum v. Union of India* and others were also based on anthropocentric principle since they also depended on harm to humans as a prerequisite for invoking those principles.

While referring to various international conventions such as Convention for conservation of Antarctic Living Resources 1980, The Protocol to Antarctic Treaty on Environmental Protection 1998, The Bern Convention on Conservation of European Wildlife and Natural Habitats 1982, CITES, and CBD, the Court pointed out:

India is a signatory to CBD, which also mandates the contracting parties to develop and maintain necessary legislation for protection and regulation of threatened species and also regulate trade therein. CITES in its preamble also indicates that Fauna and Flora are irreplaceable part of the natural environment of the earth and international cooperation is essential for the protection of certain species against over exploitation and international trade . . . CITES, to which India is a signatory, classifies species into different appendices in the order of their endangerment, and prescribes different modes of regulation in that regard.

The court noted that the Indian sandalwood (*Santalum album* Linn) was not seen included in the species listed in Appendix-II of CITES; however, red sandalwood (*Pterocarpus Santalinus*) was seen included in Appendix-II. At the same time, International Union for Conservation of Nature (IUCN), which was an international organization dedicated to finding pragmatic solutions of our most pressing environment and development challenges, had included *Santalum album* Linn in its Red List of threatened species as “vulnerable” and red sandalwood (*Pterocarpus Santalinus*) in the Red List as “endangered.” Therefore, the Court further noted, both in CITES and in the IUCN, Red List of threatened species red sandalwood was described as “threatened with extinction,” “endangered.” A taxon was critically endangered when the available evidence indicated that it met with the criteria of extremely high risk of extinction. It was endangered when it met with the criteria of facing a very high risk of extinction. A taxon was vulnerable when it was considered to be facing a high risk of extinction. Near threatened means a taxon was likely to qualify for a threatened category in the near future.

The Court noted that the CITES as well as IUCN had acknowledged that Red Sandalwood is an endangered species. The Court also pointed out that it was a settled law that the provisions of the Treaties/Conventions, which were not contrary to Municipal laws, be deemed to have been incorporated in the domestic law.

The Court concluded, by giving directions to the Central Government to take appropriate steps under relevant laws, as mentioned above, to safeguard Red Sanders as nowhere in the world, this species was seen, except in India. The Court also noted that “we owe an obligation to world, to safeguard this endangered species, for posterity.” The Court also gave direction to the Central Government to formulate a policy for conservation of sandalwood including provision for financial reserves for such conservation and scientific research for sustainable use of biological diversity in sandalwood. The Court also concluded by expressing its view that “time has also come to think of a legislation similar to the Endangered Species Act, enacted in the United States which protects both endangered species defined as those ‘in danger of extinction throughout all or a significant portion of their range’ and ‘threatened species,’ those likely to become endangered ‘within a foreseeable time.’”

INDONESIA

ENVIRONMENTAL LAW – POLLUTION – RATIFICATION OF ANNEXES MARPOL CONVENTION

Presidential Regulation No. 29 of 2012 on Ratification of Annex III, Annex IV, Annex V, and Annex VI Of The International Convention For the Prevention of Pollution from Ships 1973 as Modified by the Protocol Of 1978 Relating Thereto.

Regulation 29/2012 aims to ratify Annex III, Annex IV, Annex V, And Annex VI Of The International Convention For The Prevention Of Pollution From Ships 1973 As Modified By The Protocol Of 1978 Relating Thereto that has been accepted on November 2nd, 1973 and February 17th, 1978 as determined by the 58th Marine Environment Protection Committee (MPEC) in MPEC.176 (58) Resolution on October 10th, 2008 in London, England.

KOREA

INTERNATIONAL AGREEMENTS – SUSTAINABLE DEVELOPMENT – ESTABLISHMENT OF THE GLOBAL GREEN GROWTH INSTITUTION – SUPPORT FOR GREEN ECONOMIC GROWTH IN DEVELOPING AND EMERGING COUNTRIES

The Agreement on the Establishment of the Global Green Growth Institute, Adopted on May 12, 2012 and Entry into Force on September 18, 2012, The Republic of Korea Ratified on November 29, 2012 and Entered into Force on December 29, 2012

Global Green Growth Institution (GGGI) was established to support green economic growth in developing and emerging countries. GGGI headquarter is located in Seoul, Korea. GGGI is open to all UN member countries and consists of general assembly, board of directors, an advisory committee and secretariat. The institutes in Korea, where headquarter is located, and those in other member countries has privileges and immunities.

GREENHOUSE-GAS EMISSION ACT – ACHIEVE SET REDUCTION OF GREENHOUSE-GAS EMISSION – RESPONSE TO CLIMATE CHANGE – CAP AND TRADE SYSTEM

Enactment of the Act on the Allocation and Trading of Greenhouse-Gas Emission Permits, Promulgated on May 14, 2012, Act No. 11319

According to the Framework Act on Low Carbon, Green Growth, the Act on the Allocation and Trading of Greenhouse-Gas Emission Permits (hereinafter “Greenhouse-Gas Emission Act”) was enacted to effectively achieve the set reduction of national greenhouse-gas emission. In addition, the purpose of the Act is to actively participate in the worldwide effort to respond to the climate change by assigning greenhouse-gas emission permits to companies that discharges heavy amount of greenhouse-gas and adopting cap and trade system.

Through this Act, the government established basic plan for cap and trade system to set the mid-term and long-term policy goals for 5 years and 10 years. Presidential Committee of Green Growth and Cabinet meeting confirmed this plan. In addition, the Act regulates specific procedure and system such as the establishment of emission allocation committee,

designation of the target companies, allocation, revision and cancellation of emission permit, emission trading, verification and certification of report on greenhouse-gas emission quantity, imposing fine, and support in tax system.

NEPAL

RIGHT TO THE ENVIRONMENT – CONSERVATION OF NATURAL RESOURCES – INTRA-GENERATIONAL EQUITY – PRECAUTIONARY APPROACH – CONVENTION ON BIOLOGICAL DIVERSITY

Advocate Ram Kumar Acharya v. The Prime Minister of Nepal and others [Supreme Court of Nepal, Special Bench, decided on September 11, 2012, Nepal Law Reporter (Nepal Kanoon Patrika), Vol. 55, No. 1, pp. 47-68, 2013]

The Bardiya National Park of Nepal occupies an area of 374 sq. miles is the largest and most undisturbed national park in the Terai belt of Nepal. It inhabits 59 species of mammals, 129 species of fish including rare dolphins, 42 species of reptiles, 407 species of birds, and other rare species including endangered flora and fauna. The Government of Nepal, Department of Road initiated a 27-kilometer long road construction project through the Bardiy National Park and also got the Environmental Impact Assessment (EIA) approval from the Ministry of Environment of the Government of Nepal. The writpetitioner, an NGO working in the field of environment protection, brought the public interest litigation (PIL) before the Supreme Court of Nepal, challenging the road construction initiated by the Department of Road. The petitioner argued that the road construction would irreparably damage the rich biological diversity and demanded to order the government to stop the plan and the act of road construction through the Bardiya National Park. Additionally, the petitioner claimed that the act of road construction would violate the obligations of the Nepali government that arise from the international laws, which Nepal is a party to, including the Convention on Biological Diversity (CBD), 1992, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), 1973, Ramsar Convention, 1971, and World Heritage Convention, 1972.

Defending the road construction project, the Department of Road contended that with a full assessment of the need for development and the

responsibility of conservation, the project was selected as one of the most efficient and desirable road construction that connects the hill region with the Terai belt in the area to support the infrastructural need to promote the socio-economic development. As indicated in the EIA, new trees were to be planted along both sides of the road in proportion to 1:25 to further enrich the biodiversity in the area. Further, the Government of Nepal argued that the road construction project was initiated with the prior consent of the local people, who deeply considered that the construction of the road would foster their socio-economic development

The Supreme Court found that the preparation of EIA report itself was faulty and abrogated the EIA. It also ordered to initiate an objective and realistic EIA with a comprehensive analysis of the possible alternatives along with the impact to the environment accompanied by a wider range of public consultation if the road construction through the park is the only alternative for a sustainable development. However, the Supreme Court noted that among the five available alternatives, the government had chosen the project without any convincing reasons to exclude other alternatives. As a party to more than twenty international environmental instruments including different treaties and conventions, the government of Nepal cannot simply disregard its obligations to ensure a balance between the development and conservation. The Supreme Court also emphasized the fact that the government is a public trustee of available natural resources in the country. As the public trustee, government should indubitably bear a responsibility to conserve the natural resources and permit their use without causing any serious damage to the environment. The Court also highlighted the fact that the acts of conservation and the protection of environment should not be employed to retard all the development aspirations as well. The Court noted that the natural resources were indeed for human well-beings. Thus, it should not be understood that no trees could ever be cut, no roads could ever be constructed, no embankment activities could ever be carried out, no bridges should be constructed, or that other similar developmental works be stopped permanently. The Court, however, acknowledging the need for development, instructed that any use of natural resources should be guided by the idea of sustainable development.

Human rights

BANGLADESH

RIGHT TO LIFE – MANDATORY DEATH PENALTY AS INFRINGEMENT OF THE RIGHT AGAINST INHUMAN OR DEGRADING PUNISHMENT – ICCPR – UDHR

***Bangladesh Legal Aid and Services Trust (BLAST) v. Bangladesh* [Writ Petition No. 8283 of 2005. 63 DLR. HCD (2011) 10. Judgment March 02, 2010]**

The convicted detainee [Md. Sukur Ali], allegedly a child (below the age of 16), was proved guilty beyond doubt and was sentenced to death by the trial court under section 6(2) of the Repression of Suppression against Women and Children (Special Provisions) Act, 1995. The sentence was confirmed by the High Court Division and was also upheld by the Appellate Division of the Supreme Court. Subsequently a review petition was lodged with the Appellate Division that also was rejected. In this backdrop, the constitutionality of section 6(2) of the Act of 1995 was challenged by BLAST, a human rights organization, on behalf of Md. Ali while he had been waiting in the death row. Factually, section 6 of the Act of 1995 prescribed the death penalty as the only punishment for the offence of causing death during or after the commission of rape. The petitioner argued that the mandatory death penalty for the offence of murder infringes the right against inhuman or degrading punishment and other cruel treatment under article 35(5) of the Constitution as well as the rights enshrined in article 5 of the UDHR and articles 5 and 6.1 of the ICCPR.

The Court found that article 5 of ICCPR is internalized almost verbatim into the Bangladeshi Constitution (art. 35 (5)) and that the right to life in art 32 of the Constitution, which corresponds to art. 6.1 of ICCPR, also qualifies the extent of the death penalty. The petitioner's counsel submitted that the provisions of ICCPR (articles 6(1), 7, 14(1)(5)) should be read into the provisions of the Constitution of Bangladesh (arts. 32; 35(5)) while considering the legality of the mandatory death penalty, because Bangladesh became party to this treaty. The Attorney-General, however, argued

that international treaties are not enforceable in Bangladesh unless they are specifically incorporated into the domestic law.³⁸

The High Court Division cited the ICCPR as a further ground in addition to the Constitution for striking down section 6(2) of the 1995 Act for prescribing the mandatory death penalty for the offence of ‘rape and murder’. The Court held: “We find article 5 of the UDHR and article 7 of the ICCPR [as] reproduced almost verbatim into the Constitution[’s] . . . article 35(5). . . [T]he question, [therefore], is whether the death penalty is such that it can be termed as torture or cruel, inhuman or degrading treatment or punishment. We bear in mind also that our Constitution in article 32 qualifies the power of any authority to impose the death penalty”.

The Court found that “the mandatory provision of death penalty given in any statute cannot be in conformity with the rights . . . under the Constitution” and it “curtails the court’s discretion” to impose upon the accused an alternative sanction. Accordingly, it declared section 6(2) of the Repression of Suppression against Women and Children (Special Provisions) Act 1995 *ultra vires* the Constitution.

**CHILDREN’S RIGHTS— APPLICATION OF THE CHILD RIGHTS
CONVENTION— CUSTODY OF CHILDREN— WELFARE OF
CHILDREN— ENSURING THE BEST INTEREST OF THE CHILD**

***Rayana Rahman v. Bangladesh* [Writ Petition No. 7795 of 2009, 63 DLR (2011) HCD 305. Judgment March 10, 2010]**

This case involved the “abduction” (taking away) of a child by one of the parents. The facts of the case are as follows. After the break-up of marital relation between the respondent, Ahmed Arif Billah, and the petitioner, Rayana Rahman, the latter remarried for the second time. The couple had a male son of three years old. The petitioner, even after marrying another man, used to see and also talk to her son over telephone regularly. One evening, the child’s father allegedly took him away beyond the knowledge of the members of the petitioner’s family. The petitioner’s parents and some other close relatives requested the respondent to return the boy but he refused to comply. The respondent filed a suit in the Family Court

38 The Attorney-General referred to *Hussain Muhammad Ershad v. Bangladesh*, (2001) 21 BLD (AD) 69 and *The Government of Bangladesh v. Sheikh Hasina* (2008) 28 BLD (AD) 163.

against the petitioner praying for guardianship of his son and sought an interim injunction restraining the child's mother from interfering with the respondent's custody of the child. The Family Court allowed the above mentioned petition. In such circumstances, the petitioner filed the present constitutional petition challenging the detention of the child by his father and seeking an order to return the child to her.

The Court observed that the welfare of the child will be taken care of by the Family Court, but the only question that it would look into was "whether the [child]³⁹ was illegally removed from the custody of his mother". By citing precedent, the Court held that a writ petition (constitutional petition) may continue challenging the wrongful removal of any child by either parent, even during the pendency of any concerned family court suit.⁴⁰

Imbibed with the concept that, "in matter concerning the custody of the minor children, the paramount consideration is the welfare of the minor and not the legal right of" any particular party to the suit,⁴¹ the Court applied its constitutional jurisdiction to protect the best interest of the child by ordering a shared custodial responsibility.⁴²

In deciding this case, the Court applied the Convention on the Rights of the Child 1989 (CRC) which, it noted, is binding for Bangladesh. It observed that, as per article 3(1) of this Convention, "in all actions concerning children, whether undertaken by public or private social welfare institution, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." This particular reliance on the CRC formed the basis of the High Court Division's reasoning for its intervention although the custody of children was within the jurisdiction of the Family Court.

39 The Court used the term *detenu* (detainee), which I think is not a proper term to describe the child removed from the guardian's custody.

40 *Abdul Jalil v. Sharon Laily Begum Jalil* 50 DLR (AD) 55.

41 *Id.*

42 "Having considered all aspects of the case" and also taking into consideration that "the mother has also a right to take care of, and give company to, the [child]", the Court felt "inclined to direct that the [child] will stay with the father five days a week and two days a week with his mother".

**PROTECTION OF WOMEN – PRIVACY – FREEDOM OF EXPRESSION
– GENDER BASED VIOLENCE AS A FORM OF SERIOUS HUMAN
RIGHTS VIOLATION – UDHR – ICESCR – UN COMMITTEE ON THE
ELIMINATION OF VIOLENCE AGAINST WOMEN.**

***Advocate Md. Salauddin vs. Bangladesh* [Writ Petition No. 4495 of 2009; 63 DLR (2011) HCD 80; Judgment April 8, 2010]**

This case involved a public official's religiously arrogant comments against a school headmistress for wearing headscarf. In 2009, an incident of harassment by a superior education officer against a primary school headmistress took place in a remote District, which came into the notice of the Court through a newspaper report brought to the Court's notice by an Advocate of the Supreme Court. The Advocate asked for appropriate punitive actions against the respondent and asked that the Court framed guidelines charting assistance to women working in different government organizations facing harassment. Bangladesh Legal Aid and Services Trust (BLAST) that later became a party to the litigation argued that the conduct of male state official concerned is a form of sexual harassment and a clear instance of gender-based discrimination.

The Court declared that "[i]t is the personal choice of a woman to wear veil or to cover her head. Any . . . attempt to control a woman's movement and expression . . . is clearly a violation of her right to personal liberty. In Bangladesh there has been no uniform practice of veiling or head-covering among women. In the absence of any legal sanction, an attempt to coerce or impose a dress code on women clearly amounts to a form of sexual harassment". Moreover, the Court held, subjecting a woman to harassment for her failure to wear head-scarf is a discriminatory act, which is a violation of the equality clause of the Constitution and is "inconsistent with international standards".

The Court cited a number of international instruments to press upon Bangladesh's obligation to ensure the enjoyment of the right to privacy and freedom of expression. It cited UDHR (arts. 1, 2, 3, & 5), ICCPR (arts. 17 & 19), ICESCR (3 & 7), and General Recommendations No. 19 of the CEDAW Committee. It declared that "[t]hese standards and obligations of the state have been set out in reports of the United Nations Special Rapporteur on Violence against Women . . ." The Court pointed out that as a party to the International Covenant on Civil and Political Rights (ICCPR), Bangladesh

has agreed to bar interference with the right to privacy (article 17) and to protect freedom of expression (article 19). Bangladesh has an obligation to respect and ensure these rights in a non-discriminatory manner, as set forth in article 2 of ICCPR, the Court remarked.

It continued to observe that, “any form of violence against [any] woman” is incompatible with the Universal Declaration of Human Rights⁴³ and is therefore a violation of the international obligations of Bangladesh. In its view, article 3 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) guarantees the equal right of men and women to the enjoyment of all rights set forth in that Covenant and many of the substantive rights set out in the Covenant cannot be enjoyed by women if gender-based violence is widespread. The Court further cited the General recommendation No. 19 of the United Nations Committee on the Elimination of Violence against Women (11th session, formulated in 1992), approvingly recognizing that “gender-based violence is a form of discrimination which seriously inhibits a woman’s ability to enjoy rights and freedoms on a basis of equality with men” and that State parties should pay regard to this when reviewing their laws and politics. Especially, the Court focused on the General Recommendation assessment that rural women are at special risk of violence because of the persistence of traditional attitudes in many rural communities and it imposes an obligation on states to ensure that services for victims of violence are accessible to rural women.

Finally, the Court adjudged as unconstitutional the particular incident of harassment involved in this case, and issued, *inter alia*, the following directions:

- (1) The Ministry of Education is directed to ensure that the women working in different public and private educational institutions are not subjected to harassment by their superiors and others.
- (2) The Ministry of Education shall ensure that, women working in all educational institutions are not compelled to wear veil or cover their head with scarf against their will.

43 UDHR, Arts. 1, 2, 3 & 5.

CRUEL, INHUMAN AND DEGRADING TREATMENT OR PUNISHMENT
– ICCPR – CONVENTION AGAINST TORTURE – CUSTOMARY
INTERNATIONAL LAW – VIOLENCE AGAINST WOMEN

Bangladesh Legal Aid and Services Trust (BLAST) v. Bangladesh [Writ Petition No. 5863 of 2009 with WP Nos. 754 and 4275 of 2010; 63 DLR (2011) HCD 1; Judgment July 8, 2010]

A “public interest litigation” (PIL) was filed by several human rights organizations seeking court directives for the prevention of *Fatwa*-driven atrocities against women and girl children. The facts of the case are that one Mr. Enamul Mia allegedly used to tease a 16 years old girl on her way to school. One day, he raped her, but the victim, fearing the shame, did not report the offence. The victim was married off to a man in the neighbouring village. After a month of her marriage, the medical test discovered that she was pregnant for seven months. As a result, she was divorced and had to reside in her father’s house after an abortion. Following her return, the influential people of the village arranged for an arbitration and compelled the girl to receive 101 lashes as punishment in pursuant to *fatwa* and fined the victim’s father taka 1000, failing which the whole family would be forced into isolation while the offender remained surprisingly untouched. In the wake of several such horrific incidents of imposition of extra-judicial punishments in the name of *fatwa* (religious edict) reported by the national media from the mid-2009s, this petition was filed.

The High Court Division of the Supreme Court held that these “incidents” involved “violation of articles 27, 28, and 35 of the Constitution inasmuch as they amount to discrimination against women, who are overwhelmingly the subject of such extra-judicial penalties and who are systematically denied recourse to law or legal protection . . . from cruel or degrading or inhuman treatment or punishment”. The kind of offences for which women have been subjected to lashing and beating are for talking to man, pre-marital relations, or for having a child out of wedlock. None of these are offences under law of Bangladesh. As the Court observed, even traditional dispute resolution system (*salish*) has to be carried out in accordance with the law of the country that prohibits the imposition of extra-judicial penalties.

The Court held that, “[i]mposition and execution of extra-judicial penalties including those in the name of execution of *fatwa* is bereft of any

legal pedigree and has no sanction of law". It declared unconstitutional the imposition of extra-judicial punishments in the name of *Fatwa* and directed that such conducts be treated as criminal offences under the relevant penal laws. The Court cited article 7 of the ICCPR and articles 2 & 16 of the Convention against Torture.⁴⁴

The Court reasoned that, the failure of the State to combat such incidents of execution of extra-judicial penalties involves a breach not only of its constitutional obligation but also of an international law obligation to ensure the citizens' right against cruel, inhuman and degrading treatment or punishment.

It further stated that "[t]he failure of the state to take any systematic action to address such incidents of imposition and execution of extra-judicial penalties involves a breach of its obligations under the Constitution and international law to ensure the right to freedom from cruel, inhuman and degrading treatment or punishment". It held that international legal prohibition of torture or other ill-treatment is binding on Bangladesh, and observed as follows:

- (a) Bangladesh has an obligation under international law to prevent, prohibit and punish torture and other cruel, inhuman or degrading treatment or punishment. This obligation is contained in a number of international treaties binding on Bangladesh. The universally recognized prohibition of torture or other ill-treatment is also a basic principle of customary international law.
- (b) Article 7 of the International Covenant on Civil and Political Rights (ICCPR) provides that, "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". This provision enshrines an absolute proscription, which cannot be limited in any circumstances, and from which no derogation is possible.
- (c) Articles 2 and 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) outline that state must prevent acts of torture and other ill-treatment. Article 2(2) of the Convention provides that "no exceptional circumstances whatsoever, whether a state of war or a threat of

44 Both the Conventions are ratified by Bangladesh.

war, internal political instability or any other public emergency, may be invoked as a justification of torture". The UN Committee against Torture has affirmed that the prohibition of such conduct is absolute and non-derogable.

- (d) The Convention on the Elimination of all forms of Discrimination against Women (CEDAW) does not explicitly refer to the prohibition of torture and other ill-treatment. Nonetheless, the Committee on the Elimination of Discrimination against Women has held that violence against women "impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law".
- (e) The Human Rights Committee in its General Comment No. 7 has stressed that the prohibition on torture and other ill-treatment, "must extend to corporal punishment.

The Court remarked that courts of Bangladesh will not enforce these Covenants, treaties and conventions, even if ratified by the State, as they do not become part of *corpus juris* of the State unless incorporated in the municipal legislation. The Court can, however, "look into these conventions and covenants as an aid to [the] interpretation of the provisions of Part III of the Constitution particularly to determine the rights implicit in the rights like the right to life and the right to liberty, but not enumerated in the Constitution".⁴⁵

The Court declared extra-judicial punishments including those in the name of execution of *fatwa* to be without lawful authority, and issued the following directions:

- (i) The persons responsible for imposition of extra-judicial punishments and the abettors shall be held responsible under the Penal Code and other criminal laws.

⁴⁵ Article 25 of the Constitution states, "amongst others, 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".

- (ii) The law-enforcing agencies and the local government institutions shall take preventive measures so that extra-judicial punishments including in the name of execution of *fatwa* do not happen in their concerned areas.
- (iii) The Ministry of Education is directed to incorporate various types of articles in educational materials in the syllabus at the school, college and university levels and particularly in *madrassas* (religious educational centers), highlighting the supremacy of the Constitution and the rule of law and discouraging imposition of extra-judicial punishment of any form in the name of execution of Islamic Sharia/*fatwa*.

**CHILDREN’S RIGHTS – PROHIBITION OF CORPORAL PUNISHMENT –
CHILD PROTECTION – BEST INTEREST OF THE CHILDREN –CHILD
RIGHTS CONVENTION – RIGHT AGAINST TORTURE – CRUEL,
INHUMAN OR DEGRADING PUNISHMENT OR TREATMENT**

***Bangladesh Legal Aid and Services Trust (BLAST) v. Bangladesh* [Writ Petition No. 5684 of 2010. 63 DLR (2011) HCD 643. Judgment January 13, 2011]**

Towards the beginning of 2010, there was a spate of newspaper reports concerning numerous cases of corporal punishment which was being meted out to students in schools and *madrashas* (religious educational institutes). The victims were the children representing both boys and girls of various ages, as young as six years up to thirteen or fourteen years old. Subjected to corporal punishment by educational institutions, some children have been victim of horrendous acts of violence administered in the name of discipline. Such an incident of corporal punishment inflicted on a female student of class V, who was mercilessly beaten up for laughing at another girl who had dropped her bag, was brought to the notice of the High Court Division for appropriate action. At this juncture, BLAST and ASK, two human rights organizations, moved the High Court Division by initiating a public interest litigation challenging the constitutionality of corporal punishments such as caning, beating and chaining of children at schools and *madrashas*.

The Court relied, first, on article 35(5) of the Constitution of Bangladesh which provides that no person shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment. The Court then pointed out that Bangladesh ratified the Convention on the Rights of the Child (CRC) 1989 and, therefore, it is incumbent upon all authorities to implement the provisions of the Convention. Importantly, it referred to article 28 of CRC, and reasoned that in the light of the Convention, corporal punishment upon children must be prohibited in all settings including schools, homes and work places. As the Court commented, children who are subjected to corporal punishment or indeed psychological and emotional abuse cannot be expected to develop freely and properly and will not be able to give their best to this society. There are by now numerous countries which have imposed prohibition of corporal punishment both at home and in educational institutions.

The Court observed that, in order to make the prohibition of corporal punishment in the educational establishments effective, the laws relating to disciplinary action against the teachers who impose corporal punishment on students are required to be amended. Finally, it directed the Ministry of Education to ensure inclusion of a provision within the Service Rules dealing with teachers of public and private educational institutions of the country to the effect that the imposition, by a teacher, of corporal punishment upon any student shall be deemed to be an act of misconduct that would subject the wrongdoer to dismissal.

UDHR – ICCPR – ICESCR – CEDAW – EQUALITY OF MEN AND WOMEN – NON-DISCRIMINATION – TEASING AS SEXUAL VIOLENCE

***Bangladesh National Women Lawyers Association (BNWLA) v. Bangladesh* [Writ Petition No. 8769 of 2010, 31 BLD (2011) HCD 324. Judgment January 25 and 26, 2011]**

This case involved the increasing trend of sex-based violence against women, often known as eve-teasing (stalking). Numerous gruesome incidents of eve-teasing/stalking along with the resultant suicides and killings of the female victims and their relatives were being reported in the media, particularly since 2009. In this backdrop, a public-spirited organization popularly known as BNWLA approached the High Court Division seeking some directives/guidelines as the state agencies failed to combat

this particular form of sexual harassment (teasing of girls and women). Moreover, insufficiencies of the existing legal mechanisms to address this social menace compelled the court to direct the government to enact an appropriate legislation, and, pending such legislation, to mandate certain executive measures to prevent sexual harassment including eve-teasing/stalking in the streets, neighbourhoods, public places, rail and bus stations, and public and private transports.

While issuing certain guidelines and mandating executive measures to prevent sexual harassment including eve-teasing or stalking, the Court drew inspiration from the UDHR 1948 and three major human rights instruments – ICCPR, ICESCR and CEDAW – ratified by Bangladesh but not translated into municipal laws. The Court stated that the Universal Declaration of Human Rights (UDHR) 1948 recognises the equal rights of men and women (preamble, articles 1 and 2), while discrimination in the enjoyment of civil, political, economic, social and cultural rights on the basis of sex has been prohibited under the International Covenant on Civil and Political Rights (ICCPR) 1966 (article 2(1)). It continued to say that the International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1979 is the most comprehensive treaty on women's human rights, establishing legally binding obligations to end discrimination against women.

The Court referred to the fact that Bangladesh has acceded to the above instruments, binding itself thereby to implement them. In the Court's words, these international norms "are not just meaningless commitments". "It has now been settled by several decisions [in] this subcontinent that when there is a gap in the municipal law in addressing any issue, the courts may take recourse to international conventions and protocols on that issue for the purpose of formulating effective directives and guidelines to be followed by all concerned until the national legislature enacts laws in this regard". By citing two important decisions of the Supreme Court of Bangladesh, the court reiterated that if the domestic laws are not clear enough or if there is a lack of applicable rule therein, the national courts should draw upon the principles incorporated in the international instruments.⁴⁶

The Court noted that, another bench of the Court in an earlier case, *BNWLA v. Bangladesh* (2009) 14 BLC (HCD) 694, relied on international

46 *Hussain Muhammad Ershad v. Bangladesh* (2001) 21 BLD (AD) 69; *State v. Metropolitan Police Commissioner* (2008) 60 DLR (HCD) 660.

instruments to issue several directives to prevent sexual harassment in educational institutions and workplaces of women. “Keeping intact the definition of sexual harassment given by this court in the above mentioned case of 2009”, the present Court in this case added stalking of women and girls within the definition of sexual harassment. For this purpose, it defined the term stalking in clear terms. It observed as follows: “Since this court’s earlier decision in the above mentioned case has not dealt with sexual harassment in places apart from educational institutions and work places, we hold that the mischief of sexual harassment as defined by this court and its application are not confined only to educational institutions and work places but extend to all private and public places, railway and bus station[s], public and private transports, streets, shops, markets, cinema halls, parks [and so on]”.

With the above observations and findings, the Court in the present case issued few directives and gave clarification of the phenomenon of stalking. The Court thought that the euphemistic expression “eve-teasing” should not be used anymore. The expression “sexual harassment” is the appropriate term to be used by all including the law enforcing agencies, government organizations, establishments and the media for describing the incidents or mischief of so called eve-teasing, it observed. It also held that, the modified definition of sexual harassment that includes stalking shall apply to all places including bus, train, steamer, public and private transport terminals and stops, airports, streets, neighbourhoods, shops, markets, cinema halls, and so on, in addition to the workplaces and educational institutions.

Finally, the Court directed the government to take immediate steps to initiate the framing of new law or to amend the existing law for incorporating specific provisions giving evidential value to the audio-visual statement of victims or witnesses of sexual harassment so that the perpetrators can be punished solely on the basis of such recorded evidence of sexual harassment in case of unwillingness of the victim or other witnesses to give evidence fearing further attack and humiliation and/or torture.

CHINA

**REFUGEES – DEMOCRATIC PEOPLE’S REPUBLIC OF KOREA – UN
HUMAN RIGHTS COUNCIL – ILLEGAL BORDER CROSSERS FROM
DPRK SHOULD NOT BE DEEMED AS REFUGEES**

On February 29, 2012, an FM spokesperson made a statement on the plan of the US and the EU to raise the issue of the Democratic People’s Republic of Korea (DPRK) “defectors” in the UN Human Rights Council.

We oppose relevant parties’ discussion of the issue concerning illegal border crossers from the DPRK to China in relevant international agencies. These agencies are not the venue for such discussion. We have stated time and again that relevant illegal border crossers are not refugees. They crossed the border illegally out of economic purposes. We oppose the attempt to internationalise and politicise the issue and make it [a] refugee issue. China will stick to its long-standing practice and deal with relevant issue appropriately in accordance with domestic law, international law and humanitarian principles. It serves the common interests of all parties and meets the international common practice. We hope that China’s judicial sovereignty will be respected and protected and relevant parties and people will not keep playing up this issue.⁴⁷

On June 26, 2012, an FM spokesperson made a statement on some Myanmar people fleeing to Yunnan Province for shelter back to the conflict zones of Myanmar.

Recently, due to the sporadic exchanges of fire between the Myanmar Government and some local ethnic armed forces, some Myanmar people in the border area entered China temporarily to seek shelter from their relatives and friends for the sake of safety. They are not refugees and go back to Myanmar once the situation calms. Upholding the spirit of humanitarianism, China has been providing living necessities to these people.⁴⁸

47 *Foreign Ministry Spokesperson Hong Lei’s Regular Press Conference on February 29, 2012*, MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE’S REPUBLIC OF CHINA, http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t910855.shtml.

48 *Foreign Ministry Spokesperson Hong Lei’s Regular Press Conference on June 26, 2012*, CONSULATE GENERAL OF THE PEOPLE’S REPUBLIC OF CHINA IN NEW YORK, <http://www.fmprc.gov.cn/ce/cgny/eng/fyrth/t946238.htm>.

REGULATION – MILITARY MEASURES – UN PEACE KEEPING – UNSC**Peacekeeping – Regulation on Participation of People's Liberation Army in UN Peacekeeping Operations (Provisional Application)**

On March 22, 2012, the CMC, China's top military organ, adopted the Regulation on Participation of People's Liberation Army in UN Peacekeeping Operations (Provisional Application).

The Regulation is the first special military measure to regulate the participation of the Chinese army in UN peacekeeping operations. It consists of seven chapters and 37 articles, mainly covering the following aspects. Firstly, it defines the scope of peacekeeping operations. Based on the Chinese foreign policy and principles of participation in peacekeeping operations, the Regulation limits the peacekeeping operations in which the Chinese army participates to those within the framework of the UN, stresses the authority of the UNSC and the dominance of the UN and clarifies that peacekeeping operations in which the Chinese army participates are mainly responsible for such tasks as separating parties to a conflict, supervising armistice, engineering, transportation, medical guarantee, as well as rescue and relief.

Secondly, it provides for the organisation and command of peacekeeping operations. The Regulation clearly provides that the participation of Chinese army in peacekeeping operations must be under the uniform command of the CMC, and be planned and guided by the Headquarters, and that every military region and arms and services must be responsible for their corresponding works according to their duties and division of labour among them.

Thirdly, it provides for the dispatch and withdrawal of peacekeeping operations. The Regulation clarifies the procedure for approval of dispatching troops to participate in peacekeeping operations. It also regulates the formation of troops, selection of members, deployment of troops and organisation and implementation of rotation during the period from dispatch to withdrawal.

Fourthly, it provides for education and training of peacekeepers. The Regulation provides for education and training of peacekeepers in terms of ideological and political education, troops training, military professional personnel training, joint training with foreign troops and check and examination. Fifthly, it provides for management and guarantee of

peacekeeping operations. The Regulation clarifies the guarantee duties of every department in peacekeeping operations in accordance with the current provisions relating to logistics and equipment guarantee. Finally, it also clarifies disciplines, weapons, uniforms, promotion and remuneration.⁴⁹

TREATIES AND COVENANTS – MINORITY RIGHTS – DISABILITY

Initial Report under the Convention on the Rights of Persons with Disabilities

The Committee on the Rights of Persons with Disabilities considered the initial report of China (CRPD/C/CHN/1), including Hong Kong, China (CRPD/C/CHN-HKG/1) and Macao, China (CRPD/C/CHN-MAC/1), at its 77th and 78th meetings, held on 18 and 19 September 2012, and adopted the concluding observations at its 91st meeting, held on 27 September 2012.⁵⁰

INDONESIA

HUMAN RIGHTS – RATIFICATION ON HUMAN RIGHTS TREATIES AND COVENANTS

Act No. 6 of 2012 on Ratification of International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Act 6/2012)

This Convention regulates the international provisions related to international cooperation and coordination in legal migrant management and illegal migrant prevention. On September 22nd, 2004 in New York, the government of Indonesia has signed the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families without a reservation. The signature express the commitment and persistence of Indonesian Government to protect, respect, and fulfill the rights of all migrant workers and the members of their families which

49 胡锦涛签署命令 发布施行《中国人民解放军参加联合国维持和平行动条例（试行）》，XINHUA (Mar. 22, 2012), http://news.xinhuanet.com/mil/2012-03/22/c_111691498.htm.

50 Committee on the Rights of Persons with Disabilities, 8th Sess., Sept. 17-28, 2012, *Concluding observations on the initial report of China*, http://www.ohchr.org/Documents/HRBodies/CRPD/8thSession/CRPD-C-CHN-CO-1_en.doc.

hopefully can provide the prosperity for migrant workers and families. As one of the State Party, Indonesia has the commitment to support the establishment of universal convention and the implementation of principles and international standard norms in protecting the rights of all migrant workers and members of their families, globally.⁵¹

**HUMAN RIGHTS – RATIFICATION – CHILD PROTECTION –
CHILDREN’S RIGHTS**

Act No. 9 of 2012 on Ratification of Optional Protocol to the Convention on the Rights of the Child on the Involvement of the Children in Armed Conflict (Act 9/2012)

The existence of children within armed conflict can cause a serious risk for long time period. Children can be a torture and murder target as a part of war strategy. Concerning those possibilities, international citizen agreed on taking a step in the need to protect children as stipulated in the Optional Protocol to the Convention on the Rights of the Child on the Involvement of the Children in Armed Conflict. This Optional Protocol aims to prevent and protect children from the involvement and other possibilities that might happen in the armed conflict. The scope of the Protocol is to prevent the recruitment, training and make advantage of children in the armed conflict in both local and cross-country.⁵²

**HUMAN RIGHTS – RATIFICATION – CHILD PROTECTION –
CHILDREN’S RIGHTS**

Act No. 10 of 2012 on Ratification of Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (Act 10/2012)

51 Indonesia, Act No. 6 of 2012 on Ratification of International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, State Gazette of the Republic of Indonesia Year 2012 Number 115, Supplement to State Gazette of the Republic of Indonesia Number 5314, Preamble, para 4.

52 Indonesia, Act No. 9 of 2012 on Ratification of Optional Protocol to the Convention on the Rights of the Child on the Involvement of the Children in Armed Conflict, State Gazette of the Republic of Indonesia Year 2012 Number 148, Supplement to State Gazette of the Republic of Indonesia Number 5329, Preamble.

The increasing of the sale of children, child prostitution and child pornography in international mobility, is a reasonable ground to strengthen the law enforcement in preventing and countering those crimes. To further enhance the commitment of Indonesia, the government has signed the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography. The State Parties have duties to 1) forbid the sale of children, child prostitution and child pornography; 2) enforce the law for both person and corporation who offer, provide and accept children for sexual exploitation purpose, organs selling, or forced labor; illegal adoption; offer, get and provide children to do prostitution; distribute, publish, import, export, offer and sell things for child pornography purpose; 3) categorize crimes related to sale of children, child prostitution and pornography as the extradition crimes; 4) establish the international cooperation and mutual legal assistance; 5) take the steps on taking evidence temporarily or permanently of the companies which are used for sale of children, child prostitution and child pornography; 6) take the protective steps for the best interest of child and support all the needs during the criminal proceedings; 7) protect the rights and child interest as a victim.⁵³

JAPAN

FAMILY LAW – REMARRIAGE AFTER DIVORCE – ICCPR

Judgment concerning the Prohibition of Remarriage after Divorce, Okayama District Court, 18 October 2012

Art. 733(1) of the Japanese Civil Code prohibits women from remarrying within six months of a divorce. The aim of this law is to protect the legal status of any unborn child that is presumed to be conceived during the previous marriage, particularly so that the father of the unborn child can be identified. However, this provision might contravene Art. 24 of the Japanese Constitution, which provides for the equality of men and women concerning marriage. (“With regard to choice of spouse, property rights,

53 Indonesia, *Act No. 10 of 2012 on Ratification of Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, *State Gazette of the Republic of Indonesia Year 2012 No. 149*, *Supplement to State Gazette of the Republic of Indonesia No. 5330*, Preamble.

inheritance, choice of domicile, divorce and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of the sexes.”)

The plaintiff, who was divorced on March 28, 2008 and could not remarry until October 7, 2008, sued the government for compensation for the legal delay of her remarriage, based on unreasonable discrimination in case of remarriage between men and women, since only women are subject to the prohibition of remarriage. She also challenged the length of the six month prohibition period for remarriage. Even if it is necessary to protect the legal status of the unborn child, she argued that the prohibition term for remarriage should be the minimum length required to ascertain the father of the child: that the period should be one hundred days from the divorce, since otherwise, the father of child is presumed to be either the previous husband or the present husband based on Art. 722(2), which provides that “A child born after 200 days from the formation of marriage or within 300 days of the day of the dissolution or rescission of marriage shall be presumed to have been conceived during marriage.” Therefore, she claimed the law should allow for equal treatment for remarriage men and women or at least, provides a minimum length restriction for remarriage for women. Since there is an unreasonable delay due to the legislative body or the Government, she has the right to be compensated based on the State Redress Act.

The court held that in order to meet the criteria based on the State Redress Act (Act No. 125 of 1947), such action should amount to a clear infringement of right by inaction concerning legislation or long-term negligence for no justifiable reason. The court’s reasoning referred to the United Nations Human Rights Committee reports in 1998 and 2008 providing that such inaction concerning legislation is not compatible with Art. 2, 3, 26 of ICCPR and the Committee for the Convention on the Elimination of All Forms of Discrimination Against Women found that it is discrimination to have a six month ban on remarriage and recommended that the provision should be abolished in 1998, 2002 and 2008. However, the court stressed that such inaction in this case was not enough to require compensation based on the State Redress Act, particularly because of the nature of the inaction concerning legislation despite the human rights concerns expressed by international organizations.

ICCPR

**DISABILITY RIGHTS – ICCPR – CONVENTION ON
THE RIGHTS OF PERSONS WITH DISABILITIES****Judgments concerning a Disabled Person's Right to Express an Opinion
in the Municipal Council, Nagoya High Court, 11 May 2012**

The appellant (plaintiff at the first trial), who was a former member of the Nakatsugawa municipal council and had functional dysphonia due to a resection of his pharynx, sued the government for compensation under the State Redress Act. He claimed he was forced to use a conversion device due to a speech impairment despite his request to have someone to read his statement at the municipal council. He insisted that such an act was against Art. 13 (right to self-determination), Art. 14 (1) (equal rights), Art. 21 (freedom of expression) of the Japanese Constitution, Art. 19(2) (freedom of expression) of the ICCPR, Art. 21 (freedom of expression and opinion, and access to information) of the Convention on the Rights of Persons with Disabilities, and Art. 3 of the Basic Act for Persons with Disabilities (Act No. 84 of May 21, 1970, Amendment: Act No. 90 of 2011).

The court held that to force the use of such a device did infringe upon the right of the appellant to the freedom of expression and opinion in the municipal council, based on the fact that the appellant could not express his opinion by typing on a keyboard well enough in time to participate in the discussion of the municipal council. His typing skills were inadequate; therefore he sought permission to have someone read his handwriting for him. However, he was not allowed to do so and thus could not express his opinion in the municipal council for years. The court found that this deprived the appellant of his right to expression and opinion. The court did not find infringement of rights of the disabled under the Constitution, the ICCPR, or the Convention on the Rights of Persons with Disabilities. However, the court ruled that the government was responsible for such an infringement of rights and was obliged to pay compensation (three million yen) to the appellant under the State Redress Act because of the conscious intent of the other members of the municipal council who knew that the appellant had difficulty in expressing his opinions orally. Therefore, the court determined that such acts of the members of the municipal council

had met the requirements for the existence of a civil servant's intention or negligence under the State Redress Act.

**ILLEGAL IMMIGRATION – FORCED DEPORTATION – ICCPR –
CONVENTION ON THE RIGHTS OF THE CHILD**

Judgment concerning the Forced Deportation a Parent due to Violation of Immigration Status and the Right of a Child to Live with Her Parents, Tokyo District Court, 26 March 2012

A national of Myanmar who was subject to forced deportation on the grounds that he overstayed his visa, sued the Government being subject to forced deportation. He had been residing and working illegally for around 10 years. His wife is Taiwanese who possessed a resident visa and the couple has a child whose has Taiwanese nationality. He insisted that if he were forced to return to Myanmar, his family would collapse because of the difficulty of resettlement for his wife and child to Myanmar, partially because of the difficulty of international marriages face in Myanmar. He also asked the authorities to consider that the child was raised in Japan and can only speak Japanese. However, the court found that the wife was born in Myanmar and had lived there for over 10 years and she still has friends there and understands Burmese. The child was around a year old at the time of the first notice of deportation and the child had been raised in Japan for a number of years despite the parents' awareness their illegal status in Japan. Therefore, the court attributed responsibility to the parents that the child was raised in Japan and can speak only Japanese.

In conclusion, the court held that the decision concerning the forced deportation was valid based on the discretion of the Minister of Justice and Japan met its obligations under the ICCPR and Convention on the Rights of the Child. In particular, the court held that Art. 17 and 23 of the ICCPR could not have been construed to protect the alien's right of residence in case of forced deportation provided in Art.13 of the ICCPR. Additionally, the court pointed out that it is Art. 9(4) of the Convention on the Rights of the Child that presume that there may be family separation in cases of forced deportations.

In this case, it is notable that despite the wrongfulness of the overstay and working by father and the child's alien nationality, the court determined the validity of the warrant and the decision made by the Minister of

Justice by cautiously referring to and considering the rights of child under the ICCPR and the Convention on the Rights of the Child.

KOREA

CONVENTION AND PROTOCOL RELATING TO THE STATUS OF REFUGEES – REGULATING ADMISSION PROCEDURE AND TREATMENT OF REFUGEES – ENSURE FUNDAMENTAL RIGHTS OF THE REFUGEES – HARMONY WITH INTERNATIONAL LAW

Enactment of the Refugee Act, Act Promulgated on February 10, 2012, Act No. 11298

The Republic of Korea acceded to Convention and Protocol Relating to the Status of Refugees (hereinafter the “Refugee Convention”) in December 1992. Since then, the immigration office regulated the procedure for admission of refugees. However, compared to other countries, Korea has not admitted many refugees. Consequently, Korea received domestic and international criticism on the speed, clarity, and fairness of the admission process.

Therefore, Korea enacted the Refugee Act for the harmony of International law such as the Refugee Convention and domestic law by 1) aiming to ensure the fundamental rights stated in the Refugee Convention; 2) solving the problems with treating refugees; and 3) specifically regulating the refugee admission procedure and treatment of refugees.

In particular, the Refugee Act clarified meanings of ‘refugees,’ ‘humanitarian aliens,’ ‘refugee applicants,’ and so on to realize the refugee system based on International law. The refugees, humanitarian aliens and refugee applicants are prohibited from compulsory deportation against their will. For example, the refugee applicant can stay in Korea until the decision is made about the refugee admission.

In addition, the Act clarified the matters such as refugee admission procedure and collection of materials for the procedure, fact-finding, co-operation of related administrative agencies, right to counsel, company of a person in fiduciary relationship, translation, confirmation of report on refugee interview, access and copy of the documents, prohibition of publishing personal information. Moreover, the admitted refugees are treated as stated in the Refugee Convention. Accordingly, they receive the same social security as Korean citizens, protection based on National

Basic Living Security Act, education of minor children at primary and secondary school like Korean citizens, and recognition of the education and qualifications received abroad.

**MATERIALIZED NECESSARY PROCEDURE IN AGREEMENT WITH
CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD
ABDUCTION – ENSURE SPEEDY RETURN OF DETAINED CHILDREN
– ESTABLISHMENT OF DOMESTIC JUDICIAL PROCESS**

Enactment of the Act on the Implementation of the Hague Convention on the Civil Aspects of International Child Abduction, Promulgated on December 11, 2012, Act No. 11529

The Act on the Implementation of the Hague Convention on the Civil Aspects of International Child Abduction was enacted to materialize the procedure necessary to perform agreement to accede to the Convention on the Civil Aspects of International Child Abduction that aims for speedy return of detained (hijacked) children to other country by a person without custody.

The Act Article 4, Section 9 designated the Ministry of Justice in charge of the performance of agreement. In addition, since the Convention does not state the specific judicial process to return the children such as the jurisdiction of the court, the Act Chapter 3 assigned Seoul Family Court an exclusive jurisdiction for the cases concerning returning the children. Subsequently, the Act prepared domestic judicial process necessary to perform the agreement.

NEPAL

**RIGHTS OF THE THIRD GENDER, RIGHT TO SEXUALITY – HUMAN
RIGHTS – PERSONAL LIBERTY AND FREEDOM – RESPONSIBILITY
OF STATE UNDER THE INTERNATIONAL LAW**

Ms. Rajani Shahi v. National Women Commission of Nepal and others
[Supreme Court of Nepal, decided on November 5, 2012, Nepal Law Reporter (Nepal Kanoon Patrika), Vol. 55, No. 1, pp. 83-95, 2013]

Mrs. Rajani Shahi, a married woman, was put into a confinement by two leading non-governmental organizations (NGOs) of Nepal on the ground of claiming her security and rehabilitation. Despite the fact that she was

married to Mr. Pradeed Shahi and had given birth to a daughter, she had expressed her lesbian sexual orientation to her husband and was willing to end the marital relationship with Mr. Shahi. According to her petition before the Supreme Court of Nepal, she used to feel more comfortable having sexual relationship with a girl than with a boy. Lastly, she had filed a case before a court to get divorce with her husband Mr. Shahi. After filing the divorce case, she built a relationship with a lady. But she immediately received threats from Mr. Shahi and asked for security to an NGO working for the rights of the third gender people in Nepal. Mr. Shahi had also used different social pressures and tried to arrest her with the help of police. She had also got an injunctive order from Appellate Court against the police and Mr. Shahi, instructing them not to disturb her personal life including her right to free movement and personal security. While going to the hearing of the divorce case, she was taken into custody by Mr. Shahi with the help of police. With the coordination of the National Women Commission of Nepal, she was put into a secured habitation center under the police control. A few days later, the National Women Commission of Nepal had put her in a different rehabilitation center managed by Maiti Nepal, an NGO. In turn, Maiti Nepal had put her in a confinement, restricting her from going out, meeting her partner, and even talking with any other persons. Thus, her partner Ms. Prem Kumari Nepali had brought a petition of habeas corpus before the Supreme Court of Nepal, asking to release Mrs. Shahi from an illegal confinement and to allow her to enjoy her life as a free person.

The defendant, Maiti Nepal, in response, stated that Mrs. Shahi was not put into any illegal confinement or custody. At the request of the National Women Commission of Nepal, she was instead given protection by Maiti Nepal. He further claimed that none of her psychological, fundamental, or human rights was encroached by Maiti Nepal. The writ petition had no legal ground, as the confinement was not illegal; thus, the petition was brought with malice to defame Maiti Nepal, an NGO working to protect the rights of women in Nepal. The National Women Commission of Nepal had replied to the Supreme Court of Nepal stating that Mrs. Shahi was put into rehabilitation centers with the consent of her father and uncle to provide her security and a shelter for her benefit till the court decided her divorce case.

Recognizing the human rights of an individual guaranteed under different international human rights instruments and domestic laws in-

cluding the Constitution of Nepal, the Supreme Court of Nepal concluded that no authority or organization including NGOs could confine or put a person into custody against his or her free will. Traditionally, a marriage is understood as a relationship between two persons of opposite sex for the purpose of reproduction. However, the sexual orientation of a person cannot be controlled by a marital relationship. Every person has full autonomy to his or her body and is also free to choose his or her partner according to his or her sexual orientation. It is the fundamental human rights of every person, such as a married person's right to choose a partner, dissolve his or her marital relationship, and enter into a new relationship of his or her choice. The Supreme Court has also noted that an individual is the owner of his or her own person and body. The right to decide a sexual preference is an exclusive personal matter that is connected to the right of personal autonomy. It is not expedient to the state or society to interfere on such issues of personal autonomy. No one has the right to judge or question adult persons on how they should manage or enjoy their sexual intercourse and whether the intercourse is natural or unnatural. One's sexual orientation should never be the reason for being discriminated against or deprived of exercising one's rights of equal protection of law along with the enjoyment of fundamental human rights and personal freedom.

PHILIPPINES

STRENGTHEN AND PROPAGATE FOSTER CARE AND TO PROVIDE FUNDS – RIGHTS OF CHILDREN – FOSTER CARE

An Act to Strengthen and Propagate Foster Care and to Provide Funds Therefor

Republic Act No. 10165, known as the "Foster Care Act of 2012," was signed into law by the Philippine President on 11 June 2012. Apart from citing other local laws and the Philippine Constitution in its policy statement, it declares that the State shall guarantee that all the rights of the child found under Article 20 of the UN Convention on the Rights of the Child should be observed (Sec. 2).

The law designates who may be placed in foster care in the Philippines, which include, among others, children who are abandoned, surrendered, neglected, dependent or orphaned; victims of sexual, physical or any

other form of abuse or exploitation; and those with special needs (Sec. 4). Likewise, those who may be foster parents are provided for (Sec. 5). Foster parents are given parental authority over such children (Art. III). The law lays down the procedure in recruitment and development of foster parents (Art. IV), long-term foster placement (Art. V), the adoption of a foster child (Art. VI), and assistance and incentives (Art.VIII).

**ENFORCED OR INVOLUNTARY DISAPPEARANCE – INTERNATIONAL
CONVENANT ON CIVIL AND POLITICAL RIGHTS – INTERNATIONAL
CONVENTION FOR THE PROTECTION OF ALL PERSONS FROM
ENFORCED DISAPPEARANCE – AMPARO**

Edgardo Navia, Ruben Dio, and Andrew Buising v. Virginia Pardico, for and in behalf and in representation of Benhur v. Pardico [G.R. No. 184467. 19 June 2012]

A vehicle arrived at the house of Lolita M. Lapore. The arrival of the vehicle awakened Lolita's son, Enrique Lapore (Bong), and Benhur Pardico (Ben). When Lolita went out to see what it was, she saw two uniformed guards disembark from the vehicle. One asked Lolita where they could find her son Bong. Before Lolita could answer, the guard saw Bong and told him that he and Ben should go with them to the security office of Asian Land because a complaint was lodged against them for theft of electric wires and lamps.

According to the petitioners, they invited them to their office. Bong and Ben voluntarily went with them. They were interviewed at the security office. The suspects admitted that they took the lamp but clarified that they were only transferring it to a post nearer to the house of Lolita. Since there was no complainant, Navia ordered the release of Bong and Ben. Bong then signed a statement to the effect that the guards released him without inflicting any harm or injury to him. His mother Lolita also signed the logbook. Thereafter, Lolita and Bong left the security office. Ben was left behind as Navia was still talking to him about those who might be involved in the reported loss of electric wires and lamps. After a brief discussion, Navia allowed Ben to leave. Ben also affixed his signature on the logbook. Subsequently, petitioners received an invitation from the police relative to a complaint of Virginia Pardico (Virginia) about her missing husband Ben. Petitioners informed her that they released Ben and that they have no information as to his present whereabouts.

According to the respondents, Bong and Ben were not merely invited since they were unlawfully arrested, shoved into the Asian Land vehicle and brought to the security office for investigation. They were also threatened and physically harmed. Bong admitted that he transferred a lamp to a post near their house. However, because the lamp Bong got was no longer working, he reinstalled it on the post from which he took it. Lolita left with Bong. Ben grabbed Bong and pleaded not to be left alone before leaving. However, they were afraid of Navia, so Lolita and Bong left. Lolita singed the guard's logbook twice without reading it since she had poor eyesight. The following morning, Virginia went to the security office to visit her husband Ben, but only to be told that petitioners had already released him together with Bong the night before.

Virginia filed a Petition for Writ of Amparo before the Regional Trial Court, exasperated with the mysterious disappearance of her husband. The court issued a writ. However, the Supreme Court ruled that the petition for the writ is fatally defective and must be dismissed.

First, The Rule on the Writ of Amparo was promulgated to arrest the rampant extralegal killings and enforced disappearances in the country. Article 6 of the International Covenant on Civil and Political Rights recognizes every human being's inherent right to life. Article 9 thereof ordains that everyone has the right to liberty and security. The right to life must be protected by law while the right to liberty and security cannot be impaired except on grounds provided by and in accordance with law. This overarching command against deprivation of life, liberty and security without due process of law is also embodied in the Philippine Constitution.

Second, Ben's disappearance does not fall within the ambit of the rule and relevant laws. The rule does not define extralegal killings and enforced disappearances. This omission was intentional to allow it to evolve through time and jurisprudence and through substantive laws as may be promulgated by Congress. The Court has applied the generally accepted principles of international law and adopted the International Convention for the Protection of All Persons from Enforced Disappearance's definition of enforced disappearances, as "the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person,

which place such a person outside the protection of the law.” Congress also enacted a law defining enforced or involuntary disappearances. Reference to enforced disappearances should be construed to mean the enforced or involuntary disappearance of persons contemplated in the law in relation to the rule. There are four elements of enforced disappearance: (1) arrest, detention, abduction or any form of deprivation of liberty; (2) it was carried out by, or with the authorization, support or acquiescence of, the State or a political organization; (3) followed by the State or political organization’s refusal to acknowledge or give information on the fate or whereabouts of the person subject of the *amparo* petition; and, (4) the intention for such refusal is to remove subject person from the protection of the law for a prolonged period of time.

Thus, absent in this case is substantial evidence that the disappearance was carried out by, or with the authorization, support or acquiescence of, the State or a political organization, followed by a refusal to acknowledge the same or give information on the fate or whereabouts of said missing persons, with the intention of removing them from the protection of the law for a prolonged period of time.

INTERNATIONAL HUMAN RIGHTS LAW – RIGHT TO WATER

***Initiatives for Dialogue and Empowerment through Alternative Legal Services, Inc. (IDEALS, Inc.), et al. v. Power Sector Assets and Liabilities Management Corporation (PSALM), et al.* [G.R. No. 192088. 9 October 2012]**

PSALM is a government-owned and controlled corporation created by virtue of Republic Act No. 9136, otherwise known as the “Electric Power Industry Reform Act of 2001” (EPIRA). Sometime in August 2005, PSALM commenced the privatization of the 246-megawatt Angat Hydro-Electric Power Plant. The Board of Directors of PSALM approved the bidding procedures for the privatization. After a post-bid evaluation, PSALM’s board approved and confirmed the issuance of a Notice of Award to the highest bidder, Korea Water Resources Corporation (K-Water). A petition was filed to enjoin the sale of the power plant to K-Water.

There were many arguments raised in the petition. Related to international law, the petitioners argued that the Philippine Government, along with its agencies and subdivisions, have an obligation under international law, to recognize and protect the legally enforceable human right to wa-

ter. Petitioners cited the Advisory on the “Right to Water in Light of the Privatization of the Angat Hydro-Electric Power Plant” dated November 9, 2009 issued by the Philippines’ Commission on Human Rights which urged the Government to revisit and reassess its policy on water resources vis-à-vis its concurrent obligations under international law to provide, and ensure and sustain, among others, “safe, sufficient, affordable and convenient access to drinking water.” Once the power plant is privatized, there will be less accessible water supply, particularly for those living in Metro Manila and the Province of Bulacan and nearby areas which are currently benefit from it. Management is better left to a government body and considering the public interest involved. Must the decision to privatize the AHEPP become inevitable, the advisory called for specific and concrete safeguards to ensure the right to water of all, as the domestic use of water is more fundamental than the need for electric power.

Another related argument states that the protection of their right to water and of public interest requires that the bidding process initiated by PSALM be declared null and void for violating such right, as defined by international law and by domestic law establishing the State’s obligation to ensure water security.

The Court did not squarely address such arguments of petitioner. Rather, on the question of mootness and standing to sue, it reasoned that the petition was filed as means of enforcing the State’s obligation to protect the citizens’ “right to water” that is recognized under international law and legally enforceable under the Philippine Constitution, but also to bar a foreign corporation from exploiting Philippine water resources in violation of the Constitution. If the impending sale indeed violates the Constitution, it is the duty of the Court to annul the contract award as well as its implementation. Using other reasons not related to international law, the Court however held that the bidding and the Notice of Award issued in favor of K-Water are valid and legal.

**ENFORCED OR INVOLUNTARY DISAPPEARANCE – DEPRIVATION OF
LIBERTY COMMITTED BY STATE OR ITS AGENTS – ADHERENCE TO
INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW**

An Act Defining and Penalizing Enforced or Involuntary Disappearance

Signed into law by the Philippine President on 21 December 2012, Republic Act No. 10353, or the Anti-Enforced or Involuntary Disappearance Act of

2012, declares adherence to the principles and standards on the absolute condemnation of human rights violations set by the Philippine Constitution and various international instruments such as, but not limited to, the International Covenant on Civil and Political Rights (ICCPR), and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), to which the Philippines is a State party (Sec. 2).

Enforced or involuntary disappearance means the arrest, detention, abduction or any other form of deprivation of liberty committed by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which places such person outside the protection of the law [Sec. 3(b)]. International law is referred to in defining “order of battle,” which is a document made by the military, police or any law enforcement agency of the government, listing the names of persons and organizations that it perceives to be enemies of the State and which it considers as legitimate targets as combatants that it could deal with, through the use of means allowed by domestic and international law [Sec. 3(c)].

An investigation, trial and decision in Philippine court or body for a violation of the law shall be without prejudice to an investigation, trial, decision or any legal or administrative process before any appropriate international court or agency under applicable international human rights and humanitarian law (Sec. 19).

SRI LANKA

SUBSTANTIVE RIGHT TO APPEAL FROM A CONVICTION – FUNDAMENTAL HUMAN RIGHTS – UNIVERSAL DECLARATION OF HUMAN RIGHTS – OBLIGATIONS ON THE STATE IMPOSED BY ICCPR

***Gunasekera v. Attorney General* [2012] B.L.R. 215 (Sri Lanka)**

The Accused-Appellant-Petitioner-Appellant (Appellant) was charged before the Magistrate’s Court in Marawila, Sri Lanka for committing an offence punishable under section 64(b) of the Sri Lankan Bureau of Foreign Employment Act No. 21 of 1985 and section 386 of the Penal Code. The Appellant pleaded not guilty. After trial, she was convicted for the offence.

After conviction, sentence was postponed and the Appellant preferred an appeal to the Provincial High Court of the North Western Province Court of Chilaw, Sri Lanka.

Subsequently, sentence was imposed on the Appellant for a period of 1 year rigorous imprisonment and a fine of Rs. 15,000.

After this sentence, another appeal was preferred to the same High Court against the same conviction and sentence. Both these appeals were taken up together and were dismissed *in limine*. The first appeal was dismissed on the basis that it was a premature appeal since it was preferred before the pronouncement of the sentence. The second appeal was dismissed on the basis that the Appellant had only canvassed the sentence and not the conviction, and therefore that both appeals had not been lodged in terms of the Criminal Procedure Code.

Leave was granted to the Supreme Court on the question of law of whether the High Court Judge erred in rejecting both petitions of appeal. The Supreme Court answered the question in favour of the Appellant.

The Court was guided by the principle that where “the spirit of the law is vanquished, the law itself is diminished to that extent.” The Court adverted to the preamble and section 4 of the High Court of the Provinces (Special Provisions) Act of 1990 and held that the purpose and ambit of the section was to grant an aggrieved party any conviction, sentence or order a substantive right to appeal there from.

The Court held that the right of appeal is a fundamental human right enshrined in domestic and international law, advertent to Article 12 of the Universal Declaration of Human Rights.

It further stated that Sri Lanka had acceded to the International Covenant on Civil and Political Rights (ICCPR) which imposes an obligation on all states to ensure that the rights contained therein are guaranteed to all individuals within the state, in accordance with Article 2 of the ICCPR, and further, that Article 14(5) of the ICCPR guarantees a right to appeal from his/her conviction and sentence. The Court refers to the ICCPR Act enacted by Sri Lanka and holds that Article 4(2) of the ICCPR Act guarantees this right of Appeal.

The Court observed that there was a “deviant procedure” followed in the present case, unlike that which had been practiced over a long period of time. However the Court held that in terms of the International Law there was a right of appeal both after conviction as well as after sentence and

when such cases came as two separate appeals, they should be consolidated and heard and determined as one case and should not be perfunctorily and unthinkingly dismissed.

**HUMAN RIGHTS COUNCIL – RECONCILIATION – ACCOUNTABILITY
– LESSONS LEARNT AND RECONCILIATION COMMISSION**

Resolution on Promoting Reconciliation and Accountability in Sri Lanka, U.N. Doc. A/HRC/Res/19/2 (Apr. 3, 2012)

The second resolution pertaining to the internal armed conflict in Sri Lanka and its aftermath was adopted by the Human Rights Council (Council) in 2012. 24 states supported this resolution while 15 states voted against it and 8 states abstained. This resolution called on the Sri Lanka government to fully implement the recommendations of the Lessons Learnt and Reconciliation Commission, to develop a comprehensive action plan on such implementation, and to address the violations of international law in relation to the internal armed conflict. It also called on the UN High Commissioner for Human Rights and the special mandate holders to provide advice and technical assistance to Sri Lanka on the implementation of the foregoing.

The UN Office of the High Commissioner for Human Rights was called to submit a report at the next session of the Council on this matter.

**ARBITRARY DETENTION – RIGHT TO AN EFFECTIVE REMEDY –
DUE PROCESS – UDHR – ICCPR**

Pathmanathan Balasingam and Vijiyanthan Seevaratnam v. Sri Lanka, Working Group on Arbitrary Detention, Opinion No. 26/2012, U.N. Doc. A/HRC/WGAD/2012/26 (2012)

Mr. Balasingam and Seevaratnam had surrendered to the Sri Lankan Army following an announcement made by the latter. Subsequently, the detention of these two people was ordered under the Prevention of Terrorism Act. It was alleged that the detention of Mr. Balasingam and Seevaratnam was arbitrary in character that there was no oversight or review because courts could not rule on the lawfulness of detention of people who surrendered. The court had never handled such case before. Moreover, there were no procedural safeguards such as the right to legal representation, and there was no stipulated time period within which investigations against a per-

son who surrendered must be concluded. If the person is prosecuted and found guilty, the court may order an undefined extension of the period of rehabilitation as part of the sentence. It was also stated that appeals lodged with the International Committee of the Red Cross and the Human Rights Commission of Sri Lanka had been to no avail.

Sri Lanka government's response to a request for information by the Working Group was that the first individual was indicted in January 2011 and the date for his next court hearing was scheduled in August 2012. The second individual's case had been under consideration by the Attorney General's Department since April 2012, the completion of the investigation.

This was deemed to be an insufficient reply to the Working Group. In the absence of further information, the Working Group based its opinion on the information that had been provided by the source, in accordance to its revised method of work.

The Working Group found that the indefinite detention of people who surrendered in a rehabilitation centre without judicial oversight or review of the lawfulness of their detention constituted an arbitrary detention in and of itself and accordingly, the detention of Mr. Balasingam and Seevaratnam ran contrary to Articles 9, 10, and 11 of the Universal Declaration of Human Rights (UDHR) and Articles 9 and 14 of the International Covenant on Civil and Political Rights (ICCPR).

The Working Group requested Sri Lanka government to take the necessary steps to remedy the situation of Mr. Balasingam and Seevaratnam and to bring it into conformity with the standards and principles set forth in the UDHR and the ICCPR. The Working Group also held that the adequate remedy, under the specific circumstances of these cases, would be to release Mr. Balasingam and Seevaratnam and to accord them compensation in accordance with Article 9, paragraph 5 of the ICCPR.

**RIGHT TO EDUCATION AS A FUNDAMENTAL HUMAN RIGHT –
UNIVERSAL DECLARATION OF HUMAN RIGHTS – DIRECTIVE
PRINCIPLES OF STATE POLICY**

***Visal Bhashitha Kavirathne v. W.M.N.J. Pushpakumara* [2012] S.C. (FR)
Application No. 29/2012 (Sri Lanka)**

This application was filed by 16 students who sat for the General Certificate of Education Examination (Advanced Level Examination) held in August 2011 and the Ceylon Teachers Union. The petitioners complained

that the application of an erroneous and unjustifiable common formula to calculate the Z-Scores of the candidates of both New and Old Syllabi of the Advanced Level Examination in 2011, which resulted in the failure to rank the most qualified candidates for admission to Universities, was arbitrary, unreasonable, irrational, unjustifiable and is in violation of the petitioners' fundamental rights guaranteed under Article 12 (1) of the Constitution.

The Court does not limit its analysis to the right to equality but also refers to the formulation of the right to education as illustrated in Article 26(1) of the Universal Declaration of Human Rights (UDHR), which refers to the general availability of higher education "equally accessible to all on the basis of merit."

Further, the Court refers to Article 27(2)(h) of the Constitution which refers to the complete eradication of illiteracy and the assurance to all persons of the right to universal and equal access to education at all levels, which is a Directive principle of State Policy.

The Court observed that Article 12(1) of the Constitution, which deals with the right to equality, had been applied by the Supreme Court to uphold the right to education in many decisions concerning admission of students to government schools and universities. The Court stated that "although there is no specific provision dealing with the right to education on our Constitution as such in the UDHR, the said right has been accepted and acknowledged by our Courts through the provisions embodied in Article 12(1) of the Constitution." The Court observed that in doing so, it had accepted the right to education as a fundamental human right and had also acknowledged the value of education.

**ARBITRARY DETENTION – RIGHT TO AN EFFECTIVE REMEDY –
DUE PROCESS – UDHR – ICCPR – HUMAN RIGHTS COUNCIL
RESOLUTION 7/7**

Gunasundaram Jayasundaram v. Sri Lanka, Working Group on Arbitrary Detention, Opinion No. 38/2012, U.N. Doc. A/HRC/WGAD/2012/38(2012)

Gunasundaram Jayasundaram was arrested on September 4, 2007 in Colombo, Sri Lanka under suspicion of supporting the Liberation Tigers of Tamil Eelam (LTTE). He was allegedly arrested without a warrant by orders of the military authorities under the Emergency Regulations, and the accusations against him were based solely on statements of another person.

He was arrested and held in detention without prompt access to a lawyer, without charges being brought against him, and was not brought before an independent judicial authority. At the time the opinion was written, he had been detained for almost five years without a trial and efforts to seek judicial remedies, including a *habeas corpus* application filed on his behalf, and a fundamental right application before the Supreme Court had been met with repeated delays. Also, Mr. Jayasundaram was in ill-health condition, and allegedly, was not receiving appropriate medical attention.

The Government's response to a request for information by the Working Group was that there was evidence of Mr. Jayasundaram involvement in LTTE procurement activities and that they were awaiting a response from the Attorney-General's Department of Singapore, as he was a permanent resident of that country. Further, it stated that the *habeas corpus* application had been withdrawn by the counsel appearing for the applicant, and that the fundamental right application before the Supreme Court would be fixed for hearing after objections and counter-objections are filed.

In the light of the information made available to it, the Working Group considered that the deprivation of liberty of Mr. Jayasundaram was arbitrary, contravening Articles 9 and 10 of the UDHR and Articles 9, 14, and 26 of the ICCPR.

The Working Group requested the Government of Sri Lanka to remedy the situation of Mr. Jayasundaram and to bring it into conformity with its international human rights obligations under the ICCPR. The Working Group asserted that the appropriate remedy for the present case would be the immediate release of Mr. Jayasundaram and his enforceable right to compensation under Article 9, paragraph 5, of the ICCPR. The Working Group also requested the Government to allow Mr. Jayasundaram access to all appropriate medical facilities. Finally, the Working Group reminded the Government that, according to Human Rights Council Resolution 7/7, national laws and measures aimed at combating terrorism shall comply with all obligations under international human rights law.

**UNIVERSAL PERIODIC REVIEW – NATIONAL ACTION PLAN
FOR THE PROMOTION AND PROTECTION OF HUMAN RIGHTS
– LESSONS LEARNT AND RECONCILIATION COMMISSION –
RECOMMENDATIONS**

Report of the Working Group on the Universal Periodic Review: Sri Lanka, U.N. Doc. A/HRC/22/16 (Dec. 18 2012)

Sri Lanka underwent a review before the UN Human Rights Council, through a troika consisting of Benin, India, and Spain. The state relied on its National Action Plan for the Promotion and Protection of Human Rights, the task force established for the implementation of the recommendations made by the Lessons Learnt and Reconciliation Commission (LLRC), its resettlement programmes, the Court of Inquiry appointed by the Army to investigate into allegations regarding, among other things, civilian casualties, different forms of assistance provided to those affected by the conflict, the new language policy, and its development projects in conflict-affected areas claiming that Sri Lanka was respecting its human rights obligations.

During the interactive dialogue before the Council, 98 delegations made statements and numerous recommendations. Out of the recommendations made, Sri Lanka was in support of 110 and not in support of 94. The recommendations supported by Sri Lanka were ratification of the Convention on the Rights of Persons with Disabilities, implementation of the recommendations of the LLRC, and the strengthening of the independent function of the National Human Rights Commission. The recommendations not supported by Sri Lanka were ratification of the Statute of the International Criminal Court, the International Convention for the Protection of All Persons from Enforced Disappearance, and the Optional Protocol to the Convention against Torture, abolishing the death penalty and obtaining the assistance of the international community in the implementation of the recommendations of the LLRC.

**CITIZEN'S PETITION OF CONTINUOUS TORTURE AND THREAT
BY POLICE – HUMAN RIGHTS VIOLATION – STATE'S FAILURE
TO RESPOND TO PETITION – VIOLATION OF HUMAN RIGHTS
OBLIGATIONS IMPOSED BY ICCPR**

Annakkarage Suranjini Sadamali Pathmini Peiris v. Sri Lanka, Communication No. 1862/2009, U.N. Doc. CCPR/C/103/D/1862/2009 (2012)

This individual petition was submitted by Annakkarage Suranjini Sadamali Pathmini Peiris (Author) on her behalf as well as on behalf of her deceased husband and her two minor children. The Author claimed, among other things, that they were subject to torture and ill-treatment, arbitrary deprivation of the right to life, and the right to the family. The Human Rights Committee (Committee) recognised that the right to life, right to be free from torture, right to liberty and security, right to be free from arbitrary interference of privacy and family, and the freedom of association of the Author and her family had been violated by the state.

The violations occurred subsequent to the discovery by the Author and her husband that a vehicle purchased by them in 2003 from a police officer was in fact stolen. The Author and her family complained of this which resulted in a disciplinary inquiry being conducted against the police officer. Since then, different police officers threatened and harassed the Author and her family in their interactions with the police and the severity of these actions escalated with each complaint the Author and her family made against this conduct of the police. Even though the police officer who had sold the stolen vehicle was indicted in 2005 and died in that same year, the harassment by the police continued. In 2008, the Author's husband was shot to death by an unidentified person. Since then, the Author and her family had been compelled to live in hiding. The Author's complaints to the police, the Human Rights Commission, the Bribery Commission was proved to be futile.

The state did not respond to this petition and the Committee noted the failure of the state to respect its obligation to examine in good faith all allegations brought against them under the Optional Protocol.

Having declared the petition to be admissible, the Committee recognised that the state was in violation of its obligations under the International Covenant on Civil and Political Rights towards the Author and her family. The Committee recommended, among other things, that an effective rem-

edy be made available to the Author and her children that they be provided with adequate reparation which would include an apology to the family.

Humanitarian Law

INDONESIA

HUMANITARIAN LAW – NUCLEAR WEAPONS – RATIFICATION OF COMPREHENSIVE NUCLEAR TEST BAN TREATY

Act No. 1 of 2012 on Ratification of Comprehensive Nuclear Test-Ban Treaty (Act 1/2012)

For Indonesia, the ratification of this treaty through Act 1/2012 will strengthen the standing and credentials Indonesia as a country that is always supportive and committed to non - proliferation and nuclear disarmament and strengthen the position of Indonesia to participate urged other countries to accelerate the ratification of the treaty. Ratification by the Government of Indonesia at this time is expected to be demonstrative, showing a strong commitment to the Government of Indonesia to pursue nuclear disarmament, as well as to provide a strong pressure for other countries as listed in Annex 2 to immediately ratify the treaty. At the regional level, the ratification of the CTBT may contribute to the maintenance of regional security and stability will be the impetus for efforts to build mutual trust among countries in the region.⁵⁴ Ratification of the treaty is also an opportunity for Indonesia to take advantage of geophysical technology, nuclear, and informatics in the context of development and research, among others in developing early warning mechanisms (early warning system) against the possibility of a catastrophic earthquake and tsunami.

NEPAL

CONTROL OF ARMS, EXPLOSIVES, AND LANDMINES – ARMED CONFLICT AND THE SECURITY OF CIVILIANS – INTERNATIONAL HUMANITARIAN LAW – BILLS OF RIGHTS – RESPONSIBILITY OF

54 Indonesia, *Act No. 1 of 2012 on Ratification of Comprehensive Nuclear Test-Ban Treaty*, *State Gazette of Republic of Indonesia Year 2012 No. 1, Supplement to State Gazette of Republic of Indonesia No. 5269*, Preamble.

STATE UNDER THE INTERNATIONAL LAW

***Advocate Tulshi Simhkada v. The Constituent Assembly Parliament and others* [Supreme Court of Nepal, decided on September 5, 2012, Nepal Law Reporter (Nepal Kanoon Patrika), Vol. 55, No. 1, pp. 69-74, 2013]**

During the ten year long Maoist insurgency in Nepal, the Maoist rebel group had illegally imported a huge amount of arms, ammunition, explosives, and installed landmines indiscriminately across the country. In the post-2006 political scenario of Nepal, with the initiation of peace process in the country, the UN Mission to Nepal had initially managed the arms of the Maoist insurgents. With the withdrawal of the UN Mission, the task of arms management is now carried out by the Government of Nepal itself. Nevertheless, the demining process has faced numerous challenges. Moreover, different political groups have appeared in Nepal equipped with small arms even in the post-2006 period. Ever since these political groups increased the illegal use of arms throughout the country which escalated the problem of insecurity and rapid growth of violence and crimes, not only do they have easy access to small arms, but also criminals and individual do. The problem of insecurity in Nepal has not been ameliorated even in the post-conflict period. Instead, criminal activities have grown rapidly. Because of this increase in crimes, the writ petitioner had asked the Supreme Court of Nepal to issue an order to the government of Nepal to take necessary measures to control the proliferation and use of arms, explosives, landmines, and other weapons in the country. The petitioner had also contended that it was the responsibility of the government to ensure the security of civilians and implement the international human rights and humanitarian instruments including the Geneva Conventions, 1948 to which Nepal is a party of.

In its defense, the Government of Nepal had stated that the government was always determined to provide security to the civilians and protect their lives, liberties, and properties by creating conducive conditions for the successful implementation of the rule of law in the country. However, the government had also contended that the goal of a peaceful society could not be achieved by the efforts of a government without the cooperation of its citizens. The government had also argued that the existing domestic laws of Nepal were sufficient to implement the international commitments of Nepal including those arise from the international humanitarian laws.

If there was any need to enact a new law, it had to be realized by the parliament since law-making is the exclusive authority and jurisdiction of the legislative body. Respecting the separation of powers between the state organs, it would not be proper for other institutions or organs of the state to dictate the legislative body on the issue of what law it should enact and what law it should not enact.

Vindicating the claim of the petitioner, the Supreme Court of Nepal has stated that it was the responsibility of the government to give effect to the International Bills of Human Rights and the international humanitarian laws through the effective implementation of domestic laws in the country. The court noted that guaranteeing the security of people living inside its territorial jurisdiction should be the primary duty of a government. On top of that, a republican democratic welfare state cannot be indifferent to the primary issue of the civilian security. As a member of international community and a party to a number of international human rights and humanitarian laws, the state should continuously be determined to fulfill its international obligations. Despite the fact that Nepal has suffered from the long insurgency and conflict, which has somehow depleted its resources, nevertheless, under no condition should a state remain unresponsive to fulfilling its obligations in protecting the civilians and guaranteeing the security of people living in its territory. However, on the ground of separation of powers of the state organs, the Supreme Court declined to issue any order against the legislative body or instruct it to enact necessary laws to give effect to the international humanitarian laws.

International Economic Law

INDONESIA

TRADE – ECONOMIC COOPERATION

Joint Statement between the Minister for Foreign Affairs of the Republic of Indonesia and the Minister for Foreign Affairs of the Democratic Republic of Timor-Leste

Referring to the Arrangement between the Government of Indonesia and the Government of Timor-Leste on the Traditional Border Crossings and Regulated Markets, which was signed in Jakarta on 11 June 2003, and to

the Joint Statement by the Minister of Foreign Affairs of Indonesia and Minister of Foreign Affairs of Timor-Leste officiating the Border Crossing Pass, which was signed in Dili, East Timor on 28 July 2010, the Government of Indonesia and the Government of Timor-Leste finally signed a Joint Statement in Dili, East Timor on 19 May 2012 to launch the application of the Border-Crossing Pass in the crossing point of Napan-Boborneto to facilitate nationals of both countries who are domiciled in their respective border area, for the traditional and customary purposes or trade at a regulated market.

**INTERNATIONAL AGREEMENT –
ECONOMIC COOPERATION – TRADE**

Agreement between the Republic of Indonesia and the Portuguese Republic on Economic Cooperation

The Agreement was concluded and signed on 22 May 2012 in Jakarta, Indonesia. It comes into force 30 days after the date of the receipt of last notification on the fulfillment of internal requirements for the entry into force of the Agreement. The Agreement accommodates the desire of Indonesian Government and Portuguese Government to develop advantageous economic cooperation between the two countries. It aims to enhance the existing economic relations between the two countries in three areas namely trade, industry, energy and other mutually agreed upon areas. One of the cooperation mechanisms as set out in the Article 3 of the Agreement is encouraging promotion of contacts between public institutions of both countries, including the exchange of experts under terms to be agreed upon between the concerned bodies. The Agreement put an emphasis on the development of green industry in the two countries. Particularly in the energy sector, the Agreement highlights that the parties agree to develop new renewable forms of energy, including sustainable bio fuels and biomass, geothermal, hydro power, solar, wind and ocean energy. Ensuring the implementation of the Agreement, the Parties shall establish a Joint Committee, consisted of representatives from both States, who will be responsible for supervising and coordinating the economic cooperation between the two States.

ECONOMIC COOPERATION – RATIFICATION – TRADE AGREEMENT**Presidential Regulation No. 61 of 2012 on the Ratification of Second Protocol to Amend the Agreement on Trade in Goods Under the Framework Agreement on Comprehensive Economic Cooperation Among the Governments of the Member Countries of the Association of Southeast Asian Nations and the Republic of Korea**

Presidential Regulation No. 61 of 2012 was enacted in Jakarta, on 7 June 2012. It ratifies the Second Protocol to Amend the Agreement on Trade in Goods under the Framework Agreement on Comprehensive Economic Cooperation among the Governments of ASEAN Member States and Korea. The agreement itself was signed on 17 November 2011 in Bali, Indonesia.

RATIFICATION – BILATERAL TRADE AGREEMENT**Presidential Regulation No. 63 of 2012 on the Ratification of Trade Agreement between the Government of the Republic of Indonesia and the Government of the Kingdom of Thailand**

Presidential Regulation No. 63 of 2012 was enacted in Jakarta, on 13 June 2012. It ratifies the Trade Agreement between the Government of Indonesia and the Government of Thailand. The agreement itself was signed on 16 November 2011 in Bali, Indonesia. In essence, the agreement aims to promote and strengthen trade between two States for mutual benefit.

INTERNATIONAL AGREEMENT – ECONOMIC AND TECHNICAL COOPERATION**Agreement between the Government of the Republic of Indonesia and the Government of Georgia on Economic and Technical Cooperation**

The Agreement was signed on 29 June 2012, in Jakarta, Indonesia. It enters into force on the date of the receipt of last notification on the fulfillment of internal requirements for the entry into force of the Agreement. In essence, the Agreement aims to encourage economic and technical cooperation between Indonesia and Georgia. However, the detailed provisions with regards to the forms and methods as well as to the conditions of the cooperation in the specific agreed areas will be laid down in separate

implementing agreement. One thing to be highlighted is that the parties have agreed to establish a Joint Commission to examine the implementation of the Agreement, to talk about the issues that might occur from the application of the Agreement, and to provide all necessary recommendation to achieve its purposes.

**RATIFICATION – ECONOMIC COOPERATION – TRADE AGREEMENT
– EXPANSION OF BILATERAL TRADE – FREE TRADE AGREEMENT**

Presidential Regulation No. 98 of 2012 on the Ratification of Preferential Trade Agreement between the Government of the Republic of Indonesia and the Government of the Islamic Republic of Pakistan

Presidential Regulation No. 98 of 2012 was enacted on 17 November 2012. It ratifies the preferential trade agreement between the Government of Indonesia and the Government of Pakistan which was concluded in Jakarta, on 3 February 2012. In essence, the Agreement aims to eliminate obstacles to trade in order to expand bilateral trade between Indonesia and Pakistan which leads to Free Trade Agreement (FTA) between them. In accordance with the principle of the Most Favored Nation (MFN), all products as set out in Annex I and Annex II of the Agreement enjoy reduction of price and even elimination of price where relevant. Furthermore, Article 5 of the Agreement states that the provision of GATT 1994 and WTO Agreements shall be applicable to all products covered in the Agreement.

TRADE – ECONOMIC COOPERATION

Protocol to Incorporate Technical Barriers to Trade and Sanitary and Phytosanitary Measures into the Agreement on Trade in Goods of the Framework Agreement on Comprehensive Economic Co-operation between the Association of Southeast Asian Nations and the People's Republic of China

This Protocol has been signed in Phnom Penh, Cambodia on November 19, 2012, ratified through Presidential Regulation No. 28 of 2014, State Gazette Year 2014 Number 79 that has been enacted on April 21, 2014. This Protocol entered into force on January 1, 2013. The objectives of this Protocol are to facilitate and promote trade in goods among the Parties by ensuring technical regulations, standards and conformity assessment procedures do not create unnecessary barriers to trade; to strengthen cooperation,

including information exchange in relation to the preparation, adoption and application of standards, technical regulations and conformity assessment procedures; and to promote mutual understanding of each Party.

International Labour Organisation (ILO)

PHILIPPINES

INTERNATIONAL LABOR ORGANIZATION (ILO) – ILO CONVENTION 189 (CONVENTION CONCERNING DECENT WORK FOR DOMESTIC WORKERS)

Philippine Senate Resolution No. 115, 6 August 2012

ILO Convention 189 was adopted by the General Conference of the ILO on 16 June 2011 in Geneva. The convention applies to all domestic workers, sets standards for decent work for them, and guarantees minimum labor protections to them at par with workers in the formal economy.

The convention provides for the basic rights of domestic workers which need to be recognized and respected through the adoption of laws, policies and measures that would enable them to exercise such rights. Social dialogue is promoted as a means of designing and effectively implementing policies and measures that would protect the rights of domestic workers. The Philippine President ratified the convention on 18 May 2012.

The resolution refers to the vital contribution of domestic workers to the functioning of households, the labor market, and the economy. It states that there are 1.93 million domestic workers in the country, and in 2010 alone, more than 100,000 Filipino domestic workers are deployed to various countries. Domestic workers are particularly vulnerable to discrimination and other human rights abuses.

INTERNATIONAL LABOR ORGANIZATION (ILO) – MARITIME LABOR CONVENTION

Philippine Senate Resolution No. 118, 13 August 2012

In 2006, the Maritime Labor Convention was adopted by the ILO General Conference in Geneva. In concurring with the executive's ratification of the

convention on 28 May 2012, the Senate resolution refers to the Philippines as a primary source of seafarers in the world, accounting for an estimated 30% of seafarers in the global shipping fleet. Aside from seafarers deployed on foreign ships, some 40,000 Filipino seafarers work on board domestic fleets. The seafaring industry contributes to national development, but Filipino seafarers are exposed to a wide range of issues. There is a need to re-share regulations and vigorously enforce policies and programs to safeguard the seafaring industry and Filipino seafarers.

The resolution hails the convention as the seafarers' bill of rights which puts in a single treaty existing maritime labor instruments and brings those up to date to address current realities and conditions. It consolidates 37 maritime conventions and 31 ILO recommendations to provide unified regulations and standards to protect the welfare and promote the rights of seafarers. The convention is organized into three main parts, namely, the Articles and Regulations (core rights and principles and basic obligations of Member States), and the Code (details for the implementation of the Regulations, including mandatory standards and non-mandatory guidelines).

International Law Commission

INDIA

IMMUNITY – PROVISIONAL APPLICATION OF TREATIES –
CUSTOMARY INTERNATIONAL LAW – OBLIGATION TO EXTRADITE
OR PROSECUTE – MOST-FAVORED-NATION CLAUSE – MFN – GATT

Statement by India on Agenda Item 79: “Report of the International Law Commission on the Work of Its Sixty-Fourth Session (Part-Two)” at the Sixth Committee of the 67th Session of the United Nations General Assembly on November 6, 2012⁵⁵

According to India, this topic held great significance as it was directly related to the performance abroad of the officials of a State. The topic was complex and politically sensitive. India agreed with the Special Rapporteur that the substantive issues relating to this topic were cross-cutting and interrelated, but, at the same time, each and every issue needed to be looked

55 See MINISTRY OF EXTERNAL AFFAIR, <http://meaindia.nic.in>.

into carefully and in a through manner. Consideration of this topic, India noted, required a balanced approach taking into account the existing law and practice on the related issues. In this regard, India suggested that the in-depth examination of the judgment of the International Court of Justice of February 3, 2012 in the *Jurisdictional immunities of the States*' case would be desirable, which inter-alia identified state practice in respect of immunities before national jurisdictions.

India pointed out that the issue of relationship between the *immunity ratione materiae* and *immunity ratione personae* would also need to be examined by taking into account the State practice and the ICJ judgment in the case, *certain questions of mutual assistance in criminal matters*. Concerning the applicability of immunity *ratione personae* beyond troika, India was in favor of identifying a clear criterion in establishing such practice by taking into consideration the judgment of the ICJ in the *Arrest Warrant case*.

India considered that the established legal order and certain aspects of immunity dealt under the existing international instruments should not be disturbed.

As regards the new topic of "Provisional application of treaties," India supported the view that aspects relating to the formation and identification of customary international law did not form part of the scope of this topic. India was in favor of preserving the regime established under Article 25 of the 1969 Vienna Convention on Law of Treaties and not creating new conditions and circumstances for the provisional application of treaties. On the question of the final outcome of the Commission's work, India agreed with those members of the Commission who thought it was pre-mature to take any decision as to the form of the outcome and that the topic did not necessitate the elaboration of draft articles.

On the topic "Formation and evidence of customary international law," India pointed out that Custom had been recognized as a source of international law, and this was also reflected in the Statute of the International Court of Justice annexed to the UN Charter. Customary principles of international law, India further noted, developed out of behavior of the States in their international relations through a unique process and were not always easily defined. India felt that it might be, therefore, difficult to advance new rules on the formation and evidence of customary international law. India was of the view that the work of the Commission should

be mainly focused on ways and methods concerning the identification of the rules of customary international law and that how the evidence of those rules could be established.

India agreed with the Special Rapporteur that elaboration of conclusions with commentaries or guidelines on this topic would be of high practical value for the judges, scholars, and practitioners who face the questions of customary international law both at the international and national levels.

India viewed the work on the codification and clarification of issues concerning the topic of “the obligation to extradite or prosecute” was of great importance given the fact that the obligation was based on the rule that a criminal should not go scot free and should be brought before the justice. The progress on the topic was slow for which the reason in the report appeared to be the absence of basic research on whether or not the obligation had obtained the customary law status. In this regard, India agreed with those members of the Commission who were of the view that the absence of the customary nature of the obligation should not pose insurmountable difficulties in the further consideration of the topic.

India considered that the obligation to extradite or prosecute and the concept of universal jurisdiction were not interrelated in the sense that one was dependent on the other and so agreed with those members of the Commission who had opined to delink the topic from the universal jurisdiction.

India agreed with the observation of the Working Group on this topic that the in-depth analysis would be required of the ICJ judgment of July 20, 2012 in the case *Questions relating to the obligation to prosecute or extradite* in order to assess its implication for this topic.

As regards the topic of Most-Favored-Nation clause, India noted that the state practice in relation to MFN provision had been, to a large extent, superseded by specific multilateral, bilateral, and regional arrangements. The GATT and resort to the dispute settlement under the investment agreements had resulted in the interpretation of MFN provision in the investment context.

India agreed with the Commission’s observation that the reason of the peculiarities of the application of MFN clause in the mixed arbitral decisions was the different nature of the parties to the proceedings—the claimant being a private person and the respondent being a State—and that

the tribunal acted as a functional substitute for an otherwise competent domestic court of the home State.

International Organisations

INDONESIA

ECONOMIC COOPERATION AND DEVELOPMENT – FRAMEWORK AGREEMENT WITH OECD

Framework of Cooperation Agreement between the Government of the Republic of Indonesia and the Organization for Economic Co-Operation and Development

This Agreement has been signed in Jakarta, September 27th, 2012. It entered into force on the signatory date and has been enacted for 5 (five) years. As stipulated on the Agreement, Organization for Economic Co-Operation and Development (OECD) and Indonesia will cooperate in these fields, namely forum dialogue related to the global issues; monitoring, evaluation and standardization in promoting government reformation and transparency; and the development of public service to support the establishment of good management in entrepreneurship.

Jurisdiction

CHINA

FOREIGN RELATED CRIMES – JURISDICTION – CRIMINAL – CHINESE CRIMINAL CODE

Supreme People's Court Interpretation of the Second Amendment to the 1979 Criminal Procedural Code

On November 5, 2012 the Supreme People's Court adopted the Interpretation in order to correctly understand and apply the second amendment to

the 1979 Criminal Procedural Code.⁵⁶ This Interpretation came into force on January 1, 2013.

Articles 4–10 of the Interpretation provide the detailed rules on jurisdiction of the Chinese courts in foreign-related crimes. Article 4 provides that the jurisdiction over any crime committed in the Chinese-registered ships outside the Chinese territory shall be exercised by the court of the Chinese port where the ship anchored for the first time after the crime. Article 5 provides that the jurisdiction over any crime committed in the Chinese-registered aircraft outside the Chinese territory shall be exercised by the court of the place where the aircraft landed for the first time after the crime.

Article 6 provides that the jurisdiction over the crimes committed on international trains shall be determined according to agreements which were concluded by China and other relevant countries; in case that there is no such an agreement, the jurisdiction shall be exercised by the court of the place where the train arrives in China for the first time after the crime, or the court of the place which is the destination of the train.

Article 7 provides that the jurisdiction over the crimes committed by Chinese citizens inside Chinese embassies or consulates abroad shall be exercised by the court of the place where his or her employer is located or the court of the place where his or her household is registered.

Article 8 provides that the jurisdiction over any crime committed by Chinese citizens outside the Chinese territory shall be exercised by the court of the place where he or she enters China or the court of the place where he or she resided before leaving China; if the victim is also a Chinese citizen, jurisdiction may be also exercised by the court of the place where the victim resided before leaving China.

Article 9 provides that jurisdiction over any crime committed by an alien against the Chinese State or a Chinese citizen outside the Chinese territory shall be exercised by the court of the place where the alien enters

56 The CRIMINAL PROCEDURAL CODE OF THE PEOPLE'S REPUBLIC OF CHINA was adopted at the Second Session of the Fifth National People's Congress (NPC) on July 1, 1979. It was amended for the first time at the Fourth Session of the Eighth NPC on Mar. 17, 1996. The SECOND AMENDMENT was adopted at the Fifth Session of the Eleventh NPC on Mar. 14, 2012 and came into force on Jan. 1, 2013.

China or resides in China, or the court of the place where the Chinese victim resided in China before leaving China, provided that the alien shall be punished according to the Chinese Criminal Code.

Article 10 provides that jurisdiction over crimes stipulated in international treaties which were ratified or acceded to by China, within the scope of the obligations which have been accepted by China, shall be exercised by the court of the place where the defendant was captured.⁵⁷

INDIA

JURISDICTION – UNIVERSAL JURISDICTION – TERRITORIAL – NATIONALITY – THE NATURE OF OFFENCES – INTERNATIONAL CRIMES

Statement by India on Agenda Item 84 “The Scope and Application of Universal Jurisdiction” at the Sixth Committee of the 67th Session of the United Nations General Assembly on October 17, 2012⁵⁸

India held the firm view that those who commit crimes must be brought to justice and punished. A criminal, India further noted, should not go scot free because of procedural technicalities including the lack of jurisdiction.

India also pointed out that assuming and exercising jurisdiction was, however, a distinct subject in itself. According to India, the term “jurisdiction,” in legal parlance, referred to two aspects: first, the rule-making and second, rule-enforcing. The widely recognized theories of jurisdiction included, India pointed out, Territorial, which was based on the place where the offence was committed; Nationality, which was based on the nationality of the accused or the nationality of the victim; and Protective, which was based on the national interests affected.

These jurisdictional theories, India observed, required a connection between the state asserting jurisdiction and the offence, including the

57 http://www.court.gov.cn/qwfb/sfjs/201212/t20121228_181551.htm.

58 See MINISTRY OF EXTERNAL AFFAIRS, <http://meaindia.nic.in>.

nationality of the offender or of the victim, or the place of the commission of offence.

India stated that under the present agenda item, we were, however, deliberating upon a new and different type of jurisdictional theory, namely the universality theory, which lacked proper legal backing at both the national and international levels.

According to India, a State invoking the universal jurisdiction claimed to exercise jurisdiction over any offender, irrespective of the question of nationality or the place of commission of the offence, or of any link between that State and the offender.

It assumed that each state had an interest in exercising jurisdiction to prosecute offences which all nations had condemned. The rationale for such jurisdiction was the nature of certain offences, which affected the interests of all states, even when they were unrelated to State(s) assuming jurisdiction.

Piracy on the high seas, India noted, was the only one such crime, over which claims of universal jurisdiction was undisputed under general international law. It considered that the principle of universal jurisdiction in relation to piracy had been codified in the UN Convention on the Law of the Sea, 1982.

In respect of certain other crimes such as genocide, war crimes, and crimes against humanity and torture, India observed, international treaties have provided universal jurisdiction. They include, among others, the Four Geneva Conventions of 1949 and the Apartheid Convention.

The question that arises was whether the jurisdiction provided for specific serious international crimes in certain treaties could be converted into a commonly exercisable jurisdiction in respect of a wider range of offences.

Several issues remained unanswered including those related to the basis of extending the application of such jurisdiction, the relationship with the laws relating to immunity, pardoning and amnesty, and harmonization with domestic laws.

Several treaties obliged the states parties either to try a criminal for or handover trial to a party willing to do so. This was the obligation of *aut dedere, aut judicare* ("either extradite or prosecute"). This obligatory principle, India pointed out, should not be confused with the universal jurisdiction.

KOREA

**DIPLOMATIC PROTECTION – IMMUNITY FROM JURISDICTION –
INTERNATIONAL JUDICIAL JURISDICTION – INDIVIDUAL RIGHT
OF CLAIM – VALIDITY OF FOREIGN JUDGMENT IN RELATION TO
FUNDAMENTAL PRINCIPLES OF DOMESTIC LAW**

***Yeoet.al. v. Nippon Steel & Sumimoto Metal Ltd* [2009Da68620. May 24, 2012]**

Facts

This case concerns claims for damages by victims of compulsory drafting under Japanese colonization. In 1942, the Plaintiff Yeo 00 and 4 others were born in Korea and were drafted by force to be factory workers in the post Nippon Steel Corporation and national service units. Contrary to their initial contract, the plaintiffs did not receive wages properly and were forced to work in a restricted area. Then, they returned to Korea after Japan was defeated. The plaintiffs claimed for damages of overdue wages, compulsory detention, forced labor, default on the contract, and torts in the Japanese court. However, in 2003, they finally lost the case in Supreme Court of Japan. Hereafter, the plaintiffs brought the same case against the defendant in Korean national court.

Legal Issues

This case was the first case to acknowledge the possibility of winning the case for the Korean citizens who were injured by the Japanese Corporations under the Japanese colonization on following issues:

- 1) Whether international judicial jurisdiction should be recognized;
- 2) The factors to review to approve the outcome of foreign (Japanese) judgment to decide whether the judgment is against Korea's good custom or other social order and whether to approve Japanese judgment against the plaintiffs;
- 3) Whether the legal identity of the defendant and the post Nippon Steel Corporation is the same;
- 4) Whether the right of claim of the plaintiffs, the victims of forced labor, has expired by Agreement Between Japan and the Republic of Korea Concerning the Settlement of Problems in Regard to Property and Claims and Economic Cooperation in 1965 (hereinafter "Agreement Concerning the Settlement Problems"); and
- 5) whether the defendant's statute of limitation argument is allowed

Judgment

The Supreme Court denied efficacy of Japanese Court's judgment that 'Japanese Corporation does not have a liability of compensation for the forced labor victims under the Japanese colonization' because such judgment is unconstitutional. The Supreme Court also confirmed the official opinion of the Joint Committee of Private and Public for the Following Countermeasure After Publication of Documents about Korea-Japan Conference (hereinafter "Joint Committee") in August 26, 2005 that was formed after this case was brought to the court.

[Korea-Japan] Agreement Concerning the Settlement Problems was not an agreement to settle the compensation on Japanese colonization. Rather, it was to settle two countries' monetary and civil claim and obligation based on San Francisco Peace Treaty Article 4. The Agreement did not include settlement on the claims about crimes against humanity that Japanese governmental power or military power committed including military prostitution issue. Consequently, Japanese government is still liable about these issues. In addition, issues concerning Koreans in Sakhalin and victims of atomic bomb were not included in the Agreement as subject of right of claim.

The Supreme Court confirmed that Korea has actual relation to the concerned party and the matter of dispute. Thus, ruled that the Korean domestic court also has the international judicial jurisdiction on this case.

The claim for compensation for damages resulted from illegal acts by post Nippon Steel Corporation in association with the Japanese government. They coerced or deceived the plaintiffs to the forced labor. Accordingly, the plaintiffs argue that such forced labor was illegal and that the defendant has the same legal liability that the post Nippon Steel Corporation still has on the plaintiffs. In addition, in this case, the Japanese government's illegal action was partially taken in Korea, the plaintiffs are all residing in Korea, and the content of issue is closely related to Korea's history and political change in situations.

Then, the Supreme Court ruled that whether to approve the past Japanese court's judgment on the same issue should be reviewed considering the fundamental principles that domestic law (including the Constitution) protects and the effect on the societal order if the foreign judgment is approved. Thus, the Supreme Court ruled as following:

According to canon of the Constitution of Korea, Japanese Colonization of Korean peninsula was nothing more than an illegal occupation. Accordingly, the legal relationship arising from Japan's illegal occupation cannot coexist with the spirit of Constitution and, thus, has no legal effect. Therefore, approving the Japanese court's judgment as it stands is clearly against Korea's good custom and other societal order because the reasoning of judgment collides with the central value of the Korean Constitution. In conclusion, this court cannot approve the efficacy of the Japanese judgment.

In addition, on the issue about whether the post Nippon Steel Corporation is the same legal entity with the defendant, the Supreme Court ruled that it should be decided based on the Korean law at that time, not based on foreign Japanese law. In this case, the court ruled that the defendant maintained the same identity with the post Nippon Steel Corporation.

Lastly, concerning the statute of limitation on the right of claim, the court ruled that; first, the Korea-Japan Agreement Concerning Settlement Problems was to settle two countries' monetary and civil claim and obligation based on San Francisco Peace Treaty Article 4, not to settle the right of claim on the crimes against humanity that Japanese governmental power or military power committed. Second, the Supreme Court rejected the defendant's arguments on statute of limitation, determining that it is against the principle of good faith and abuse of a right as the following:

relationship ... until two countries established diplomatic relationship. Consequently, the plaintiffs could not have executed the judgment even if they got the judgment against the defendant in Korea. In addition, Although Korea and Japan entered into diplomatic relationship in 1965, the Korean citizens generally regarded that Korea-Japan Agreement Regarding Settlement Problems comprehensively covered the individual right of claim against Japan or Japanese people ... because not every document related to the Agreement was publicized. ... Especially, not until late 1990s, ... people began to realize that right of claim arising out of the crime against humanity by Japanese government and illegal act directly related to the Japanese colonization was not expired by entering into the Agreement. Finally, [in 2005], ... the Joint Committee announced a public opinion that the right of claim for crime against humanity that Japanese government participated in and the illegal acts directly related to Japanese colonization was not settled by the Agreement Concerning Settlement Problems. Therefore, based on these facts and the above-mentioned principles of law, the denial

of fulfilling the obligation to the plaintiffs by the defendant who actually has the same legal identity as the post Nippon Steel Corporation is conspicuously unjust. Since such denial is abuse of right against the principle of good faith, it cannot be tolerated.

In conclusion, the Supreme Court ruled that the post Nippon Steel Corporation's compulsory mobilization of the plaintiffs for forced labor and not paying wages were illegal acts against Korean workers at that time. Thus, the defendant is liable for their damages. The original decision against the plaintiff was reversed and the case was remanded to the Seoul High Court.

Park et.al v. Mitsubishi Heavy Industries Ltd
[2009Da22549. May 24, 2012]

Facts

This case concerns claims for damages by victims of compulsory drafting under Japanese Colonization. In 1944, the plaintiffs, Park 00 and 5 others, were born in Korea and were forced to work in post Mitsubishi Heavy Industries Ltd and other shipyards. The plaintiffs brought claims for damages of compulsory drafting against the international law and other illegal acts in the Japanese court. However, in 2007, they finally lost the case in Supreme Court of Japan. Hereafter, the plaintiffs brought the same case against the defendant in Korean national court.

Judgment

This case was joined with the judgment for the case number 2009 DA 6820 in May 24, 2012. The legal issues in this case are identical to the other case and the same analysis was made. Thus, further explanation is omitted.

SINGAPORE

JURISDICTION – ACT OF STATE DOCTRINE – NON-APPLICABILITY OF FOREIGN JUDICIAL PROCEEDINGS

WestLB AG v Philippine National Bank and Others [2012] SGHC 162; [2012] 4 SLR 894

Facts

This case involved a tussle for funds deposited in the plaintiff bank between four parties: (a) the first defendant, the Philippine National Bank (“PNB”);

(b) the second to sixth defendants, which were foundations established in Vaduz, Liechtenstein and Panama (“the Foundations”); (c) the seventh defendants, human rights victims (“the HRVs”) who suffered human rights abuses during the rule of Filipino President Ferdinand E Marcos; and (d) the tenth defendant, the Republic of the Philippines (“the Republic”). These Funds were originally part of a pool of assets held in various Swiss bank accounts held by the Foundations.

The Republic believed that the Swiss bank deposits were originally state-owned assets, that Marcos had siphoned away off during his tenure as President. In 1986, the Republic successfully obtained assistance from the Swiss authorities for the return of the Swiss deposits and the moneys were released in 1998 to PNB to hold as escrow agent pending a final decision of the Philippines courts in relation to the entitlement to the Swiss deposits. PNB deposited the Swiss moneys in various Singapore banks, including the plaintiff bank. In 2003, the Philippines Supreme Court ordered the Swiss moneys to be forfeited in favour of the Republic (“the Forfeiture judgment”).

Meanwhile, the HRVs commenced a class action against Marcos in Hawaii for the human rights infringements suffered during his rule. The District Court of Hawaii ruled in favour of the HRVs and ordered Marcos’ estate to assign more than US\$1.9b for the HRVs’ benefit, including all rights, title and interest in the Swiss banks. As this was not complied with, the Clerk of the District Court of Hawaii, Walter AY Chinn, executed an assignment on behalf of Marcos’ estate to this effect (“the Chinn Assignment”).

Relying on the proceedings between the Swiss and Philippines authorities to prove their claims, PNB argued that as escrow agent, it had legal title to the Funds and was entitled to repayment of them. The Republic relied on the series of events beginning from its request to the Swiss authorities for the release of the funds to the Philippines Supreme Court’s forfeiture judgment, arguing that these were acts of state and were thus unimpeachable (the “Green Line Argument”). The HRVs relied on the assignment by the Clerk of the District Court of Hawaii to prove their title to the Funds. The Foundations’ claim was based status as the ‘original legal owners’ of the Funds.

Judgment

On the ‘act of state doctrine’ argument, Justice Andrew Ang held:

38 Despite the appealing simplicity of the Green Line argument, however, it is fundamentally flawed in its assumption that the act of state doctrine applies in aid of the Republic's claim. The act of state doctrine immunises from judicial review the sovereign acts of a foreign state, which are automatically non-justiciable by reason of their sovereign nature. Where the doctrine applies, the forum court will refrain from adjudicating upon the propriety of the legislative or executive acts of a recognised foreign state within the limits of its own territory (RICHARD FENTIMAN, *INTERNATIONAL COMMERCIAL LITIGATION* (Oxford University Press, 2010) at paras 10.06 and 10.09; and DICEY, MORRIS & COLLINS, *THE CONFLICT OF LAWS* VOL 1 (Sweet & Maxwell, 14th Ed, 2006) ("DICEY, MORRIS & COLLINS vol 1") at paras 5-041 and 5-043). In what was probably the earliest formulation of the modern act of state doctrine, Chief Justice Fuller of the US Supreme Court held in *Underhill v Hernandez* 168 US 250 (1897) that:

Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

39 The doctrine limits, for prudential rather than jurisdictional, reasons, the forum court from inquiring into the validity of a recognised foreign sovereign's public acts committed within the latter's own territory (*Honduras Aircraft Registry Ltd v Government of Honduras* 131 F.3d 157 (11th Cir, 1997)). As such, it is separate and distinct from the doctrine of sovereign immunity (DAVID EPSTEIN & CHARLES S BALDWIN, IV, *INTERNATIONAL LITIGATION: A GUIDE TO JURISDICTION, PRACTICE AND STRATEGY* (Martinus Nijhoff Publishers, 4th Rev Ed, 2010) ("Epstein & Baldwin") at p 292).

40 Such restraint stemmed from the judicial recognition that certain disputes involving foreign sovereigns are not appropriately considered by the courts (EPSTEIN & BALDWIN at pp 278, 281-282). As was observed in *Banco Nacional de Cuba v Peter L F Sabbatino* 376 US 398 (1964) at 423:

The act of state doctrine ... arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the

area of international relations. The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere. ... [emphasis added]

41 In *Underhill v Hernandez*, the defendant was a general in command of a revolutionary army in Venezuela which had seized the city Bolivar where the plaintiff, an American citizen, was resident. The plaintiff had constructed a waterworks system for Bolivar under a contract with the defeated government and also ran a machinery repair business. When he applied for a passport to leave the city, this was refused by the defendant who wished that the former would operate his waterworks and repair works for the benefit of the community and revolutionary forces. When the plaintiff was finally allowed to return to the US, he commenced proceedings in the Circuit Courts to recover damages caused by, inter alia, the defendant's refusal to grant him a passport, his alleged confinement in his own house and for alleged assaults and affronts by the defendant's subordinates. On appeal, Chief Justice Fuller declined a decision on the merits. The revolutionary government under which the defendant was acting had since been recognised by the US as the legitimate government of Venezuela. The defendant's acts were thus the acts of the government of Venezuela and, as such, were not properly the subject of adjudication in the courts of another country (*Underhill v Hernandez* at 254).

42 For the act of state doctrine to apply, the "act" in question must be a public governmental act and the subject-matter of the act must be located within the foreign sovereign's territory at the material time (EPSTEIN & BALDWIN at pp 279, 289). Further, there must exist a "factual predicate" for the doctrine to apply, ie, act of state issues only arise when the outcome of the case turns upon the effect of official action by a foreign sovereign (*WS Kirkpatrick & Co, Inc v Environmental Tectonics Corporation, International* 439 US 400 (1990) at 406).

43 Turning to the present facts, the Green Line argument based on the act of state doctrine appears to be a red herring. First, the challenge mounted by the HRVs and the Foundations against the Republic's case is that the Forfeiture Judgment did not validly vest in the Republic an entitlement to the Funds. The Forfeiture Judgment, which was rendered by the Philippines Supreme Court, was

not a legislative or executive act to which the act of state doctrine applies. Second, and more importantly, there is no issue arising for determination by this court as to the propriety of any foreign sovereign act. A close examination of the claims by the HRVs and the Foundations shows that neither contains a challenge as to the legitimacy of the Swiss freeze orders, the in-principle grant of the transmission of the Swiss Deposits to the Republic, the delegation of the determination of title to the Philippines courts and the subsequent transfer of the Swiss Deposits to Singapore. The act of state doctrine would have been relevant and of aid to the Republic had the challenge against its case been in relation to these listed acts. As this is not the case, the Republic's reliance on the act of state doctrine appears somewhat misplaced.

44 As stated, the crux of the dispute in relation to the Republic's entitlement to the Funds centred on the legal effect of the Forfeiture Judgment, viz, whether it passed beneficial title to the Republic, which would in turn depend upon whether the Forfeiture Judgment is in personam and penal in nature, as the HRVs and the Foundations assert. Given the foregoing, the act of state doctrine does not apply in this case.

Law of the Sea

CHINA

TERRITORIAL BOUNDARY – DISPUTE – SUYAN ROCK

On March 13, 2012, Foreign Ministry Spokesperson Liu Weimin expressed China's position of the issue of Suyan Rock.

The Suyan Rock is situated in the waters where the exclusive economic zones of China and the Republic of Korea [ROK] overlap. The ownership of the rock should be determined through bilateral negotiation, pending which neither of the two should take unilateral moves in these waters. China and the ROK have a consensus on the Suyan Rock, that is, the rock does not have territorial status, and the two sides have no territorial disputes.⁵⁹

59 *Foreign Ministry Spokesperson Liu Weimin's Regular Press Conference on March 12, 2012*, MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE'S REPUBLIC OF CHINA,

TERRITORIAL BOUNDARY – DISPUTE – HUANGYAN ISLAND

China has ample jurisprudential evidence supporting its sovereign rights over Huangyan island and there is no issue needing to be settled under International Tribunal on the Law of the Sea

On April 18, 2012, Foreign Ministry Spokesperson Liu Weimin made a statement concerning Huangyan Island, the dispute over which the Philippine Foreign Minister proposed to submit to the International Tribunal on the Law of the Sea. He said:

The Huangyan Island is China's inherent territory and there is no such issue of taking the dispute to the International Tribunal on the Law of the Sea. China has ample jurisprudential evidence supporting its sovereign rights over the Island. China was the first to discover and name the Huangyan Island and also the first to include it into China's territory and exercise sovereign jurisdiction over it. The waters surrounding the Huangyan Island has been a traditional fishing ground for Chinese fishermen. Since ancient times, Chinese fishermen have been fishing in waters surrounding the Island. China National Bureau of Statistics, China Earthquake Administration and State Oceanic Administration have carried out multiple scientific researches on the Huangyan Island and its adjacent waters. Prior to 1997, the Philippines had had no objection to the Chinese Government's exercise of sovereign administration, development and exploitation of the Huangyan Island, but instead, expressed on many occasions that the Island is outside the scope of Philippine territory. On the official Philippine maps published in 1981 and 1984, the Island is also marked outside Philippine territorial limits. The UN Convention on the Law of the Sea allows coastal states to claim a 200-nautical-mile exclusive economic zone, but coastal states have no rights to undermine other countries' inherent territorial sovereignty based on that. Any attempt to change the ownership of territorial sovereignty by using the UNCLOS is against international laws as well as the purpose and principle of the UNCLOS.⁶⁰

http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t913936.shtml.

- 60 *Foreign Ministry Spokesperson Liu Weimin's Regular Press Conference on April 18, 2012*, EMBASSY OF THE PEOPLE'S REPUBLIC OF CHINA IN LIBYA, <http://ly.chineseembassy.org/eng/fyrth/t925289.htm>.

OKINOTORI REEF – CONTINENTAL SHELF

Okinotori Reef, unable to sustain human habitation, shall have no exclusive economic zone or continental shelf. On May 16, 2012, an FM Spokesperson made a statement on the UN Commission on the Limits of the Continental Shelf's result of handling the Okinotori Reef issue.

According to information released by the UN Commission on the Limits of the Continental Shelf, the Commission has adopted the result of handling Japan's claim of outer continental shelf. Japan's claim of its outer continental shelf based on Okinotori Reef was not acknowledged by the Commission. It is completely baseless that Japan alleged that the Okinotori Reef had been recognised by the Commission as an "island".

Actually, only 310,000 square km out of the 740,000 square km-claim of Japan submitted to the Commission is recognised by the Commission. The unrecognised claim includes the around 250,000 square km southern Kyushu Palau ridge based on the Okinotori Reef.

The Japanese side mentioned that the Shikoku basin to the north of the Okinotori Reef had been recognised by the Commission. However, the area, in fact, is based on other parts of Japan's land territory, completely irrelevant to the Okinotori Reef.

After Japan submitted its claim to the Commission, China and the ROK have delivered multiple notes to the UN Secretary-General, stressing that in light of international law, the Okinotori Reef which cannot sustain human habitation shall have no exclusive economic zone or continental shelf and requesting the Commission not to recognise Japan's claim of outer continental shelf based on the Okinotori Reef. Many other countries have also voiced disagreements over Japan's illegitimate claim. The Commission's handling of Japan's claim including the Okinotori Reef issue is fair and reasonable, in compliance with international law, and has safeguarded the overall interest of the international community. China welcomes that decision.⁶¹

61 *Foreign Ministry Spokesperson Hong Lei's Remarks on the UN Commission on the Limits of the Continental Shelf's Result of Handling the Okinotori Reef Issue*, EMBASSY OF THE PEOPLE'S REPUBLIC OF CHINA IN HUNGARY, <http://www.chinaembassy.hu/hu/fyrth/t933024.htm>.

**TERRITORIAL BOUNDARY – DISPUTE –
XISHA ISLAND – NANSHA ISLAND**

Xisha and Nansha Islands are Chinese territory

On June 21, 2012, Foreign Ministry Spokesperson Hong Lei made a statement on the so-called Vietnamese Law of the Sea which places China's Xisha and Nansha Islands under Vietnam's so-called "sovereignty" and "jurisdiction".

The Chinese Government hereby reaffirms: the Xisha and Nansha Islands are Chinese territory. China has indisputable sovereignty over the above islands and their adjacent waters. It is illegal and invalid for any country to lay territorial and sovereign claims to the Xisha and Nansha Islands or take any actions on that basis.⁶²

**UNCLOS – SOUTH CHINA SEA – SIX-POINT PRINCIPLES ON THE
SOUTH CHINA SEA ISSUE**

China is open to discussion on the South China Sea issue and will uphold the principles of UNCLOS

On July 21, 2012, Foreign Ministry Spokesperson Hong Lei made remarks on the ASEAN foreign ministers' statement concerning the six-point principles on the South China Sea issue.

The core of the South China Sea issue is disputes between relevant countries concerning the sovereignty over the Nansha Islands and demarcation of their adjacent waters. China has ample historical and legal basis for its sovereignty over the Nansha Islands and their adjacent waters.

China is ready to work with ASEAN countries to fully and effectively implement the Declaration on the Conduct of Parties in the South China Sea (DOC) in a bid to jointly uphold peace and stability in the South China Sea. China is open to discussions with ASEAN countries on working out a Code of Conduct in the South China Sea (COC). We hope all parties can abide strictly by the DOC so as to create necessary conditions and atmosphere for the discussion of the COC.

62 *Foreign Ministry Spokesperson Hong Lei's Regular Press Conference on June 21, 2012, PERMANENT MISSION OF THE PEOPLE'S REPUBLIC OF CHINA TO THE UN, <http://www.china-un.org/eng/fyrth/t945296.htm>.*

As a signatory to the UN Convention on the Law of the Sea (UNCLOS), China attaches great importance to upholding the principles and purposes of the UNCLOS. The Convention makes it clear right at the beginning that it aims at “establishing a legal order for the seas and oceans with due regard for sovereignty of all states”. The Convention is not an international treaty to regulate disputes of territorial sovereignty between states, nor can it serve as the basis to arbitrate such disputes. Countries concerned should settle the demarcation disputes in the South China Sea on the basis of solving disputes of territorial sovereignty over the Nansha Islands, in accordance with historical facts and International Law including the UNCLOS.

Giving high priority to its relations with ASEAN, China is committed to promoting good-neighbourly friendship and mutually beneficial cooperation with ASEAN and jointly advancing the process of East Asian cooperation. As the underlying impact of the international financial crisis continues to unfold, China and ASEAN share common interests in and responsibilities for safeguarding regional peace and stability and maintaining the development momentum in Asia. The two sides should continue to view and handle their relations from a strategic and long-term perspective, strengthen strategic communication and achieve mutual benefit and win-win progress in the spirit of mutual respect and trust.⁶³

SCOPE OF TERRITORIAL SEA BASE POINTS – STATE OCEANIC ADMINISTRATION

State Oceanic Administration’s measures on selection and protection of the protection scope of territorial sea base points

On September 11, 2012 the State Oceanic Administration promulgated the Measures on Selection and Protection of the Protection Scope of Territorial Sea Base Points. They provide that the State Oceanic Administration is responsible for supervising and directing the work of selection and protection of the protection scope of territorial sea base points, and that the detailed work of selection rests on the governments of provinces,

63 *Foreign Ministry Spokesperson Hong Lei’s Remarks on ASEAN Foreign Ministers’ Statement on the Six-Point Principles on the South China Sea Issue*, MINISTRY OF CIVIL AFFAIRS OF THE PEOPLE’S REPUBLIC OF CHINA http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2535_665405/t955114.shtml

autonomous regions and municipalities directly under the State Council where the base points are located.⁶⁴

In accordance with the Measures, on December 3, 2012, the State Oceanic Administration promulgated the Technical Program on Selection and Definition of Protection Scope of Territorial Sea Base Points (Provisional Application). This Program made detailed provisions on the principles of selection and definition of protection scope, the working programs, the collection of materials, the on-site survey and the writing of the selection and definition reports.⁶⁵

**XISHA ISLANDS, NANSHA ISLANDS, AND ZHONGSHA ISLANDS
– REVISED REGULATIONS ON ADMINISTRATION OF COASTAL
BORDER SECURITY**

On November 27, 2012, the 35th session of the standing committee of the fourth provincial People's Congress of Hainan Province revised the regulations on administration of coastal border security of Hainan Province

On November 27, 2012, the 35th Session of the Standing Committee of the Fourth Provincial People's Congress of Hainan Province revised the Regulations on Administration of Coastal Border Security of Hainan Province, which was adopted on November 26, 1999. The revised Regulations come into force on 1 January 2013.

In accordance with the statement made by the Spokesperson of the Standing Committee of the People's Congress of Hainan Province on 30 December 2012, the application scope of the Regulation was not revised. In accordance with the decision of the First Session of the Eighth National People's Congress on the establishment of Hainan Province on April 13, 1988, Xisha Islands, Nansha Islands, Zhongsha Islands, and their maritime areas are under jurisdiction of Hainan Province. Article 31 of the Revised Regulations provides that foreign ships and personnel shall comply with Chinese laws and regulations if they enter into the maritime areas under

64 海洋局印发《领海基点保护范围选划与保护办法》, THE CENTRAL PEOPLE'S GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA, http://www.gov.cn/gzdt/2012-09/12/content_2222958.htm.

65 海洋局印发《领海基点保护范围选划技术规程》, CHINA NEWS (Dec. 3, 2012), <http://www.chinanews.com/gn/2012/12-03/4377942.shtml>.

the jurisdiction of Hainan Province and shall not commit any of the following acts in violation of administration of coastal border security: (1) illegal stopping or anchoring for the purpose of disturbing social order while passing the territorial sea areas under the jurisdiction of Hainan Province; (2) exiting or entering without examination or authorisation, or changing the port of exit or entry without authorisation; (3) landing illegally on any island or reef under the jurisdiction of Hainan Province; (4) destroying naval defense instalments or productivity or life installments on any island or reef under the jurisdiction of Hainan Province; (5) propaganda activities in violation of Chinese State sovereignty or endangering Chinese State security; and (6) other activities in violation of regulation of administration coastal border security in laws or regulations.⁶⁶

EAST CHINA SEA – CONTINENTAL SHELF

Submission to the commission on the limits of the continental shelf

On December 14, 2012 China submitted to the Commission on the Limits of the Continental Shelf, in accordance with Article 76, paragraph 8 of the Convention, information on the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of its territorial sea is measured in part of the East China Sea. The executive summary of the Chinese submission states in paragraph 1:

The geomorphologic and geological features show that the continental shelf in the East China Sea (hereinafter referred to as “ECS”) is the natural prolongation of China’s land territory, and the Okinawa Trough is an important geomorphologic unit with prominent cut-off characteristics, which is the termination to where the continental shelf of ECS extends. The continental shelf in ECS extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea of China is measured.

In paragraph 5, titled “Natural Prolongation of Land Territory”, the summary states:

The shelf of ECS is of stable continental crust. At the Okinawa Trough, however, due to the upwelling of the upper mantle and the sharp thinning of the continental crust, the crust is transformed

66 海南省沿海邊防治安管理条例, THE PEOPLE’S GOVERNMENT OF HAINAN PROVINCE, <http://www.hainan.gov.cn:1500/data/law/2007/09/352/>.

from thinned continental crust to transitional crust. Nascent oceanic crust occurs in the central rifted zone of the south part of the Okinawa Trough. The shelf of ECS, the slope of ECS and the Okinawa Trough form a passive continental margin. The Okinawa Trough is the natural termination of the continental shelf of ECS.

China then gives the line of the outer limits of its continental shelf by connecting ten selected points in the Okinawa Trough, and also informs the Commission of that China, the Republic of Korea and Japan are yet to complete the delimitation of the continental shelf in the area involved in the submission.⁶⁷

INDIA

LAW OF THE SEA – MARINE ENVIRONMENT – MARITIME TRADE AND SECURITY – PIRACY – CGPCS – THE LAW OF THE SEA CONVENTION, 1982

Statement by India on Agenda Item 75 [A] and [B] – “Oceans and the Law of the Sea” at the 67th Session of the United Nations General Assembly on December 11, 2012⁶⁸

India noted that this year, the subject of oceans occupied a special place as the United Nations was commemorating the thirtieth anniversary of the opening for signature of the Convention on the Law of the Sea. While noting that the oceans play a vital role in supporting life on Earth, India pointed out that the outcome document of the United Nations Conference on Sustainable Development, which held in Rio de Janeiro, Brazil in June 2012, entitled “The Future we Want” recognized oceans and seas as an integrated and essential component of the Earth’s ecosystem that were critical to sustaining it. According to India, this, however, was possible only through the proper management and use of ocean resources and the preservation and protection of marine environment. India also noted that

67 *Submission by the People’s Republic of China Concerning the Outer Limits of the Continental Shelf beyond 200 Nautical Miles in Part of the East China Sea*, UNITED NATIONS DIVISION FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, http://www.un.org/Depts/los/clcs_new/submissions_files/chn63_12/executive%20summary_EN.pdf.

68 See MINISTRY OF EXTERNAL AFFAIRS, <http://meaindia.nic.in>.

the oceans were facing a number of challenges including from the illegal, unreported, and unregulated fishing, deterioration of the marine environment, biodiversity loss, climate change, and those relating to the maritime safety and security including the acts of piracy.

India expressed its serious concern over piracy and armed robbery at sea, particularly off the coast of Somalia. According to India, piracy was a grave threat to the freedom of the seas, maritime trade, and the security of maritime shipping. It endangered lives of seafarers, affected national security and territorial integrity, and hampered economic development of nations. While pointing out that India was actively cooperating in international efforts to combat piracy and armed robbery at sea, it sought to support the joint and concerted efforts by the international community to tackle this menace. In this regard, India expressed its deep appreciations for the Contact Group on Piracy off the Coast of Somalia (CGPCS), which, since its establishment in January 2009, was serving as an excellent forum for international cooperation and coordination in fight against piracy off the coast of Somalia.

The Law of the Sea Convention, 1982, India observed, was the key international instrument governing the ocean affairs. It sets out the legal framework for activities in oceans and seas, and is of strategic importance as the basis for national, regional, and global action in the marine sector. According to India, the effective and unhindered functioning of the institutions established under the Convention, namely the International Sea-bed Authority, the International Tribunal for the Law of the Sea, and the Commission on the Limits of the Continental Shelf were the key in achieving the goal of fair and equitable uses of oceans and their resources including through the effective implementation of the provisions of the Convention.

INDONESIA

TREATIES AND CONVENTIONS— RATIFICATION ON IMSAR 1979

Presidential Regulation No. 30 of 2012 on the Ratification of International Convention Maritime Search And Rescue, 1979 With Annex And 1998 Amendments to the International Convention on Maritime Search and Rescue, 1979 (Resolution Maritime Safety Committee 70 (69)) (Regulation 30/2012)

Regulation 30/2012 aims to ratify the International Convention Maritime Search And Rescue, 1979 With Annex And 1998 Amendments to the International Convention On Maritime Search And Rescue, 1979 (Resolution Maritime Safety Committee 70 (69)) that has been signed on April 27th, 1979 in Hamburg, Germany. Annex in this Convention has been amended on May 18th, 1998 through the Resolution Maritime Safety Committee 70 (69) and has become the 1998 Amendments to the International Convention on maritime Search and Rescue, 1979 (Resolution Maritime Safety Committee 70 (69)).⁶⁹ The Convention and the Annex are stipulated to form an international law in developing Search and Rescue services in national navigation in Indonesia seas or out of Indonesia seas.

JAPAN

TERRITORIAL BOUNDARY – DISPUTE – SENKAKU ISLANDS

On 16 April 2012, then Mayor of Tokyo, Shintaro Ishihara, announced at a symposium given by the Heritage Foundation in Washington, that in order to protect Japanese territory by the Japanese people, the Tokyo Metropolitan Government had decided to purchase the Senkaku Islands. The motive was is to secure Japanese territorial title over the islands by building ports and other facilities.

On 7 June, Japan's ambassador to China, Uichiro Niwa, criticized the Tokyo Metropolitan Government's plan to buy the islets, arguing that it could result in an extremely grave crisis in Japan-China bilateral relations. Foreign Minister Koichiro Genba immediately admonished Mr. Niwa over the remark indicating that it was his personal view and differed from the stance of the government. Foreign Minister Genba said that the change of ownership is a domestic matter that does not concern the international community.

The central government never accepted the plan of the Tokyo Metropolitan Government and on 27 August, rejected a request to send a survey team to the islands as part of the plan to purchase three of the five

69 Indonesia, *Presidential Regulation No. 30 of 2012 on Ratification of International Convention Maritime Search And Rescue, 1979 With Annex And 1998 Amendments to the International Convention On Maritime Search And Rescue, 1979 (Resolution Maritime Safety Committee 70 (69))*, *State Gazette of the Republic of Indonesia Year 2012 No. 79*, art. 1.

uninhabited islets. The team instead only observed the islets from a salvage vessel they chartered.

After the public announcement by Mayor Ishihara of his plan to purchase three of the islets, the Chinese government expressed its strong opposition to the plan and intensified its criticism. Under these circumstances, the Japanese government decided to nationalize the disputed islands in order to mitigate criticism from China and to keep peace and stable administration of the islands.

On 3 September 2012, an agreement was reached between the owner of the islands and the Japanese government to purchase three of five islands of Senkaku, that is, Uotsuri-island, Kitagojima-island and Minamikojima-island. On 11 September, the government purchased the islands for about \$20,500,000 and completed the registration of transfer procedures.

SINGAPORE

TERRITORIAL BOUNDARY – DISPUTE – SOUTH CHINA SEAS – SCARBOROUGH SHOAL – STATEMENT OF POSITION

Statement by Ministry of Foreign Affairs, 20 July 2012

In response to media queries on the ASEAN Foreign Ministers' Statement on ASEAN's Six-Point Principles on the South China Sea issued by Cambodia as the ASEAN Chair on 20 July 2012, as well as to an article by Philippine Undersecretary for Foreign Affairs Erlinda Basilio published on 18 July 2012, Singapore was asked if wanted a specific mention of the Scarborough Shoal in the Joint Communiqué of the 45th ASEAN Ministerial Meeting (AMM), and how Singapore viewed the latest Statement, which does not include such a mention. In response to these queries, the MFA Spokesman said:

Singapore was not one of the states that had taken the position that it was absolutely necessary for the Scarborough Shoal to be specifically mentioned in the Joint Communiqué. As previously mentioned, several ASEAN Member States (AMS) had tried very hard to negotiate a consensus on the South China Sea paragraph in the Joint Communiqué of the 45th AMM. To this end, Singapore as well as other AMS had made various proposals which did not refer specifically to Scarborough Shoal or other geographical features.

As stated previously, Singapore has supported and welcomed the statement that has been issued.

Minister for Foreign Affairs K Shanmugam's reply to Parliamentary Questions and Supplementary Questions, 13 August 2012

Sir, to begin, I would like to restate Singapore's position on the South China Sea disputes. We are not a claimant state and we have always maintained that by their very nature, the specific territorial disputes in the South China Sea can only be settled by the parties directly concerned. However, that does not mean that Singapore has no interests in these disputes. Singapore's interests in the disputes, and the South China Sea, including on the question of the freedom of navigation, have been stated clearly on several occasions and I do not propose to repeat them here.

2 It is useful to revisit the roots of ASEAN and how it is important to Singapore, as this will allow us to see the present developments in context. Many in this House know that Singapore was one of the founding members of ASEAN when it was established in 1967, along with Indonesia, Malaysia, the Philippines and Thailand. Our governments forged a common cause to maintain order in our region amidst the Cold War. Order was the essential precondition for development and prosperity for our peoples. We agreed to build a region united by a desire for stability and autonomy, promoting regional cooperation rather than competition, to fend off the alternative of a splintered Southeast Asia which would have become an arena for Cold War protagonists and their proxies.

3 Forty-five years on, this imperative still holds true. Building a strong, cohesive and autonomous ASEAN remains a key goal of our foreign policy. ASEAN helps its members manage the inherent complexities of the region as well as the evolving geopolitical order in the Asia-Pacific. Only a united ASEAN can credibly play a central role in engaging major powers towards the common goal of promoting regional peace, stability and prosperity. This strategic underpinning of ASEAN was given fresh impetus with the signing of our Charter in Singapore on 20 November 2007, which ushered ASEAN into a new phase of rules-based and principled regional norms. We agreed to build an ASEAN Community with a capital 'C' in 2015. We recognised that an ASEAN Community is critical for maintaining ASEAN's competitiveness in the region and globally.

4 It was thus regrettable that no Joint Communiqué was issued at the 45th ASEAN Ministerial Meeting (AMM) in Phnom Penh in July 2012. I say this because the lack of a Joint Communiqué reflects disunity within

ASEAN. ASEAN unity and centrality are key to the vision of the ASEAN Community. An ASEAN that is not united and cannot agree on a Joint Communiqué will have difficulties in playing a central role in the region. If we cannot address major issues affecting or happening in our region, ASEAN centrality will be seen as a slogan without a substance. Our ability to shape regional developments will diminish.

5 The reason why there was no Joint Communiqué was that there was no consensus on how to reflect recent developments in South China Sea in the Communiqué. We worked hard to find a compromise. But a compromise could not be reached because of the distance between positions taken by ASEAN members. While several draft formulations were put forward in an effort to bridge the gap, they were unfortunately rejected by one side or the other and the ASEAN Ministerial Meeting ended without a Joint Communiqué. All of us were heartened and appreciative that Indonesia managed to broker a common ASEAN position a week after the meetings ended. The ASEAN statement on “Six-Point Principles on the South China Sea” released on the 20 July 2012 has gone some way to repair the damage to ASEAN’s credibility, but more work needs to be done.

6 Some Members have asked about the impact of this incident on ASEAN’s community building efforts. While the Phnom Penh meetings were a setback, I do not think that this in itself will divert us from our goals. We must press on with this important task despite the setback. As between ASEAN members, there is much that needs to be done and should be done to achieve the goal of an ASEAN Community. We must work on that within ASEAN. The setback in Phnom Penh will of course have some impact on ASEAN’s relationships with external partners, in our push for ASEAN Community. The state of the global economy will also have an impact.

7 I said earlier that the failure to issue a Communiqué was linked to recent developments in the South China Sea. As the House knows, territorial claims in the South China Sea involve four ASEAN states and China. However, the claims are not the totality of ASEAN-China interactions, simply one part of many. All ASEAN members regard China as an important and valued partner. The strength of relations is demonstrated by our bilateral trade, which has grown from less than US\$10 billion in 1991 to more than US\$230 billion in 2010, making China ASEAN’s largest trading

partner and ASEAN China's third largest trading partner. The ASEAN-China Free Trade Agreement also entered into force on 1 January 2010. Beyond economics, ASEAN-China cooperation spans across eleven sectors, including environment, culture, and health. China has consistently been one of the strongest supporters of ASEAN's Community Building efforts, and has devoted effort and resources to help the region. It is clearly in ASEAN's and China's interests to maintain and strengthen cooperation for mutual benefit.

8 I have set out these areas of cooperation to provide some context to the heated debate on the outcome of the 45th AMM, the role that China may or may not have played, and the impact on ASEAN-China relations. I think it is simplistic to try and identify any one actor or cause for what happened in Phnom Penh. There were many actors and many causes for the way the events unfolded.

9 ASEAN and all major powers share a common interest in maintaining peace and stability in the South China Sea. ASEAN needs to work closely with China, a claimant state, to promote cooperation and manage tensions in the area. A good start is the full implementation of the Declaration on the Conduct of Parties in the South China Sea (DOC) that both sides signed in 2002 to build confidence and trust amongst the participants. In the same way, ASEAN and China should start talks on a Code of Conduct in the South China Sea (COC) soon. Recent tensions in the South China Sea underscore the need for the COC discussions to take place sooner rather than later. That would be in everyone's interest. I wish to underscore that ASEAN as a grouping cannot and does not take sides on the merits of a particular claim or claims. Nor do we attempt to resolve the disputes. That is a matter for the parties directly concerned. ASEAN's consistent collective position on the issue is that all parties should refrain from the use of force and work together to resolve disputes in accordance with international law, in particular the 1982 United Nations Convention on the Law of the Sea. Thank you sir.

Legal Personality

KOREA

FUNDAMENTAL HUMAN RIGHTS OF FOREIGNERS – ILLEGAL ALIENS – SUBSTANTIVE RIGHT TO APPEAL TO A CONSTITUTIONAL COURT

[2008Hun-Ma430. August 23, 2012]

Facts

In 1991, the Claimant from Nepal entered into Korea with 15 days qualified visitor's visa. In 1998, the Claimant from Bangladesh entered into Korea with 90 days qualified visa waiver program. Both claimants did not leave Korea after the expiration of qualified period. In addition, since 2008, they worked as the chairman and the vice-chairman of the Migrants' Trade Union (MTU). On May 2, 2008, the Seoul immigration office detained them in Cheong-ju foreigner protection place as they were classified as subjects to compulsory deportation under immigration law. The immigration office filed orders for compulsory deportation afterward.

The claimants made an objection and brought an administrative proceeding to revoke the deportation orders. However, in May 15, 2008, the respondent began the execution and deported the claimants by sending them to Bangkok through airplane. Thereafter, the claimants brought this case to the Constitutional Court by arguing that the emergency protection and execution of the order of protection and the order of compulsory deportation and its execution violated their fundamental rights.

Legal Issues

The main issue was violation of the claimant's fundamental rights, but prior to this, the court made judgment on the following issues:

- 1) Whether the claimants are subject to make a constitutional appeal on the fundamental rights in the constitutional court under the Constitutional Court Act Article 68, Section 1.
- 2) Whether the foreigner can be subjected to fundamental right that is not only citizen's right but also fundamental human right.

Judgment

The Constitutional Court ruled that although the claimants are illegal aliens, they could make a constitutional appeal as subjects of fundamental human rights.

Illegal stay simply means that the claimants are not qualified to stay according to the law. Consequently, as human rights, certain fundamental rights of foreigners do not depend on whether they are qualified to stay. ... The personal liberty, freedom of residing, right to have lawyer, right to bring the case to the court and other alleged violated rights fall under human rights. Therefore, the claimants have rights to these fundamental rights.

Municipal Law

INDIA

THE RULE OF LAW – INTERNATIONAL PEACE AND SECURITY – NATIONAL LEVEL – INTERNATIONAL LEVEL

Statement by India on Agenda Item 83: “The Rule of Law at the National and International Levels” at the 67th Session of the United Nations General Assembly on October 10, 2012⁷⁰

India noted that the outcome document reaffirms commitment of the international community towards the rule of law and adhering, for their purpose, to the principles of the United Nations Charter and international law. India further noted that the document took stock of the contemporary political, social, and economic conditions and stressed upon the implementation of the rule of law related principles in order to achieve the objective of the maintenance of international peace and security, peaceful co-existence, and development. India also noted that the document stressed the importance of continuing efforts to reform the Security Council. India considered it essential to reform the Security Council at the earliest possible to make the body broadly representative, efficient, and transparent. It strongly condemned the acts of terrorism wherever,

70 See MINISTRY OF EXTERNAL AFFAIRS, <http://meaindia.nic.in>.

whenever, and by whomever committed. It stressed for collective action in the fight against terrorism, which continues to pose a serious threat to the international peace and security. India believed that the advancement of the rule of law at the national level was essential for the protection of democracy, economic growth, sustainable development, ensuring gender justice, eradication of poverty and hunger, and protection of human rights and fundamental freedoms. India considered that the law making activity at the national level was exclusively the domain of the national legislature.

PHILIPPINES

PREVENTION OF CYBERCRIME – DOMESTIC AND INTERNATIONAL LEVELS – FULL FORCE AND EFFECT OF INTERNATIONAL INSTRUMENTS

An Act Defining Cybercrime, Providing for the Prevention, Investigation, Suppression and the Imposition of Penalties Therefor and for Other Purposes

Republic Act No. 10175, or the Cybercrime Prevention Act of 2012, punishes cybercrime and other offenses (Ch. II). As part of State policy, it says that the State shall adopt sufficient powers to effectively prevent and combat such offenses by facilitating their detection, investigation, and prosecution at both the domestic and international levels, and by providing arrangements for fast and reliable international cooperation (Sec. 2).

The law states that all relevant international instruments on international cooperation in criminal matters, arrangements agreed on the basis of uniform or reciprocal legislation, and domestic laws, to the widest extent possible for the purposes of investigations or proceedings concerning criminal offenses related to computer systems and data, or for the collection of evidence in electronic form of a criminal offense, should be given full force and effect (Sec. 22). An office within the Department of Justice of the Philippines was created as central authority in all matters related to international mutual assistance and extradition (Sec. 23).

TREATIES – LABOR CONTRACTS

Magsaysay Maritime Corporation and/or Wastfel-Larsen Management A/S v. Oberto S. Lobusta [G.R. No. 177578. 25 January 2012]

Magsaysay Maritime Corporation is a domestic corporation and the local manning agent of the vessel MV “Fossanger” and of petitioner Wastfel-Larsen Management A/S. Lobusta is a seaman who has worked for Magsaysay Maritime Corporation since 1994. In March 1998, he was hired again as Able Seaman by Magsaysay Maritime Corporation in behalf of its principal. The employment contract provides for his basic salary, and overtime pay. It also provides standard terms and conditions governing the employment of Filipino seafarers on board ocean-going vessels, approved per Department Order No. 33 of the Philippines’ Department of Labor and Employment and Memorandum Circular No. 55 of the Philippine Overseas Employment Administration (POEA Standard Employment Contract), both series of 1996, which shall be strictly and faithfully observed.

Lobusta boarded MV “Fossanger” in 1998. After two months, he complained of breathing difficulty and back pain. While the vessel was in Singapore, he was admitted to a hospital and diagnosed to be suffering from severe acute bronchial asthma with secondary infection and lumbosacral muscle strain. He was certified as fit for discharge for repatriation for further treatment. A series of tests and consultations with doctors ensued in the Philippines. He was declared not physically fit to resume his normal work as a seaman. A complaint for disability/medical benefits was filed before the National Labor Relations Commission (NLRC).

The Labor Arbiter rendered a decision ordering Magsaysay Maritime Corporation to pay Lobusta (a) US\$2,060 as medical allowance, (b) US\$20,154 as disability benefits, and (c) 5% of the awards as attorney’s fees. The arbiter ruled that Lobusta suffered illness during the term of his contract. The arbiter held that provisions of the Labor Code, as amended, on permanent total disability do not apply to overseas seafarers. An appeal was lodged before the NLRC, which was dismissed. The Court of Appeals declared that Lobusta is suffering from permanent total disability and increased the award of disability benefits in his favor to US\$60,000

Now, before the Supreme Court, Magsaysay Maritime Corporation argued, among others, that the Court of Appeals erred in applying the provisions of the Labor Code instead of the provisions of the POEA con-

tract in determining Lobusta's disability. The Supreme Court held that not only must the POEA Standard Employment Contract be considered in determining disability. It cited jurisprudence to state (1) that the standard employment contract for seafarers was formulated by the POEA pursuant to its mandate; (2) that the 1996 POEA Standard Employment Contract itself provides that all rights and obligations of the parties to the contract, including the annexes thereof, shall be governed by the laws of the Republic of the Philippines, international conventions, treaties and covenants where the Philippines is a signatory; and (3) that even without this provision, a contract of labor is so impressed with public interest that the Civil Code expressly subjects it to special laws. Magsaysay Maritime Corporation and/or Wastfel-Larsen Management A/S was ordered to pay Lobusta US\$65,163 as total award.

TREATIES – LABOR CONTRACTS

***PhilAsia Shipping Agency Corporation and/or Intermodal Shipping, Inc. v. Andres G. Tomacruz* [G.R. No. 181180. 15 August 2012]**

Tomacruz was a seafarer, whose services were engaged by PhilAsia Shipping Agency Corp., on behalf of Intermodal Shipping, Inc. In 2002, the parties signed a 12-month Philippine Overseas Employment Administration (POEA) Contract of Employment. Before he boarded M/V Saligna, he underwent a pre-employment medical examination and he was certified fit to work. While in Japan, blood was discovered in his urine and a kidney stone was diagnosed in his right kidney. He was still allowed to continue working. He repatriated to the Philippines, went to doctors and found stones in both his kidneys, but he was certified fit to work. PhilAsia Shipping Agency Corp. told him that because of the huge amount spent on his treatment, their insurance company did not like his services anymore.

Tomacruz filed a complaint for disability benefits, sickness wages, damages, and attorney's fees against PhilAsia Shipping Agency Corp. The Labor Arbiter held that as a contractual employee, his employment was governed by the contract signed every time he was hired. Once services were terminated, the employer was under no obligation to re-contract him. The company doctor gave a more accurate assessment of his condition. The National Labor Relations Commission (NLRC) agreed with the arbiter. The

claim for benefits was not granted. On appeal, the Court of Appeals granted the claim on the basis that he suffered from permanent total disability.

The core issue is the propriety of the appellate court's award of benefits to Tomacruz on the basis of the Labor Code provisions on disability and despite the company-designated physician's declaration of his fitness to work. The Supreme Court once again held that the entitlement of seafarers to disability benefits is governed not only by medical findings but also by contract and by law. Pertinent to international law, it resonated that the Philippine standard overseas employment contract provides that all rights and obligations of the parties to the contract, including the annexes thereof, shall be governed by the laws of the Republic of the Philippines, international conventions, treaties and covenants where the Philippines is a signatory.

Sovereignty

CHINA

CHINA-INDIA RELATIONS – CHINA – TREATIES AND CONVENTIONS

India agrees on the establishment of a working mechanism for consultation and co-ordination on India-China border affairs

On January 17, 2012, China and India concluded an agreement on the establishment of a working mechanism for consultation and co-ordination on China–India border affairs. The full text of the agreement is as follows:

The Government of the People's Republic of China and the Government of the Republic of India (hereinafter referred to as the "two sides");

Firmly believing that respecting and abiding by the Line of Actual Control pending a resolution of the Boundary Question between the two countries as well as maintaining and strengthening peace and tranquillity in the China–India border areas is very significant for enhancing mutual trust and security between the two countries, for resolving the Boundary Question at an early date and for building the China–India Strategic and Cooperative Partnership for Peace and Prosperity;

Desiring to materialise the spirit of the Agreement between the Government of the People's Republic of China and the Government of the

Republic of India on the Maintenance of Peace and Tranquillity Along the Line of Actual Control in the China–India Border Areas signed on 7th September 1993, the Agreement between the Government of the People’s Republic of China and the Government of the Republic of India on Confidence Building Measures in the Military Field Along the Line of Actual Control in the China-India Border Areas signed on 29th November 1996 and the Protocol between the Government of the People’s Republic of China and the Government of the Republic of India on Modalities for the Implementation of Confidence Building Measures in the Military Field Along the Line of Actual Control in the China-India Border Areas signed on 11th April 2005;

Aiming for timely communication of information on the border situation, for appropriately handling border incidents, for earnestly undertaking other cooperation activities in the China–India border areas, have agreed as follows:

Article I

The two sides agree to establish a Working Mechanism for Consultation and Coordination on China-India Border Affairs (hereinafter referred to as “the Working Mechanism”) to deal with important border affairs related to maintaining peace and tranquillity in the China-India border areas.

Article II

The Working Mechanism will be headed by a Director General level official from the Ministry of Foreign Affairs of the People’s Republic of China and a Joint Secretary level official from the Ministry of External Affairs of the Republic of India and will be composed of diplomatic and military officials of the two sides.

Article III

The Working Mechanism will study ways and means to conduct and strengthen exchanges and cooperation between military personnel and establishments of the two sides in the border areas.

Article IV

The Working Mechanism will explore the possibility of cooperation in the border areas that are agreed upon by the two sides.

Article V

The Working Mechanism will undertake other tasks that are mutually agreed upon by the two sides but will not discuss resolution of the Boundary Question or affect the Special Representatives Mechanism.

Article VI

The Working Mechanism will address issues and situations that may arise in the border areas that affect the maintenance of peace and tranquillity and will work actively towards maintaining the friendly atmosphere between the two countries.

Article VII

The Working Mechanism will hold consultations once or twice every year alternately in China and India. Emergency consultations, if required, may be convened after mutual agreement.

Article VIII

This Agreement shall come into force on the date of its signature. It may be revised, amended, or terminated with the consent of the two sides. Any revision or amendment, mutually agreed by the two sides, shall form an integral part of this Agreement. Signed in duplicate in Hindi, Chinese and English languages at New Delhi, on 17th January 2012, all three versions being equally authentic. In case of divergence the English text shall prevail.⁷¹

**TAIWAN – ONE-CHINA PRINCIPLE –
DIPLOMATIC RELATIONS WITH TAIWAN**

Countries should adhere to the one-China principle with regard to their relations with Taiwan

On February 22, 2012, Foreign Ministry Spokesperson Hong Lei made a statement regarding Taiwan's attempt to make official its relation with countries with which it has no diplomatic relation and to participate in inter-governmental organisations and UN agencies in the "capacity of a government". He said:

71 The Chinese version *available at* http://www.fmprc.gov.cn/mfa_chn/wjb_602314/zjzg_602420/bjhysws_603700/bhfg_603706/t947958.shtml; the English version *available at* <http://www.mea.gov.in/bilateral-documents.htm?dtl/17963/>.

We do not object to non-governmental economic, trade and cultural exchanges between Taiwan and countries that have diplomatic relations with us, but we oppose any official interactions or the signing of official agreements between them or Taiwan's participation in international organisations that are limited to sovereign states only.

The remarks by some people in Taiwan you mentioned are a violation of and challenge to the one-China principle universally recognised by the international community. It is wrong and very harmful. We hope and believe that relevant countries will continue to adhere to the one-China principle, prudently handle Taiwan-related issues and take concrete actions to support the peaceful development of cross-Straits relations.⁷²

JURISDICTION – ESTABLISHMENT OF SANSHA MUNICIPALITY – XISHA ISLANDS, NANSHA ISLANDS, AND ZHONGSHA ISLAND

Change of Administrative Jurisdiction

On June 21, 2012, the Ministry of Civil Affairs announced that with the approval of the State Council, the Agency on Xisha Islands, Nansha Islands and Zhongsha Islands under Hainan Province has been discontinued, and that a new Sansha Municipality has been established, with the jurisdiction over Xisha Islands, Zhongsha Islands, Nansha Islands, as well as their maritime areas. The announcement further stated that the People's Government of the new Sansha Municipality is stationed on the Yongxing Island of Xisha Islands.

The spokesperson of the Ministry of Civil Affairs made the statement that:

China is the first country to discover, name and exercise continuous sovereign jurisdiction over Xisha Islands, Zhongsha Islands, Nansha Islands and their maritime areas. After the establishment of the People's Republic of China, the Agency on Xisha Islands, Nansha Islands and Zhongsha Islands was established in 1959. This Agency was directly under the leadership of Hainan administrative region, and exercised jurisdiction over Xisha Islands, Zhongsha

72 *Foreign Ministry Spokesperson Hong Lei's Regular Press Conference on February 22, 2012*, MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE'S REPUBLIC OF CHINA, http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t908252.shtml.

Islands, Nansha Islands and their maritime areas. In 1988, Hainan administrative region was abolished, and Hainan Province was established. This Agency was therefore under the jurisdiction of Hainan Province. The establishment of Sansha Municipality is the adjustment and refinement of China's administrative management regime on Xisha Islands, Zhongsha Islands, Nansha Islands and their maritime areas of Hainan Province.⁷³

DIAOYU DAO DISPUTE

Baselines of the Territorial Sea of Diaoyu Dao and its Affiliate Islands

On September 10, 2012, in accordance with the Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone adopted and promulgated on February 25, 1992, the Government of the People's Republic of China announced the baselines of the territorial sea adjacent to Diaoyu Dao and its affiliated islands of the People's Republic of China.⁷⁴

DIAOYU DAO ISLAND DISPUTE – ACT ON THE PROTECTION OF SEA ISLANDS

State Oceanic Administration and the ministry of civil affairs jointly publicised the standardised names of the Diaoyu Island

In accordance with the Act on the Protection of Sea Islands, the State Oceanic Administration standardised the names of islands in the Chinese maritime area. With the approval of the State Council, the State Oceanic Administration and the Ministry of Civil Affairs jointly publicised the

73 民政部新闻发言人就国务院批准设立地级三沙市答记者问, MINISTRY OF CIVIL AFFAIRS OF THE PEOPLE'S REPUBLIC OF CHINA, <http://www.mca.gov.cn/article/zwgk/mzyw/201206/20120600325075.shtml>.

74 *Statement on the Government of the People's Republic of China On the Baselines of the Territorial Sea of Diaoyu Dao and Its Affiliated Islands*, UNITED NATIONS DIVISION FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/chn_mzn89_2012_e.pdf; see also, *The Chart of Baselines of Territorial Sea of Diaoyu Dao and its Affiliated Islands of the People's Republic of China*, UNITED NATIONS DIVISION FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/MAPS/chn_mzn89_2012.jpg.

standardised names of the Diaoyu Island and part of its affiliated islands on March 2, 2012.⁷⁵

On September 25, 2012, the State Council Information Office released a white paper on Diaoyu Island and its affiliated islands titled “Diaoyu Dao, An Inherent Territory of China”.⁷⁶

TIBET – DALAI LAMA’S VISIT TO JAPAN

Tibet is an inalienable part of China

On November 13, 2012, Foreign Ministry Spokesperson Hong Lei made a statement on Dalai’s address to an audience of 140 Japanese parliamentarians in the Japanese Upper House. He said:

Tibet is an inalienable part of China. Under the cloak of religion, Dalai is a political exile who has long been engaged in activities aimed at splitting China on the international stage. We are firmly opposed to the provision of support by any country or any person to Dalai in any form for his anti-China separatist activities.⁷⁷

PHILIPPINES

SOVEREIGN IMMUNITY – IMMUNITY FROM SUIT – CONSENT – ARBITRATION

***China National Machinery and Equipment Corporation v. Hon. Cesar D. Santamaria, et al.* [G.R. No. 185572. 7 February 2012]**

China National Machinery and Equipment Corp. (CNMEG) entered into a Memorandum of Agreement with North Luzon Railways Corp. (Northrail) for the conduct of a feasibility study on a railway line (Northrail Project).

75 国家海洋局、民政部受权公布我国钓鱼岛海域部分地理实体标准名称 STATE OCEANIC ADMINISTRATION PEOPLE’S REPUBLIC OF CHINA, http://www.soa.gov.cn/xw/ztbd/2012/dydszgdsslt/dydszgdsslt_549/201211/t20121129_11361.htm.

76 钓鱼岛是中国的固有领土》白皮书 (全文), MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE’S REPUBLIC OF CHINA, http://www.fmprc.gov.cn/mfa_chn/ziliao_611306/tytj_611312/zcwj_611316/t973235.shtml.

77 *Foreign Ministry Spokesperson Hong Lei’s Regular Press Conference on November 13, 2012*, EMBASSY OF THE PEOPLE’S REPUBLIC OF CHINA IN THE REPUBLIC OF FINLAND, <http://www.chinaembassy-fi.org/eng/fyrth/t988806.htm>.

CNMEG is a corporation organized and created under Chinese law. The Export Import Bank of China (EXIM Bank) and the Philippines' Department of Finance (DOF) entered into a Memorandum of Understanding in which China agreed to finance the Northrail Project. The Chinese government designated EXIM Bank as lender and the DOF as borrower. The amount of US\$400 million was extended to the borrower, payable in 20 years. The Chinese Ambassador to the Philippines, Wang Chungui, wrote a letter to DOF Secretary Jose Isidro Camacho informing him of CNMEG's designation as the Prime Contractor for the project. Several agreements were entered into. Several individuals, herein respondents, filed a complaint contending that the Contract and Loan Agreements were void for being contrary to the Constitution and other laws.

One of the issues considered by the Court is whether CNMEG was immune from suit, therefore, precluded from being sued before Philippine domestic courts. The Supreme Court held that CNMEG was not entitled to immunity from suit. It explained the doctrine of sovereign immunity as embodied in Philippine jurisprudence. There are two conflicting concepts. On the one hand, the *classical or absolute theory* states that a sovereign cannot, without its consent, be made a respondent in the courts of another sovereign. On the other, the *restrictive theory* holds that the immunity of the sovereign is recognized only as regards public acts or acts *jure imperii* of a State, but not with regard to private acts or acts *jure gestionis*. The Philippines adheres to the restrictive theory. Immunity cannot extend to commercial, private and proprietary acts. The State may be said to have descended to the level of an individual, and thus, has given its consent to be sued when it enters into business contracts.

CNMEG was engaged in a proprietary activity. It is true that the contract agreement does not reveal that the project was as proprietary activity. However, the same could be seen in conjunction with three other documents, namely, the Memorandum of Understanding between Northrail and CNMEG, the Letter of Ambassador Wang to Secretary Camacho, and the Loan Agreement. It was a purely commercial transaction. Mere entering into a contract by a foreign State with a private party cannot be the ultimate test, and such act is only the start of the inquiry. Even if CNMEG contends that it performs governmental functions (China designated the corporation), it failed to adduce evidence that it has not consented to be sued under Chinese law.

When a State or international agency wishes to plead sovereign or diplomatic immunity in a foreign court, it requests the foreign office of the State where it is sued to convey to the court that it is entitled to immunity. CNMEG failed to present a certification to that effect from the Philippines' Department of Foreign Affairs. Lastly, the stipulation in one of the agreements to submit any dispute to arbitration may be construed as an implicit waiver of the immunity from suit.

SINGAPORE

SOVEREIGNTY OVER PEDRA BRANCA – IMPLEMENTATION OF ICJ JUDGMENT – JOINT TECHNICAL COMMITTEE

Joint Press Statement by H.E. Dato' Sri Anifah Aman, Minister of Foreign Affairs, Malaysia and H.E. K. Shanmugam, Minister for Foreign Affairs, Republic Of Singapore: Sixth Meeting of the Malaysia-Singapore Joint Technical Committee on the Implementation of the International Court of Justice Judgment on Pedra Branca, Middle Rocks and South Ledge, Kuala Lumpur, 22-23 February 2012

Malaysia and Singapore met on 22-23 February 2012 in Kuala Lumpur to further discuss the implementation of the International Court of Justice (ICJ) Judgment on Pedra Branca, Middle Rocks and South Ledge. The Malaysian delegation was led by Tan Sri Mohd Radzi Abdul Rahman, Secretary-General of the Ministry of Foreign Affairs, Malaysia and the Singapore delegation was led by Mr Bilahari Kausikan, Permanent Secretary of the Ministry of Foreign Affairs, Singapore.

The Meeting continued discussions on related issues arising from the International Court of Justice (ICJ) Judgment on the Case Concerning Sovereignty over Pedra Branca, Middle Rocks and South Ledge.

The Meeting endorsed the Report of Survey of the Joint Hydrographic Survey in and around Pedra Branca and Middle Rocks and took note of the Summary of Work by the Sub-Committee of the Joint Survey Works in and around Pedra Branca, Middle Rocks and South Ledge. The Meeting commended the Sub-Committee on the successful completion of the Joint Survey Works. With the completion of the work of the Sub-Committee in accordance with its Terms of Reference, the Meeting agreed to the dis-

solution of the Sub-Committee on the Joint Survey Works in and around Pedra Branca, Middle Rocks and South Ledge.

The Meeting agreed that the Seventh Meeting of the Malaysia-Singapore Joint Technical Committee (MSJTC) on the Implementation of the International Court of Justice (ICJ) Judgment on Pedra Branca, Middle Rocks and South Ledge will be held in September 2012.

Terrorism

BANGLADESH

UN CONVENTION; BI-LATERAL – REGIONAL OR INTERNATIONAL TREATY – SECURITY COUNCIL RESOLUTIONS ON TERRORISM – INTERNATIONAL TERRORISM – TERRORIST FINANCING

The Anti Terrorism (Amendment) Act 2012 (Act 6 of 2012), amending the Anti-terrorism Act 2009 – the Act is in compliance with the SAARC Regional Convention on Suppression of Terrorism 1987, International Convention for the Suppression of Terrorist Bombings 1997 and a response of the UN Security Council Resolution 1373/2001.

The Bangladesh Parliament enacted the Anti-terrorism Act 2009 in February 2009 to prevent and effectively punish certain terrorist activities. In 2012, the Anti-terrorism Act of 2009 has been further amended via the Anti-terrorism (Amendment) Act 2012, which came into force on 20 February 2012. This amending Act further internationalises the anti-terrorism regime that was provided by the Anti-terrorism Act 2009 (Act 16 of 2009), which too was in line with international standards.

The amending Act of 2012, along with the anti-money-laundering legislation noted above, seeks to provide new rules to prevent terrorist financing. The amending Act is thus informed of regional and international anti-terrorism instruments.⁷⁸ For example, newly inserted section 17(e) of the Anti-terrorism Act 2009 refers to the UN Resolution Nos. 1267 and 1373

78 Such as, for example, the SAARC Regional Convention on Suppression of Terrorism 1987; International Convention for the Suppression of Terrorist Bombings 1997. Also, the Act seems to be informed of a UN SC Resolution, the UN SC RES 1373/2001/28 September, that calls on states to work together urgently to prevent and suppress terrorist acts, including through including through increased

and to other resolutions accepted by Bangladesh while defining a terrorist organisation.⁷⁹ Accordingly, section 15(3) as amended by the 2012 Act refers to UN resolutions and applicable standards under any UN convention.

The amending Act replaces section 6 of the original Act of 2009, which defines and criminalises terrorist activities. The amended section 6 provides that,⁸⁰

- (1) If any person, by creating horror amongst the public or segment of the public and with an intent to jeopardize the territorial integrity, solidarity, security or sovereignty of Bangladesh, for the purpose of compelling the government or any other person to do or not to do an act –
 - (a) causes death, inflicts grievous hurt, confines or abducts any person or causes damage or assists in causing damage to any property of a person; or
 - (b) entices others to kill any person, or inflict upon him grievous hurt, or to confine or abduct him or to cause damage to property of the state, entity or of any individual,
 - (c) uses or keeps in his possession any explosive, flammable substance, or firearms, or
 - (d) If any person commits or attempts to commit or incites others to commit any offence to jeopardize the security of any foreign country or to cause damage to its property, or if any person is personally or financially involved in such activities against a foreign state, or
 - (e) if any person or entity keeps in possession any property derived from any terrorist activity or given by any terrorist individual or groups, of
 - (f) if any person, being a foreign national, commits an offence under clauses (a), (b), and (c), —

cooperation and full implementation of the relevant international conventions relating to terrorism.

79 Amended by § 10 of the Anti-terrorism (Amendment) Act 2012.

80 Replaced by § 5 of the Anti-terrorism (Amendment) Act 2012. Unofficial English text.

he shall be deemed to have committed the offence of “terrorist activities”.

- (2) Any person committing terrorist activities shall be sentenced with death or with life imprisonment or with a rigorous imprisonment of not more than 20 years but not less than four years. Additionally, a fine may also be imposed against the convict.

The amending Act replaces section 7 of the original Act of 2009, which creates the offence of financing of terrorism. The new section 7 provides that:⁸¹

- (1) If any person or entity knowingly supplies or intends to supply money, service, material support or any other property to other person and if there is reasonable cause to believe that those would be used or have been actually used, wholly or partly, for terrorist activities by any terror or terrorist group or organisation, he would be deemed to have committed the offence of financing terrorist activities.
- (2) If any person knowingly receives money, service, material support or any other property, and if there is reasonable cause to believe that those would be used or have been actually used, wholly or partly, for terrorist activities by any terror or terrorist group or organisation, he would be deemed to have committed the offence of financing terrorist activities.
- (3) If any person knowingly manages money, service, material support or any other property for the use by any other person or entity, and if there is reasonable cause to believe that those might be or have actually been used, wholly or partly, for terrorist activities by any terror or terrorist group or organisation, he would be deemed to have committed the offence of financing terrorist activities.
- (4) If any person knowingly incites any other person to supply or receive any money, service, material support or any other property which are reasonably believed to be used or which have actually

81 Replaced by § 6 of the Anti-terrorism (Amendment) Act 2012.

been used, wholly or partly, for terrorist activities by any terror or terrorist group or organisation, he would be deemed to have committed the offence of financing terrorist activities.

- (5) If any person is found guilty of offences under sub-sections (1) to (4), he shall, upon conviction, be punished with an imprisonment of not more than twenty years and not less than four years. In addition to imprisonment, the court may impose a fine of taka 10,000,000 or of an amount being the double of the value of property involved in the offence, whichever is greater.
- (6) If any entity is found guilty of offences under sub-sections (1) to (4), actions may be taken against it under section 18, and a fine of taka 50,000,000 or of an amount being the triplex of the value of property involved in the offence, whichever is greater, may also be imposed against it. Further, the managers, chief executive, or the managing director of such organisation, shall be liable to be punished with an imprisonment of not more than twenty years and not less than four years. In addition to imprisonment, they may also be subjected to a fine of taka 20,000,000 or of an amount being the double of the value of property involved in the offence, whichever is greater.

The Act empowers the central bank to take necessary measures to prevent and suppress terrorist financing. The amended section 15 provides that,⁸²

- (1) In order to prevent an offence under this Act being committed, the Bangladesh Bank shall have powers to call for information/report from any reporting institution as to any suspect transaction, to send the report so received to any law-enforcing agency for action, to compile and preserve necessary statistics and data, to create a database for suspected transactions and to analyse these information, to direct the concerned reporting institution to restrict the operation of any account which is reasonably suspected to be engaged in terrorist financing, to inspect banks or any reporting institution with a view to detecting transactions involved in the financing of terrorism, and so on (sec. 15(1)).

82 Replaced by § 8 of the Anti-terrorism (Amendment) Act 2012.

- (2) Bangladesh Bank will have to inform the law-enforcing agencies of the result of its detection of any institution or person that may have been involved in suspected transaction, and render its assistance for the investigation (sec. 15(2)).
- (3) In case of an offence of terrorism occurred in a foreign country, the Bangladesh Bank initiate measures to freeze account of the concerned person or organisation in accordance with any bilateral, regional or international treaty or any UN convention or the Security Council resolutions (sec. 15(3)).
- (4) The law-enforcing agency may, for the interest of investigating a charge of terrorist financing, gain access to any bank document or record with the approval of any competent court or upon the approval of the Bangladesh Bank (sec. 15(7)).

With a view to preventing terrorist financing, the amending Act of 2012 replaced sec. 16 of the original Act of 2009, to impose upon every reporting institution⁸³ an obligation (1) to report to the central bank, on their own motion, any suspected transaction, (2) to issue guidelines for its Board, or Directors, or the Chief Executive on ways to prevent such transactions involved in terrorist financing. Breach of this obligation or the supply, by any institution, of wrong or misleading information is subject to penalised by a fine of maximum taka 10,00,000 (sec. 16(3)). Additionally, the license of the recalcitrant institution or that of any of its branch/outlet may also be cancelled by the central bank/other licensing authority.

Amended section 20(1) (b) of the original Act of 2009,⁸⁴ mandates the Government to freeze the bank-accounts or any other account and to attach all property of any organisation prohibited as a terrorist entity.

83 Reporting institutions are banks, non-banking financial institutions, insurance companies, money-exchangers, any company/institution dealing in the transferring or remittal of money, any other institution doing business with the approval of Bangladesh Bank. See *ibid*, § 2(20).

84 Replaced by § 12 of the Anti-terrorism (Amendment) Act 2012.

INDONESIA

INTERNATIONAL COOPERATION – RATIFICATION – COOPERATION IN COMBATTING TERRORISM IN THE ASEAN REGION

Act No. 5 of 2012 on the Ratification of Convention on Counter Terrorism (Act 5/2012)

Act 5/2012 aims to ratify the ASEAN Convention on Counter Terrorism. Terrorism is transnational organized crime and has resulted in loss of life regardless of the victim, causing widespread public fear, loss of independence, as well as property damage. The cooperation in security and counter terrorism in ASEAN is needed to establish the peace and dynamic stability in region. There is a need to do some efforts in countering terrorism through the regional cooperation. All of the principles contained in the ASEAN Convention on Counter-terrorism, among others, includes the view that terrorism cannot and should not be attributed to religion, nationality, civilization, or any ethnic group, respecting the sovereignty, equality, territorial integrity and national identity, not intervene affairs in the country, respecting the territorial jurisdiction, the existence of mutual legal assistance, extradition, and promoting the peaceful settlement of disputes. Moreover, it specifically contains the provisions regarding the rehabilitation program for terrorism suspects, fair and humane treatment and respect for human rights in the process of handling.⁸⁵

PHILIPPINES

PENALIZATION OF FINANCING TERRORISM – RECOGNITION AND ADHERENCE TO INTERNATIONAL COMMITMENT COMBATTING FINANCING OF TERRORISM – EXTRA-TERRITORIAL APPLICATION – EXTRADITION

An Act Defining the Crime of Financing of Terrorism, Providing Penalties Therefor and for Other Purposes

Known as the “The Terrorism Financing Prevention and Suppression Act of 2012,” Republic Act No. 10168 emphasizes the recognition and adherence

⁸⁵ Indonesia, *Act No. 5 of 2012 on Ratification of ASEAN Convention on Counter-Terrorism*, *State Gazette of the Republic of Indonesia Year 2012 No. 93, Supplement to State Gazette of the Republic of Indonesia No. 5306*, Preamble, para 6.

of the Philippines to international commitments to combat the financing of terrorism, specifically to the International Convention for the Suppression of the Financing of Terrorism and other binding, terrorism-related resolutions of the UN Security Council pursuant to Chapter VII of the UN Charter (Sec. 2). The law essentially penalizes the financing of terrorism and related offenses. It was signed into law on 20 June 2012.

Terrorist acts are violations of certain sections of the Philippines' Human Security Act of 2007; any other act intended to cause death or serious bodily injury to a civilian, or to any other person "not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act;" and any act which constitutes an offense under The Terrorism Financing Prevention and Suppression Act of 2012 that is within the scope of any of the certain treaties to which the Philippines is a party. These treaties are the following: Convention for the Suppression of Unlawful Seizure of Aircraft; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; International Convention against the Taking of Hostages; Convention on the Physical Protection of Nuclear Material; 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; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf; and International Convention for the Suppression of Terrorist Bombings [Sec. 3(j)].

A terrorist is a natural person who, among others, commits terrorist acts. This includes those who contribute to the commission of terrorist acts by a group of persons acting with a common purpose where the contribution is made intentionally and with the aim of furthering the terrorist act or with the knowledge of the intention of the group to commit a terrorist act [Sec. 3(i)]. A terrorist organization, association or group of persons is defined also [Sec. 3(k)].

The crime of financing of terrorism is committed by any person who, directly or indirectly, willfully and without lawful excuse, possesses, pro-

vides, collects or uses property or funds or makes available property, funds or financial service or other related services, by any means, with the unlawful and willful intention that they should be used or with the knowledge that they are to be used, in full or in part: (a) to carry out or facilitate the commission of any terrorist act; (b) by a terrorist organization, association or group; or (c) by an individual terrorist (Sec. 4). Attempt or conspiracy to finance terrorism and deal with property or funds of designated persons is criminalized (Sec. 5).

The law states that the Philippines' Anti-Money Laundering Council, consistent with international obligations, shall be authorized to issue a freeze order with respect to property or funds of a designated organization, association, group or any individual to comply with binding terrorism-related Resolutions, including Resolution No. 1373, of the UN Security Council pursuant to Article 41 of the UN Charter. The order shall be effective until the basis for the issuance thereof shall have been lifted. However, if the property or funds subject of the order are found to be in any way related to financing of terrorism or acts of terrorism committed within the jurisdiction of the Philippines, they shall be the subject of civil forfeiture proceedings. (Sec. 11)

Notably, on certain cases, the law is given extra-territorial application, subject to the provision of an existing treaty, including the International Convention for the Suppression of the Financing of Terrorism of which the Philippines is a party, and to any contrary provision of any law of preferential application. In the case of an alien whose extradition is requested pursuant to the International Convention for the Suppression of the Financing of Terrorism, and that alien is not extradited to the requesting State, the Philippines, shall submit the case without undue delay to the Department of Justice for the purpose of prosecution in the same manner as if the act constituting the offense had been committed in the Philippines. Philippine courts shall have jurisdiction over the offense. (Sec. 19)

Treaties

INDIA

TAXATION OF OFFSHORE CAPITAL GAINS AND THE INDIAN INCOME-TAX ACT – GLOBAL CORPORATE STRUCTURES AND TAX AVOIDANCE MEASURES – DOUBLE TAXATION TREATIES – FOREIGN DIRECT INVESTMENT AND INVESTMENT TREATIES

Vodafone International Holdings B.V. v. Union of India and Another
[Supreme Court of India, 20 January 2012 <http://JUDIS.NIC.IN>]

Facts

This case is related to the taxation of offshore capital gains. Besides that, the case also provided a window for the existence of a complex corporate share structure at the global level and its transfer to various holding companies located in different jurisdictions. The Court provided the summary of the facts involved in the opening paragraph. The matter concerned a tax dispute involving the Vodafone Group with the Indian Tax Authorities in relation to the acquisition by Vodafone International Holdings (VIH), a company resident for tax purposes in the Netherlands, of the entire share capital of CGP Investments (Holdings) Ltd. (CGP), a company resident for tax purposes in the Cayman Islands vide transaction dated 11.02.2007, whose stated aim, according to the Revenue, was “acquisition of 67% controlling interest in Hutchison Essar Limited (HEL), being a company resident for tax purposes in India.” This was disputed by the appellant VIH stating that VIH agreed to acquire companies which in turn controlled a 67% interest, but not controlling interest, in Hutchison Essar Limited. According to the appellant, CGP held indirectly through other companies’ 52% shareholding interest in HEL as well as Options to acquire a further 15% shareholding interest in HEL, subject to relaxation of FDI norms. In short, the Indian tax authorities sought to tax the capital gains arising from the sale of the share capital of CGP on the basis that CGP, whilst not a tax resident in India, held the underlying Indian assets.

While the above paragraph provides a brief set of facts leading the taxing of an offshore transaction, the first few paragraphs of the Court verdict explained the complex internal and global corporate structure of the companies involved and the transactions undertaken. The Court had to

decide as to how in certain circumstances tax avoidance measures should be identified and brought under the tax net. While considering this issue, the Court examined the arguments put forward with regard two important cases, namely *Union of India v. Azadi Bachao Andolan* (2004) 10 SCC 1 and the *McDowell and Co. Ltd. v. CTO* (1985) 3 SCC 230. The Court pointed out:

Before coming to Indo-Mauritius DTAA, we need to clear the doubts raised on behalf of the Revenue regarding the correctness of Azadi Bachao (supra) for the simple reason that certain tests laid down in the judgments of the English Courts subsequent to the *Commissioners of Inland Revenue v. His Grace the Duke of Westminster* 1935 All E.R. 259 and *W.T. Ramsay Ltd. v. Inland Revenue Commissioners* (1981) 1 All E.R. 865 help us to understand the scope of Indo-Mauritius DTAA. It needs to be clarified, that, McDowell dealt with two aspects. First, regarding validity of the Circular(s) issued by CBDT concerning Indo-Mauritius DTAA. Second, on concept of tax avoidance/evasion. Before us, arguments were advanced on behalf of the Revenue only regarding the second aspect.

The Court referred to several English cases (two of them as quoted in the above) and to the Westminster Principle which stated that “given that a document or transaction is genuine, the court cannot go behind it to some supposed underlying substance.” The Court also noted that this principle had been reiterated in subsequent English Court judgments as “cardinal principle.”⁸⁶

86 Ramsay was a case of sale-lease back transaction in which gain was sought to be counteracted, so as to avoid tax, by establishing an allowable loss. The method chosen was to buy from a company a readymade scheme, whose object was to create a neutral situation. The decreasing asset was to be sold so as to create an artificial loss and the increasing asset was to yield a gain which would be exempt from tax. The Crown challenged the whole scheme saying that it was an artificial scheme and, therefore, fiscally ineffective. It was held that Westminster did not compel the court to look at a document or a transaction, isolated from the context to which it properly belonged. It is the task of the Court to ascertain the legal nature of the transaction, and, while doing so, it has to look at the entire transaction as a whole and not to adopt a dissecting approach. In the present case, the Revenue has adopted a dissecting approach at the Department level 61. Ramsay did not discard Westminster but read it in the proper context by “device” which was colorable in nature had to be ignored as fiscal nullity. Thus, Ramsay laid down the principle of statutory interpretation rather than an over-arching

The Court referred to what has been termed as “separate entity principle” and noted that the approach of both the corporate and tax laws, particularly in the matter of corporate taxation, generally was founded on this principle i.e., to treat a company as a separate person. The Court noted

anti-avoidance doctrine imposed upon tax laws. *Furniss (Inspector of Taxes) v. Dawson* (1984) 1 All E.R. 530 dealt with the case of interpositioning of a company to evade tax. On facts, it was held that the inserted step had no business purpose, except deferment of tax although it had a business effect. *Dawson* went beyond *Ramsay*. It reconstructed the transaction not on some fancied principle that anything done to defer the tax be ignored but on the premise that the inserted transaction did not constitute “disposal” under the relevant Finance Act. Thus, *Dawson* is an extension of *Ramsay* principle. After *Dawson*, which empowered the Revenue to restructure the transaction in certain circumstances, the Revenue started rejecting every case of strategic investment/tax planning undertaken years before the event saying that the insertion of the entity was effected with the sole intention of tax avoidance. In *Craven (Inspector of Taxes) v. White (Stephen)* (1988) 3 All. E.R. 495, it was held that the Revenue cannot start with the question as to whether the transaction was a tax deferment/saving device but that the Revenue should apply the look at test to ascertain its true legal nature. It observed that genuine strategic planning had not been abandoned. The majority judgment in *McDowell* held that “tax planning may be legitimate provided it is within the framework of law” (para. 45). In the latter part of para. 45, it held that “colorable device cannot be a part of tax planning[,] and it is wrong to encourage the belief that it is honorable to avoid payment of tax by resorting to dubious methods.” It is the obligation of every citizen to pay the taxes without resorting to subterfuges. The above observations should be read with para. 46 where the majority holds “on this aspect one of us, Chinnappa Reddy, J. has proposed a separate opinion with which we agree.” The words “this aspect” express the majority’s agreement with the judgment of Reddy, J. only in relation to tax evasion through the use of colorable devices and by resorting to dubious methods and subterfuges. Thus, it cannot be said that all tax planning is illegal/illegitimate/impermissible. Moreover, Reddy, J. himself says that he agrees with the majority. In the judgment of Reddy, J., there are repeated references to schemes and devices in contradistinction to “legitimate avoidance of tax liability” (paras. 7-10, 17 & 18). In our view, although Chinnappa Reddy, J. makes a number of observations regarding the need to depart from the “Westminster” and tax avoidance, these are clearly only in the context of artificial and colorable devices. Reading *McDowell*, in the manner indicated hereinabove, in cases of treaty shopping and/or tax avoidance, there is no conflict between *McDowell* and *Azadi Bachao* or between *McDowell* and *Mathuram Agrawal*.

that the Indian Income Tax Act, 1961, in the matter of corporate taxation, is founded on the principle of the independence of companies and other entities subject to income-tax.⁸⁷

The Court noted and accepted that the group parent company could be involved in giving principal guidance to group companies by providing general policy guidelines to group subsidiaries. The Court, however, also noted that “the fact that a parent company exercises shareholder’s influence on its subsidiaries does not generally imply that the subsidiaries are to be deemed residents of the State in which the parent company resides.” While referring to separate existence of different companies that are part of the same group, the Court noted:

It is a common practice in international law, which is the basis of international taxation, for foreign investors to invest in Indian companies through an interposed foreign holding or operating company, such as Cayman Islands or Mauritius based company for both tax and business purposes. In doing so, foreign investors are able to avoid the lengthy approval and registration processes required for a direct transfer (i.e., without a foreign holding or operating company) of an equity interest in a foreign invested Indian company. However, taxation of such Holding Structures very often gives rise to issues such as double taxation, tax deferrals and tax avoidance. In this case, we are concerned with the concept of GAAR. In this case, we are not concerned with treaty-shopping but with the anti-avoidance rules.

While noting that the concept of GAAR was not new to India since it already had a judicial anti-avoidance rule, like some other jurisdictions, lack of clarity and absence of appropriate provisions in the statute and/or

87 Companies and other entities are viewed as economic entities with legal independence vis-a-vis their shareholders/participants. It is fairly well accepted that a subsidiary and its parent are totally distinct tax payers. Consequently, the entities subject to income-tax are taxed on profits derived by them on standalone basis, irrespective of their actual degree of economic independence, and regardless of whether profits are reserved or distributed to the shareholders/participants. Furthermore, shareholders/participants that are subject to (personal or corporate) income-tax are generally taxed on profits derived in consideration of their shareholding/participations, such as capital gains. Now a days, it is fairly well settled that for tax treaty purposes a subsidiary and its parent are also totally separate and distinct tax payers.

in the treaty regarding the circumstances, in which judicial anti-avoidance rules would apply, had generated litigation in India.

Applying the above tests, we are of the view that every strategic foreign direct investment coming to India, as an investment destination, should be seen in a holistic manner. While doing so, the Revenue/Courts should keep in mind the following factors: the concept of participation in investment; the duration of time during which the Holding Structure exists; the period of business operations in India; the generation of taxable revenues in India; the timing of the exit; and the continuity of business on such exit. In short, the onus will be on the Revenue to identify the scheme and its dominant purpose. The corporate business purpose of a transaction is evidence of the fact that the impugned transaction is not undertaken as a colorable or artificial device. The stronger the evidence of a device, the stronger the corporate business purpose must exist to overcome the evidence of a device.

The Court did not concur with the conclusions of the High Court of Bombay in applying the “nature and character of the transaction” test. The High Court had noted that besides transferring shares, there was also transaction of transfer of other ‘rights and entitlements’ which constituted themselves “capital assets” within the relevant provisions of the Indian Income Tax Act. While disagreeing with this view, the Court stated:

This case concerns “a share sale” and not an asset sale. It concerns sale of an entire investment. A “sale” may take various forms. Accordingly, tax consequences will vary. The tax consequences of a share sale would be different from the tax consequences of an asset sale. A slump sale would involve tax consequences which could be different from the tax consequences of sale of assets on itemized basis. “Control” is a mixed question of law and fact. Ownership of shares may, in certain situations, result in the assumption of an interest which has the character of a controlling interest in the management of the company. A controlling interest is an incident of ownership of shares in a company, something which flows out of the holding of shares. A controlling interest is, therefore, not an identifiable or distinct capital asset independent of the holding of shares. The control of a company resides in the voting power of its shareholders and shares represent an interest of a shareholder which is made up of various rights contained in the contract embedded in the Articles of Association. The right of a shareholder may assume the character of a controlling interest where the extent of the

shareholding enables the shareholder to control the management. Shares, and the rights which emanate from them, flow together and cannot be dissected.

Decision

The Supreme Court did not agree with the rationale of the High Court of Bombay regarding the nature of the transaction. According to the Court, the case dealt with “share sale,” not “asset sale.” The Court further noted that the case did not involve sale of assets on itemized basis. The Court felt that the High Court “ought to have applied the look at test . . . holistically.”

The Court, applying the look at test in order to ascertain the true nature and character of the transaction, held that “the Offshore Transaction here in is a bona fide structured FDI investment into India which fell outside India’s territorial tax jurisdiction, hence not taxable.” The said Offshore Transaction, the Court noted, evidenced participative investment and not a sham or tax avoidant preordained transaction. The Court held that:

The said Offshore Transaction was between HTIL (a Cayman Islands company) and VIH (a company incorporated in Netherlands). The subject matter of the Transaction was the transfer of the CGP (a company incorporated in Cayman Islands). Consequently, the Indian Tax Authority had no territorial tax jurisdiction to tax the said Offshore Transaction.

Separate Opinion

In his separate opinion, K. S. Radhakrishnan, J. noted that the question involved in this case was of considerable importance, especially on Foreign Direct Investment (FDI), which was indispensable for a growing economy like India.⁸⁸ Mapping the global FDI regime and its impact on India, the Court further noted:

88 He also noted, “Foreign investments in India are generally routed through Offshore Finance Centres (OFC) also through the countries with whom India has entered into treaties. Overseas investments in Joint Ventures (JV) and Wholly Owned Subsidiaries (WOS) have been recognized as important avenues of global business in India. Potential users of off-shore finance are: international companies, individuals, investors, and others and capital flows through FDI, Portfolio Debt Investment, Foreign Portfolio Equity Investment, and so on. Demand for off-shore

Several international organizations like UN, FATF, OECD, Council of Europe and the European Union offer finance, one way or the other, for setting up companies all over the world. Many countries have entered into treaties with several offshore companies for cross-border investments for mutual benefits. India has also entered into treaties with several countries for bilateral trade which has been statutorily recognized in this country. United Nations Conference on Trade and Development (UNCTAD) Report on World Investment prospects survey 2009-11 states that India would continue to remain among the top five attractive destinations for foreign investors during the next two years.

Referring to various methods of cross-border FDI schemes, the Court sought to point out how these aspects needed to be reconciled with the Indian laws. The Court noted, thus:

Merger, Amalgamation, Acquisition, Joint Venture, Takeovers and Slump-sale of assets are few methods of cross-border re-organizations. Under the FDI Scheme, investment can be made by availing the benefit of treaties, or through tax havens by non-residents in the share/convertible debentures/preference shares of an Indian company but the question which looms large is whether our Company Law, Tax Laws and Regulatory Laws have been updated so that there can be greater scrutiny of non-resident enterprises, ranging from foreign contractors and service providers, to finance investors. Case in hand is an eye-opener of what we lack in our regulatory laws and what measures we have to take to meet the various unprecedented situations, that too without sacrificing national interest. Certainty in law in dealing with such cross-border investment issues is of prime importance, which has been felt by many countries around the world and some have taken adequate regulatory measures so that investors can arrange their affairs fruitfully and effectively. Steps taken by various countries to meet such situations may also guide us, a brief reference of which is being made in the later part of this judgment.

facilities has considerably increased owing to high growth rates of cross-border investments, and a number of rich global investors have come forward to use high technology and communication infrastructures. Removal of barriers to cross-border trade, the liberalization of financial markets, and new communication technologies has had positive effects on global economic growth, and India has also been greatly benefited.”

While noting that the concerned case-related cross-border investment and legal issues emanated from that, the Radhakrishnan J. agreed with facts that had been already elaborately dealt with. However, while concurring with all major issues, he felt that reference to few facts would be necessary to address and answer certain core issues that had been raised. The High Court of Bombay had held, after elaborating upon the maze of facts relating to investments made by various holding companies, that transaction between Hutch and Vodafone in transferring “controlling interest” in India as taxable under its relevant laws.

The Court noted that corporate structure was primarily created for business and commercial purposes and multi-national companies who make offshore investments always aim at better returns to the shareholders and the progress of their companies.⁸⁹ The Revenue/Courts, the Court pointed out, could always examine whether those corporate structures are genuine and set up legally for sound and veritable commercial purposes.⁹⁰ The Court further pointed out:

89 The Court pointed out, “Corporate structure created for genuine business purposes are those which are generally created or acquired: at the time when investment is being made; or further investments are being made; or the time when the Group is undergoing financial or other overall restructuring; or when operations, such as consolidation, are carried out, to clean defused or over-diversified. Sound commercial reasons like hedging business risk, hedging political risk, mobility of investment, ability to raise loans from diverse investments, often underlie creation of such structures. In transnational investments, the use of a tax neutral and investor-friendly countries to establish SPV is motivated by the need to create a tax efficient structure to eliminate double taxation wherever possible and also plan their activities attracting no or lesser tax so as to give maximum benefit to the investors. Certain countries are exempted from capital gain, certain countries are partially exempted and, in certain countries, there is nil tax on capital gains. Such factors may go in creating a corporate structure and also restructuring.”

90 While noting that some of these companies involve in manipulation of the market, money laundering and other related activities, the Court referred to a 1998 report prepared by the Organization of Economic Co-operation and Development (OECD) called “Harmful Tax Competition: An Emerging Global Issue.” This report was about doing away with tax havens and offshore financial centers, like the Cayman Islands, on the basis that their low-tax regimes provide them with an unfair advantage in the global market place and were, thus, harmful to the economics of more developed countries.

Overseas companies are companies incorporated outside India and neither the Companies Act nor the Income Tax Act enacted in India has any control over those companies established overseas and they are governed by the laws in the countries where they are established. From country to country laws governing incorporation, management, control, taxation etc. may change. Many developed and wealthy Nations may park their capital in such off-shore companies to carry on business operations in other countries in the world. Many countries give facilities for establishing companies in their jurisdiction with minimum control and maximum freedom. Competition is also there among various countries for setting up such offshore companies in their jurisdiction. Demand for offshore facilities has considerably increased, in recent times, owing to high growth rates of cross-border investments and to the increased number of rich investors who are prepared to use high technology and communication infrastructures to go offshore. Removal of barriers to cross-border trade, the liberalization of financial markets and new communication technologies has had positive effects on the developing countries including India.

The Court surveyed various legislative measures taken by India to regulate offshore tax evasion. Specific reference was made to India-Mauritius Double Taxation Treaty and the legal principles that had been evolved in the *Azadi Bachao Andolan* case decided by the Supreme Court.

After considering various provisions of the Indian tax laws, particularly Section 195 of the Indian Income Tax Act, 1961 relating to offshore transactions, Radhakrishnan, J. concurred and held that he did not agree with the conclusions that the sale of CGP share by HTIL to Vodafone would amount to transfer of a capital asset within the meaning of Section 2 (14) of the Indian Income Tax Act.

NATIONAL AND INTERNATIONAL LEGAL REGIMES RELATING TO
HAZARDOUS/TOXIC WASTES – CONFORMITY OF INDIAN LAWS
WITH BASEL CONVENTION AND MARPOL CONVENTION

Research Foundation for Science Technology and Natural Resource v. Union of India and Others [Supreme Court of India, 6 July 2012 <http://JUDIS.NIC.IN>]

Facts

Research Foundation for Science Technology and Natural Resource Policy, a civil society organization, filed a writ petition before the Supreme Court seeking to ban imports of all hazardous/toxic wastes. It also sought a direction to amend the rules relating to hazardous and toxic wastes in conformity with the BASEL Convention and Article 21, 47, and 48A of the Constitution. The petition also sought to declare that without adequate protection to the workers and public and without any provision of sound environment management of disposal of hazardous/toxic wastes, the Hazardous Wastes (Management & Handling) Rules, 1989 (HWMH rules, 1989) violates fundamental rights, and therefore, is unconstitutional. Importation of toxic wastes from industrialized countries to India under the cover of recycling was also challenged as violating Articles 14 and 21 of the Indian Constitution. (It also violates Article 47 which enjoins a duty on the State to raise the standards of living and improve public health and Article 48A which provides that the State shall endeavor to protect and improve the environment and to safeguard the forests and wildlife of the country).

The petition also referred to the tragedies that had occurred on account of either dumping or releasing of hazardous and toxic wastes into the environment such as the Union Carbide factory at Bhopal in 1984. The petition also referred to the context in which Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal was adopted under the auspices of the United Nations Environment Programme (UNEP), which had convened a Conference on the Global Convention on the Control of Transboundary Movements of Hazardous Wastes pursuant to the decision adopted by the Governing Council of UNEP on 17th June 1987. This Conference was held at the European World Trade and Convention Centre, Basel. The petition noted that the Basel Convention was adopted on March 22, 1989, and India signed the Convention on Sep-

tember 22, 1992. The petitioner contended that India should have enacted the laws or amended the existing regulatory framework regarding to the transboundary movement procedures of hazardous wastes.

The petition outlined the salient features of the Basel Convention: (a) inform other parties about its decision to prohibit the import of hazardous wastes or other wastes for disposal (Article 13); (b) when notified about this prohibition, other parties should not permit exportation of hazardous wastes and other wastes to that party; (c) prohibit exportation of hazardous wastes and other wastes if there is no written consent of the importing State to that specific importation; (d) prepare steps to prevent pollution due to hazardous wastes affecting human health and the environment.

One of the main concerns of the petitioners was that Asia was fast becoming a vast dumping ground for international waste traders under the garb of recycling. Petitioner also drew the attention of the Court to the provisions of the HWMH Rules, 1989 and complained that the same had not been implemented by the Central Government, the State Governments, and Union Territories and their respective Pollution Control Boards. Pursuant to this, the Court asked all the relevant State Governments and Union Territories and the respective Pollution Control Boards to submit a report (affidavit) stating the status of implementation.

Judgment

The Court, after considering the reports and finding it unsatisfactory, decided to appoint a High-Powered Committee with 14 issues as terms of reference. These issues related to the various aspects of implementation of Basel Convention within India. The issues were, briefly, (a) to what extent hazardous wastes listed in the Basel Convention had been banned by the Government; (b) to present the status of recycling imported and indigenous hazardous wastes; (c) to determine the status of implementation of the HWMH Rules, 1989 by various State and other entities; (d) to safeguard in place to ensure that banned toxic/hazardous wastes would not be imported; (e) make changes required in the existing laws to regulate the functioning of units handling hazardous wastes and protect the people (including workers in the factory) from environmental hazards; (f) to assess the existing facilities for disposal of hazardous wastes; (g) what needs to be done further to regulate the existing body of laws; (h) to make recommendations for issuance of authorization/permission under provi-

sions of HWMH Rules, 1989; (i) to identify criteria for designating areas for locating units handling hazardous wastes and waste disposal sites; (j) to examine the effectiveness of State Boards in handling hazardous wastes in accordance with HWMH Rules, 1989; (k) to recommend a mechanism for publication of inventory giving area-wise information about level and nature of hazardous wastes; (l) to identify a framework of reducing risks to environment and public health by promoting production methods and products, which are ecologically friendly, and thus, reduce the production of toxics; (m) to examine quantum and nature of hazardous wastes lying at the docks/ports/ICDs, and recommend a mechanism for its safe disposal or re-export to the original exporters; and (n) to decontaminate ships before they are exported to India for breaking.

This High-Powered Committee submitted its report after making thorough examination of all matters relating to hazardous wastes. The Court considered this report in October 2003 and laid emphasis on two issues: (a) relating to imported waste oil lying in the ports and docks; and (b) ship breaking. The Court noted that the ship breaking operations could not be allowed to continue without strictly adhering to all precautionary principles. The Court was concerned about the illegal imports of waste oil lying in the ports and docks. It constituted an eight-member Committee to deal with this issue and act against such illegal importers under the relevant laws that included Customs Act, 1962 and Central Excise Act, 1944. Further, the Court also had to deal with issues of large scale oil wastes located in ports and docks with their importers untraceable. In order to deal with that, it constituted a Monitoring Committee comprising experts suggested by the Ministry of Environment and Forests. While dealing with this issue, the Court considered the requirements under the MARPOL Convention, which was mandatory for signatory States to allow discharge of sludge oil for the purposes of recycling. The Court noted that:

The original MARPOL Convention was signed on 17th February, 1973, but did not come into force. Subsequently, in combination with the 1978 Protocol, the Convention was brought into force on 2nd October, 1983. As will be noticed from the acronym, the expression “MARPOL” is the short form of “Marine Pollution.” The same was signed with the intention of minimizing pollution on the seas, which included dumping, oil and exhaust pollution. Its object was to preserve the marine environment through the complete elimination of pollution by oil and other harmful substances and

the minimization of accidental discharge of such substances. As far as this aspect of the matter is concerned, the Central Government was directed to file an affidavit indicating in detail how the said oil was dealt with. The issue relating to the import of such sludge oil was left unresolved for decision at a subsequent stage.

While hearing the case, the court examined at length “two dominating principles relating to pollution namely, the polluter-pays principle and precautionary principle.” Based on this, the Court gave several directions. The Court, taking into account the reports of the Monitoring Committee, gave directions (from 2003 to 2005) to destroy or recycle hazardous wastes which were identified at various sites such as ports and other places. The Court also noted that a detailed analysis and consideration of the proper implementation of the Basel Convention and MARPOL Convention within India were still pending as mentioned in the prayers of the petitioners (referring to Basel Convention and Articles 21, 47, and 48 A of the Constitution and also amendment of the HWMH Rules, 1989 to provide adequate protection to workers and public). It also noted that the proceedings before the Court became a continuing mandamus, and it from time to time took up several issues emanating from the first prayer in the writ petition to ban imports of all hazardous/toxic wastes. The Court also noted that one of the Conventions, namely, the impact of the MARPOL Convention, though referred to, was not decided and left for decision at the final hearing. The Court referred to the history, evolution, and salient features of the MARPOL Convention. It stated, thus:

The MARPOL Convention, normally referred to as “MARPOL 73/78”, may be traced to its beginnings in 1954, when the first conference was held and an International Convention was adopted for the Prevention of Pollution of Sea by Oil (OILPOL). The same came into force on 26th July, 1958 and attempted to tackle the problem of pollution of the seas by oil, such as, (a) crude oil; (b) fuel oil; (c) heavy diesel oil; and (d) lubricating oil. The first Convention was amended subsequently in 1962, 1969 and 1971, limiting the quantities of oil discharge into the sea by Oil Tankers and also the oily wastes from use in the machinery of the vessel. Prohibited zones were established extending the setting up of earmarked areas in which oil could be discharged, extending at least 50 miles from the nearest land. In 1971, reminders were issued to protect the Great Barrier Reef of Australia. 1973 saw the adoption of the International Convention for the Prevention of Pollution from Ships. The said

Convention, commonly referred to as MARPOL, was adopted on 2nd November, 1973, at the International Marine Organization and covered pollution by: (i) oil; (ii) chemicals; (iii) harmful substances in packaged form; (iv) sewage; and (v) garbage. Subsequently, the 1978 MARPOL Protocol was adopted at a Conference on Tanker Safety and Pollution Prevention in February, 1978.

The overall objective of the MARPOL Convention was to completely eliminate pollution of the marine environment by discharge of oil and other hazardous substances from ships, and to minimize such discharges in connection with accidents involving ships. The MARPOL 73/78 Convention has six Annexures containing detailed regulations regarding permissible discharges, equipment on board ships, etc. They are as follows: Annex I: Regulations for the Prevention of Pollution by Oil, 2 October, 1983; Annex II: Regulations for the Control of Pollution by Noxious Liquid Substances (Chemicals) in Bulk, 6 April, 1987; Annex III: Regulations for the Prevention of Pollution by Harmful Substances Carried by Sea in Packaged Form, 1 July 1992; Annex IV: Regulations for the Prevention of Pollution by Sewage from ships, 27 September 2003; Annex V: Regulations for the Prevention of Pollution by Garbage from Ships, 31 December 1988; and Annex VI: Regulations for the Prevention of Air Pollution from Ships and Nitrogen oxide. The MARPOL 73/78 Convention will enter into force on 19 May 2005.

Apart from the said Regulations, the MARPOL Convention also contains various Regulations with regard to inspection of ships in order to ensure due compliance with the requirements of the Convention. The Court further noted,

India is a signatory, both to the Basel Convention as also the MARPOL Convention, and is, therefore, under an obligation to ensure that the same are duly implemented in relation to import of hazardous wastes into the country. As we have noticed earlier, the Basel Convention prohibited the import of certain hazardous substances on which there was a total ban. However, some of the other pollutants, which have been identified, are yet to be notified and, on the other hand, in order to prevent pollution of the seas, under the MARPOL Convention the signatory countries are under an obligation to accept the discharge of oil wastes from ships. What is, therefore, important is for the concerned authorities to ensure that such waste oil is not allowed to contaminate the surrounding areas and also, if suitable, for the purposes of recycling, to allow

recycling of the same under strict supervision with entrusted units and, thereafter, to oversee its distribution for reuse.

Decision

Recalling its earlier orders and two constituted Committees to analyze and monitor the quantum and handling of hazardous and other wastes during last 15 years of the proceedings (which also brought to focus contamination risks involved in ship breaking), the Court directed the Central Government to ban import of all hazardous/toxic wastes which had been identified and declared to be so under the Basel Convention and its different protocols. The Court also directed the Central Government to bring the HWMH Rules, 1989 in line with Basel Convention and Articles 21, 47, and 48A of the Constitution.

PHILIPPINES

INTERPRETATION OF TREATIES – AIR TRANSPORT AGREEMENTS – TAX EXEMPTIONS

***Silkair (Singapore) Pte. Ltd. v. Commissioner of Internal Revenue* [G.R. No. 166482. 25 January 2012]**

Silkair (Singapore) Pte. Ltd. is a foreign corporation duly licensed to do business in the Philippines as an on-line international carrier operating the Cebu-Singapore-Cebu and Davao-Singapore-Davao routes. In the course of its international flight operations, it purchased aviation fuel from Petron Corporation (Petron) in 1998, paying the excise taxes thereon in the sum of PhP5,007,043.39. The payment was advanced by Singapore Airlines, Ltd. In 1999, Silkair filed an administrative claim for refund representing excise taxes on the purchase of jet fuel from Petron, which it alleged to have been erroneously paid.

While the claim was based on the 1997 Tax Code, Silkaair also invoked Article 4(2) of the Air Transport Agreement between the Government of the Republic of the Philippines and the Government of the Republic of Singapore (Air Transport Agreement between RP and Singapore). It provides the reciprocal enjoyment of the privilege of the designated airline of the contracting parties –

ART. 4

2. Fuel, lubricants, spare parts, regular equipment and aircraft stores introduced into, or taken on board aircraft in the territory of one Contracting Party by, or on behalf of, a designated airline of the other Contracting Party and intended solely for use in the operation of the agreed services shall, with the exception of charges corresponding to the service performed, be exempt from the same customs duties, inspection fees and other duties or taxes imposed in the territory of the first Contracting Party, even when these supplies are to be used on the parts of the journey performed over the territory of the Contracting Party in which they are introduced into or taken on board. The materials referred to above may be required to be kept under customs supervision and control.

The lower courts denied the claim for tax refund. In this appeal, Silkair argues that it is the proper party to file the claim for refund, being the entity granted the tax exemption under the Air Transport Agreement between the Philippines and Singapore. It disagrees with the reasoning that since an excise tax is an indirect tax, it is the direct liability of the manufacturer, Petron, because this puts to naught whatever exemption was granted to petitioner by Article 4 of the Air Transport Agreement.

The Supreme Court, however, sustained the denial. The core legal issue is the legal personality of Silkair to file an administrative claim for refund of excise taxes. In three previous cases involving the same parties, the Court said that it has already settled the issue of whether Silkair is the proper party to seek the refund. Excise taxes are basically an indirect tax. While the tax is directly levied upon the manufacturer/importer upon removal of the taxable goods from its place of production or from the customs custody, the tax, in reality, is actually passed on to the end consumer as part of the transfer value or selling price of the goods, sold, bartered or exchanged. The proper party to question or seek a refund of the tax is the statutory taxpayer. The contention that the ruling would put to naught the exemption granted under the 1997 Tax Code and Article 4 of the Air Transport Agreement is not well-taken. Since the supplier herein involved is also Petron, Silkair must submit a valid exemption certificate for the purpose. It is premature for it to assert that the denial of its claim for tax refund nullifies the tax exemption granted to it under the 1997 Tax Code and Article 4 of the Air Transport Agreement.

TREATIES AND CONVENTIONS

In 2012, the Senate of the Philippines has concurred with several important agreements that involve the Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I); Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the International Center for Living Aquatic Resources Management; mutual legal assistance in criminal matters; consular matters; social security; visiting forces; and the International Labor Organization (ILO).

AGREEMENTS CONCURRED BY THE PHILIPPINE SENATE IN 2012 – GENEVA CONVENTIONS – INTERNATIONAL HUMANITARIAN LAW – PROTOCOL ADDITIONAL TO THE GENEVA CONVENTION OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICTS (PROTOCOL I)

Philippine Senate Resolution No. 77, 6 March 2012

The Philippines has been a party to the Four Geneva Conventions of 12 August 1949 since 6 October 1952, to Additional Protocol II and to Additional Protocol III of the Conventions since 11 December 1986 and 22 August 2006, respectively. In 1977, the Philippines signed Protocol I, but it remained one of the few States which had yet to ratify it.

According to the Senate resolution, the Philippine President ratified the Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) on 23 December 2010 and submitted it to the Senate for concurrence with the understanding that: (1) The application of Protocol I shall not affect the legal status of the Parties to the conflict and the concerned territory (no claim of status of belligerency may be invoked from it); (2) It may in no case be invoked in internal armed conflicts within sovereign States; and (3) The terms “armed conflict” and “conflict” do not include the commission of ordinary crimes.

**AGREEMENTS CONCURRED BY THE PHILIPPINE SENATE IN 2012 –
GENEVA CONVENTIONS – INTERNATIONAL HUMANITARIAN LAW –
OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE
AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR
PUNISHMENT**

Philippine Senate Resolution No. 78, 6 March 2012

The Philippines became is a State Party to the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, having ratified it on 18 June 1986.

The Senate resolution states that the Optional Protocol to the Convention places emphasis on preventing violations and introduces a new system of monitoring compliance to the Convention by establishing mechanisms that would enable regular and periodic visits to places of detention. It would also enable States Parties to benefit from the assistance that the international mechanism will offer, including advisory, technical and financial assistance. As a backgrounder, the resolution relates that the country is also a party to the International Covenant on Civil and Political Rights which provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

**LIVING AQUATIC RESOURCES – AGREEMENT BETWEEN THE
GOVERNMENT OF THE REPUBLIC OF THE PHILIPPINES AND THE
INTERNATIONAL CENTER FOR LIVING AQUATIC RESOURCES
MANAGEMENT**

Philippine Senate Resolution No. 79, 6 March 2012

The Government of the Republic of the Philippines and the International Center for Living Aquatic Resources Management (ICLARM) signed an agreement on 22 April 2008, which provides for the establishment of the WorldFish Center Office in the Philippines. The Office would primarily undertake activities for research and development of aquatic and maritime resources in the Philippines and nearby regions. It could enter into contracts, acquire/dispose properties, receive gifts and donations, hold funds, and conduct research, training and other programs in line with its mandate.

The resolution opines that the establishment of the Center brings potential for the Philippines to meet the Millennium Development Goals on poverty reduction and hunger elimination, among others. The agreement

states that the Office shall enjoy immunities and privileges accorded to an international organization of a universal character. This includes immunity from penal, civil, and administrative proceedings and exemption from customs, visa and immigration requirements.

**MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS – TREATY
ON MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS
BETWEEN THE REPUBLIC OF THE PHILIPPINES AND THE UNITED
KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND**

Philippine Senate Resolution No. 81, 8 May 2012

The treaty on mutual legal assistance in criminal matters between the Philippines and the United Kingdom was signed on 18 September 2009 in London. The Philippine President ratified it on 12 July 2011 and accordingly submitted it to the Senate for concurrence.

The Senate resolution provides that the treaty seeks to establish effective measures of cooperation in the investigation, prosecution, and suppression of criminal offenses and in proceedings related to criminal matters. It prescribes a legal framework for mutual assistance in accord with the UN Convention against Corruption and the Convention for the Suppression and Financing of Terrorism. Assistance made possible under the treaty includes taking of testimony of witnesses, provision of documents and items of evidence, exchange of criminal records, execution of searches and seizures, location and identification of witnesses, tracing and confiscation of the proceeds of crimes, and freezing of assets.

**MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS – TREATY
BETWEEN THE REPUBLIC OF THE PHILIPPINES AND THE PEOPLE'S
REPUBLIC OF CHINA CONCERNING MUTUAL LEGAL ASSISTANCE
IN CRIMINAL MATTERS**

Philippine Senate Resolution No. 83, 8 May 2012

In Beijing, on 16 October 2000, the treaty between the Philippines and China was signed by both parties. The concurring Philippine Senate resolution states that it aims to improve cooperation between the parties in respect of mutual legal assistance in criminal matters on the basis of mutual respect for sovereignty, equality and mutual benefit.

The treaty seeks to provide a legal framework for mutual assistance in the investigation, and prosecution of criminal offenses and in proceedings related to criminal matters in accord with the UN Convention against Corruption and the Convention for the Suppression and Financing of Terrorism. Assistance made possible under the treaty includes taking of testimony of witnesses, provision of documents and items of evidence, exchange of criminal records, execution of searches and seizures, location and identification of witnesses, tracing and confiscation of the proceeds of crimes, and freezing of assets. It does not apply, however, to the extradition of any person and the execution of criminal judgments, verdicts or decisions permitted by the laws of the requested party and the treaty.

SOCIAL SECURITY – CONVENTION ON SOCIAL SECURITY BETWEEN THE REPUBLIC OF THE PHILIPPINES AND THE KINGDOM OF SPAIN

Philippine Senate Resolution No. 87, 15 May 2012

The new Convention on Social Security was signed in Manila on 12 November 2002. It amended and superseded the original Convention on Social Security which was signed in 1988 and came into force a year later. It sought to expand the protection afforded by the original treaty to Filipino workers, according to the Senate resolution, by extending the reach to a broader segment of the working population, augmenting economic benefits, and clarifying the procedure in computing the regulatory base of benefits vis-à-vis insurance periods. It applies to workers who are nationals of either Spain or the Philippines, and to workers who are refugees in conformity with the 1951 UN Refugee Convention and its 1967 Protocol, and stateless persons in accordance with the 1954 UN Statelessness Convention, who reside in the territories of either parties, as well as their family members and other beneficiaries entitled to the benefits.

The new treaty also covers public sector workers contributing to the Philippines' Government Service Insurance System in addition to the originally covered private sector workers contributing to the Philippines' Social Security System with respect to economic benefits. It retains important provisions of the original treaty on equality of treatment, export of benefits, totalization, payment of benefits, and mutual administrative assistance. The Philippine President ratified it on 6 September 2011.

**VISITING FORCES – AGREEMENT BETWEEN THE GOVERNMENT OF
THE REPUBLIC OF THE PHILIPPINES AND THE GOVERNMENT OF
AUSTRALIA CONCERNING THE STATUS OF VISITING FORCES OF
EACH STATE IN THE TERRITORY OF THE OTHER STATE**

Philippine Senate Resolution No. 100, 24 July 2012

The Philippines and Australia signed the Agreement between the Government of the Republic of the Philippines and the Government of Australia Concerning the Status of Visiting Forces of Each State in the Territory of the Other State (SOVFA) on 31 May 2007 in Canberra in order to further strengthen their defense cooperation activities.

The agreement aims to provide a framework to govern the status of the Armed Forces of the Philippines and the Australian Defense Forces personnel who participate in the education, training, combined exercises, and humanitarian activities in each other's territories as part of the parties' broad and deep cooperation in the area of defense and security. The Senate resolution clarifies that the agreement is not a basing agreement since it merely provides for temporary visits of Australian personnel in joint military training, exercise, humanitarian or other activities as may be approved by both parties. Neither does it authorize either country to deploy troops or conduct operations in the other's territory. However, it establishes the status of such forces when the parties arrange to send and/or receive forces as part of the countries' defense cooperation activities.

A total of 28 articles consist the agreement, which regulate the circumstances and conditions under which the Australian Visiting Force and its Civilian Component may be present in the Philippines. Under the agreement, the Visiting Force and the Civilian Component shall respect the law of the receiving State and shall be governed by the provisions on the responsibilities and procedures between the visiting forces and the host government. The agreement provides the basis for jurisdiction and custody in instances when visiting force personnel commit offenses while in the territory of the receiving State. The Service Authorities of Australia shall cooperate with the Philippine government to prevent any abuse or misuse of the privileges granted in favour of, and to ensure proper discharge of the obligations imposed on, members of the Visiting Force or its Civilian Component.

A joint committee is established to monitor the implementation of the agreement. The Philippine President ratified it on 23 December 2010. The Senate resolution sees that the agreement would contribute to the maintenance of regional and maritime security.

SRI LANKA

ECONOMIC RIGHTS OF AUTHOR'S WORK PROTECTED BY COPYRIGHT -BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS OF 1886 – COPYRIGHT,DESIGNS AND PATENTS ACT 1988 OF THE UNITED KINGDOM

Associated Newspapers of Ceylon Ltd v. Pituwana Liyanage Shantha Chandrapuptha Amarasinghe [2012] S.C.CHC (App) No.30/2003 (Sri Lanka)

This case is an appeal against a judgment from the Commercial High Court of Colombo, Sri Lanka on *inter alia* the question of economic rights of an author in a work protected by copyright, and the quantum of such damages.

Pituwana Liyanage Shantha Chandrapuptha Amarasinghe (Respondent) alleged that his intellectual property rights had been violated by Associated Newspapers of Ceylon Ltd. (Appellant) publication of nine photographs taken by the Respondent, violating his economic rights and moral rights in such works. The pictures had been taken during the communal riots in July 1983, in an extremely volatile context and enduring great difficulty, including threats of harm and assault.

The Court refers to the Berne Convention for the Protection of Literary and Artistic Works of 1886 (Convention), as amended, to which Sri Lanka is a signatory. According to the Convention, copyright for creative works does not have to be asserted or declared, as they are automatically in force at creation and are not subject to any formalities such as registration or application in countries adhering to the Convention. Further, all rights are protected until the author explicitly disclaims them or the copyright expires.

The Court also refers to section 171(3) of the Copyright, Designs and Patents Act 1988 of the United Kingdom in drawing guidance on the question of balancing the exercise of an author's copyright with the public interest.

LITERATURE

BOOK REVIEW

Boo Chan Kim, *Global Governance and International Law: Some Global and Regional Issues* · Seoul: Bo Go Sa, 2011 · ISBN 978898433870 · 303 pp

“Globalization” is an oft-used term in academia. Given the significant exposure to the term, many tend to generally underestimate the impact of “globalization” on international relations and law. Professor Boo Chan Kim, in his manuscript *Global Governance and International Law: Some Global and Regional Issues*, observes that international relations was strongly based on a realist conception has been continuously changing towards liberalism which posits that states are under the influence of international law. Professor Kim, who is presently a Professor of International Law and Legal Philosophy at Jeju National University Law School, provides his insights and thoughts on the changes in international relations and various issues related to it.

Global Governance and International Law: Some Global and Regional Issues is a collection of eight articles Professor Kim wrote during his academic career which includes “Introduction: the Significance of Global Governance;” “Global Governance and the International Rule of Law;” “Global Governance and the United Nations;” “Global Governance and Non-Governmental Organizations;” “Global Governance and Universal Jurisdiction;” “Global Governance and the Common Heritage of Mankind;” “Global Governance and the Dispute Settlement System;” and “Global Governance and Human Rights.” These chapters present a general and basic analysis on the topic and are accessible. Even though the book is not explicitly divided and categorized into different sections, there appear to be three parts. The first part (Chapter 1 and 2) provides readers with a general concept of global governance and the international rule of law. The second part (Chapter 3, 4, 5, 6, and 7) shows the ways to implement or improve the international rule of law in the international community. The third part (Chapter 8) concludes the book by stating that a State should strive to protect and improve human rights under global governance and the international rule of law with a case study between Korea and Japan.

Chapter 1 serves as a general introduction to the book. Before the author gets into a deeper and more detailed analysis in the subsequent

chapters, Chapter 1 provides a basic definition of “global governance,” and introduces the scope of the book and the structure of his analysis. The author also clearly and briefly explains that States are starting to give respect to international law since they are under the influence of the international rule of law. Moreover, he identifies various actors such as IGOs, NGOs, and individuals have a growing influence on the international community.

Chapter 2 generally explains what he understands as the international rule of law. As the individual is subject to the domestic legal system, the international rule of law requires a State to be subject to international law. From the Professor Kim’s perspective, NGOs and IGOs are critical in international society in the promotion of the international rule of law, and the international rule of law is the basis for global governance to achieve human rights and peace in the international community.

In the third chapter, Professor Kim attempts to explain the role of the United Nations in establishing and promoting the international rule of law. He regards the U.N. as the most important IGO to effectively promote the international rule of law in international society. The U.N., which consists of various bodies and committees, performs different functions that bring States under the influence of international law. However, the author proposes that the U.N. needs to be reformed in order to be a more efficient body for the international community to achieve the international rule of law.

Chapter 4 analyzes the role of NGOs for global governance. In addition to the U.N.’s role in promoting the international rule of law, the author further proposes that the status of NGOs are growing, and the U.N. should cooperate with NGOs to fulfill the unprecedented demands for the international rule of law to protect human rights and to promote common values in the international community.

In Chapter 5, the author emphasizes the importance of universal jurisdiction to promote the international rule of law. Universal jurisdiction allows a State to hear a case that occurs in another State’s jurisdiction. He acknowledges that the mechanism of universal jurisdiction undermines the traditional notion of international law because it denies the State’s territorial sovereignty. However, he believes and strongly proposes that universal jurisdiction actually enhances the international rule of law because these two mechanisms, universal jurisdiction and the international rule of law, have the same purposes of maintaining international peace and security and promoting human rights and cooperation among the States.

In Chapter 6, Professor Kim depicts that the change from the traditional norms of sovereignty to what is presently found in the international community and cooperation is evidenced by the emergence of the Common Heritage of Mankind. As the term “Common Heritage of Mankind” implies, it is a principal that the international community as a whole has an interest in regulating its usages, such as deep seabed, Antarctica, and outer space. The impact of globalization has pushed States to realize the importance of common interests and welfare. The concept of the Common Heritage of Mankind is, therefore, a reflection of such concern. The author does not deny the fact that the traditional norms of territorial sovereignty and state interest still have influence on international relations. However, he proposes that the Common Heritage of Mankind is quickly gaining legal status in international law and is substituting traditional concepts of international law.

Chapter 7 covers the dispute settlement system in international relations. Professor Kim explains how traditional international law has dealt with disputes between States. From his perspective, the traditional methods such as negotiation, conciliation, mediation, arbitration, good offices, and the ICJ have failed to fully enforce international law upon States, thus failing to promote the international rule of law in the international community. However, he asserts that a new dispute settlement system in UNCLOS has advanced international dispute settlement by including a system for compulsory jurisdiction. He also provides a case study, a maritime dispute between Korea and Japan, as an attempt to provide a desirable dispute settlement method through the UNCLOS. He suggests that the best means to dispute settlement is prevention.

In Chapter 8, the author finally deals with the ultimate agenda of the international rule of law and international law within the context of human rights. He presents a problem that relates to ethnic Koreans living in Japan; the political rights of Koreans in Japan. First, he provides a background of the problem, and the current status of the Koreans living in Japan. Then, he discusses legal issues surrounding the political rights of foreign residents under international law, and presents how European States and Korea handle the political rights of foreign residents. Afterwards, he then analyzes the problem of political rights that the Koreans living in Japan encounter. He compares Japan with Korea, and criticizes Japan for not guaranteeing the rights of Koreans. Since throughout the entire book,

the author places an emphasis on the importance of the international rule of law, from his perspective, the purpose of the international rule of law is to protect human rights and the common welfare of the international community. The protection of political rights of foreign residents is one of the core values of human rights that is recognized by the international community. He concludes that how the Japanese government treats Koreans living in Japan is inconsistent with the core value of international law, and it further damages the relationship between Japan and Korea.

Professor Kim has organized and placed each chapter of the book in a logical order so that the readers can easily follow his train of thought. He provides a good introduction for readers, and gradually makes a deep and detailed analysis of each topic. The book is not only good introduction for the novice who is interested in learning international law and relations, but also adequate for those who already possess a basic knowledge about international law and relations. The book could have been improved if the author provided more sources and justification to support his ideas when he attempts to propose a novel concept or principle that goes beyond traditional international law. However, the content of the book itself provides enough insight and knowledge for readers to gain an appreciation for the topics presented.

YOHOSUA KIM

International Law in Asia: A Bibliographic Survey 2012

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INTRODUCTION

This bibliography provides information on books, articles, notes, and other materials dealing with international law in Asia, broadly defined. Only English language publications are listed. 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 the Washington & Lee University law journal rankings, in addition to 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 2012, or in some cases, previously published materials that have new editions in 2012. The headings used in this year's bibliography are as follows:

1. General
2. States and statehood
3. IGOs
4. NGOs
5. Territory and jurisdiction
6. Seas and marine resources
7. Rivers and water resources
8. *Jus ad bellum* and *jus in bello*
9. International criminal law and transnational crime
10. Peace and transitional justice
11. Security
12. Environment
13. Energy

14. Development
15. Human rights – General
16. Human rights – Institutions and Organizations
17. Human rights – Central Asia
18. Human rights – South Asia
19. Human rights – Northeast Asia
20. Human rights – West Asia
21. Human rights – Southeast Asia
22. Nationality, migration and refugees
23. Colonialism and self determination
24. International economic and business law – General
25. WTO and trade
26. Investment
27. Intellectual property
28. Cultural property and heritage
29. Dispute settlement
30. Arbitration
31. Private International law
32. Internet, data and communications
33. Air and Space
34. Miscellaneous

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