



Asian Yearbook of International  
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*Edited by*

B. S Chimni, M. Masahiro and L. Thio

BRILL

## ASIAN YEARBOOK OF INTERNATIONAL LAW

Launched in 1991, the *Asian Yearbook of International Law* is a major refereed publication dedicated to international law issues as seen primarily from an Asian perspective, under the auspices of the Foundation for the Development of International Law in Asia (DILA). It is the first publication of its kind edited by a team of leading international law scholars from across Asia. The *Yearbook* provides a forum for the publication of articles in the field of international law, and other Asian international law topics, written by experts from the region and elsewhere.

Its aim is twofold: to promote international law in Asia, and 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* normally contains articles and shorter notes, a section on State practice, an overview of Asian States' participation in multilateral treaties, succinct analysis of recent international legal developments in Asia, an agora section devoted to critical perspectives on international law issues, surveys of the activities of international organizations of special relevance to Asia, and book review, bibliography and documents sections. It will be of interest to students and academics interested in international law and Asian studies.

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# **Asian Yearbook of International Law**

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B.S. Chimni – Miyoshi Masahiro – Thio Li-ann

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## FOREWORD BY THE CHAIRMAN, DILA

The first issue of the *Asian Yearbook of International Law* (for the year 1991) appeared in 1993. This makes 2008 the 15th anniversary of its publication. When the *Yearbook* was originally conceived by DILA's founders, none of them was sure whether it could survive the vicissitudes of the academic publishing world. There were only three general editors – indeed there are still only three general editors – to share the tremendous burden of the work, and hardly any editorial staff to speak of. Also, none of the Asian foundations approached for funding responded favourably, and ironically the first few issues were made possible by generous grants from the Dutch Ministry of Development Cooperation and the Swedish International Development Authority, and the risk taken by its original publisher, Martinus Nijhoff.

The survival of so ambitious a publishing enterprise, running on such a small resource base, was possible only because of the tremendous dedication, industry and zeal of its general editors of years past. Over the years, the *Yearbook* has also received a boost with the creation of the Sata Prize for young scholars, through the generous donations of Mr Yasuhiko Sata of Tokibo Corporation. DILA and the international scholarly community owe them a great intellectual debt, for today the *Yearbook* has not only survived, but is an established major annual publication in the field of international law.

Starting with this issue, the *Yearbook* will be published by Routledge, a division of publishing giant Taylor & Francis. We are grateful for the many years of productive association we have enjoyed with Martinus Nijhoff, Kluwer and Brill and now look forward to an equally productive partnership with Routledge.

The General Editors have decided reluctantly to discontinue the *Chronicle* section, mainly because the internet now provides a far more detailed and comprehensive – if unfiltered – source for major world events impacting international law generally. All these years, the *Chronicle* has been put together painstakingly by Professor Ko Swan Sik, one of DILA's and the *Yearbook's* founding fathers. I wish to place on record our grateful thanks for his unremitting and dedicated efforts. We have also added two new sections. The first is the *Agora* section which will debut in Volume 14. Though of Greek rather than Asian origin, we feel that the word *agora* – literally “open space” or “place of assembly” – best captures the spirit of what we hope to achieve with this new section. The Greek *agora* was a marketplace, and for us it will be an open marketplace of ideas. For this new section, we hope to invite distinguished scholars to contribute critical pieces (ranging between 4,500 and 6,000 words) on topics of current interest. We have also introduced a new *Developments* section, the objective of which is to provide succinct and informative analyses on

international legal developments in relation to Asia (ranging from 1,500 to 4,000 words). The General Editors would be delighted to receive suggestions on possible topics for inclusion in this section. This year, we have also begun in earnest a renewed call for contributions, and it is our hope that with the growing ranks of international law scholars and students throughout Asia, more contributions will be forthcoming.

In April 2007, an Asian Society of International Law was launched by Judge Hishashi Owada of the International Court of Justice, in Singapore. A symposium on the theme of “International Law in Asia: Past, Present and Future” was organized alongside the launch and it is with great pleasure that we have included a selection of the papers presented at that event in this volume. Any new organization to foster the cause of international law should be welcomed and any new organization to raise awareness of international law to greater heights *in Asia* must be celebrated. We are thus extremely delighted to have had the opportunity to collaborate with the newly founded Asian Society of International Law in its inaugural event.

The last 15 years for the *Yearbook* have been eventful ones. It has brought many Asian scholars of international law closer together and opened up many conversations and discourses that continue to foment new scholarship. It is thus with great hope and optimism that we look forward to the next 15 years. We invite our readers, friends and fellow scholars to turn this hope into reality.

*Kevin Y.L. Tan*  
Chairman, DILA

## ABBREVIATIONS

AJIL	-	American Journal of International Law
All ER	-	All England Law Reports
Arizona JICL	-	Arizona Journal of International and Comparative Law
ASEAN	-	Association for South-East Asian States
Brooklyn JIL	-	Brooklyn Journal of International Law
BYIL	-	British Yearbook of International Law
CAA	-	Civil Aeronautics Administration
CAHAR	-	Ad Hoc Committee of Experts on the Legal Aspects of Refugees
CAT	-	Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment
CCX	-	Chicago Climate Exchange
CJIL	-	Chinese Journal of International Law
CLP	-	Chinese Law and Practice
ECHR	-	European Court of Human Rights
ECX	-	European Climate Exchange
EIA	-	Environmental Impact Assessment
FCO	-	Foreign and Commonwealth Office [England]
FLR	-	Family Law Reports
Fordham ILJ	-	Fordham International Law Journal
GEF	-	Global Environmental Facility
GEP	-	Group of Eminent Persons
GHG	-	Greenhouse Gas
HKLJ	-	Hong Kong Law Journal
Houston JIL	-	Houston Journal of International Law
HRC	-	Human Rights Committee
HRLJ	-	Human Rights Law Journal
ICCPR	-	International Covenant on Civil and Political Rights
ICJ	-	International Court of Justice [The Hague]
ICLQ	-	International and Comparative Law Quarterly
IFC	-	International Finance Corporation
IHRR	-	International Human Rights Reports
IJIL	-	Indian Journal of International Law

IJWI	-	International Journal of World Investment
ILM	-	International Legal Materials
ILO	-	International Labour Organization
ILR	-	International Law Reports
IMF	-	International Monetary Fund
IMO	-	International Maritime Organization
IPR	-	Intellectual Property Rights
IPS UN Journal	-	International Press Service United Nations Journal
IRO	-	International Refugee Organization
JALC	-	Journal of Air Law and Commerce
JALS	-	Journal of Air Law and Space
LNHCR	-	League of Nations High Commissioner for Refugees
LQR	-	Law Quarterly Review
MLJ	-	Malayan Law Journal
MLR	-	Michigan Law Review
NATO	-	North Atlantic Treaty Organization
NGO	-	Non-Governmental Organization
NSWR	-	New South Wales Law Reports
OAS	-	Organization of American States
OECD	-	Organization for Economic Cooperation and Development
PRC	-	People's Republic of China
Penn State ILR	-	Penn State International Law Review
QBD	-	Queen's Bench Division [England]
RAN	-	Rainforest Action Network
SAARC	-	South Asian Association for Regional Development
SACR	-	South African Law Commission
SADF	-	South Asian Development Fund
SIL	-	Studies in International Law
Sing. YBIL	-	Singapore Yearbook of International Law
SJLS	-	Singapore Journal of Legal Studies
SLR	-	Singapore Law Reports
Texas ILJ	-	Texas International Law Journal
TJAIL	-	The Japanese Annual of International Law
UDHR	-	Universal Declaration of Human Rights
UN	-	United Nations
UNDP	-	United Nations Development Programme
UNEP	-	United Nations Environment Programme
UNHCR	-	United Nations High Commissioner for Refugees
UNTS	-	United Nations Treaty Series
Virg. JIL	-	Virginia Journal of International Law
WLR	-	Weekly Law Reports
WWF	-	World Wildlife Fund

- Yale JIL - Yale Journal of International Law
- YILC - Yearbook of the International Law Commission



## ARTICLES



# THE UNFINISHED BUSINESS OF HUMAN RIGHTS PROTECTION AND THE INCREASING THREAT OF INTERNATIONAL TERRORISM

Ben Chigara\*

## INTRODUCTION

The first decade of the twenty-first century has been characterized by sudden “wake-up calls” on such serious issues as environmental degradation,<sup>1</sup> the futility of war as a strategy for instituting democratic governance anywhere in the world,<sup>2</sup> anti-poverty campaigns, etc. Nonetheless, it is arguable that few subjects have exercised general public and legal concerns as much as the question of what constitutes an “appropriate, efficient and sufficient” response to the increasing threat of international terrorism. The response to this threat is the burden of national governments. Therefore, the “appropriate, efficient and sufficient” test is necessarily a legal question because conduct of States everywhere is measured always by the requirements of the rule of law.<sup>3</sup>

In spite of the fact that the terrorist element is inspired and characterized always

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\* Research Professor of International Laws, Brunel University, Uxbridge UB8 3PH, United Kingdom. The author is grateful to the following: the independent referees of the *Asian Yearbook of International Law* for comments on an earlier draft; his wife Constance Chigara; and his sons – Barnabas Chigara and Benedict Chigara Jr for their loyalty and support. Amai – naBaba – naMbuya – naMukoma – vese ndakavaona, vese handichavaoni.

<sup>1</sup> Exotic tactics have been engaged, including the use of international concerts and alarmist publications. For the “Live Earth Concert” of 7 July 2007 see the Live-Earth website, available at <http://liveearth.org/?p=22> (visited 27/07/07).

<sup>2</sup> See Stopwar website, available at <http://www.stopwar.org.uk/newsite/index.php> (visited 27 July 2007).

<sup>3</sup> See *Judgments – A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)* [2004] UKHL 56. Available on UK parliament website, <http://www.publications.parliament.uk/pa/ld200405/ldjudgmt/jd041216/a&oth-5.htm> (visited 30 July 2007). See also *A and others v. Secretary of State for the Home Department (No. 2)* [2005] UKHL 71. For a critique of the rule of law theory, see Dyzenhaus, D., “Recrafting the rule of law” in Dyzenhaus, D. (ed.), *Recrafting the Rule of Law: The Limits of Legal Order*, Oxford: Hart Publishing, 1999, at 1–12.

by its resort to extreme means of illegality,<sup>4</sup> including incitement and execution of indiscriminate mass murder of innocent civilians, the United Nations Charter (1945) enjoins States to use only legal means to counter that threat.<sup>5</sup> The consequent duel between international terrorists on the one hand and States on the other raises the question of equality of arms. It explains partially why governments may have quickly resorted in the immediate aftermath of the terrorist attacks on New York on 9/11<sup>6</sup> and London on 7/7<sup>7</sup> to what the House of Lords has described as irrational counter-terrorism legislation that is anathema to both the British instincts of justice and the British constitution.<sup>8</sup>

These “duel-equalizing legislative measures” are increasing and not diminishing in number and intensity. Evidence of this is clear from the number of anti-terror laws and other measures that have been adopted by democratic States since 9/11. On 20 September 2001 the US established the Cabinet position of the Office of Homeland Security to oversee internal security arrangements and in October 2001 adopted the Patriot Act. Australia’s Anti-terror Bill became law on 7 December 2005. The UK adopted the Anti-Terrorism, Crime and Security Act (2001).

The purpose of these and other subsequent related measures is to formalize and legalize governments’ counter-terrorism strategies. This raises the question of whether State action could be justified with reference only to previously enacted enabling national laws. If it were so, then every inhumane act carried out by the apartheid government in South Africa and the Nazi government in Germany could not have been impugned under international law because both governments backed their inhumane activities with legislative force.

However, international law is unequivocally clear that a State may not invoke provisions of its own constitution or its own laws as an excuse for breach of its international obligations.<sup>9</sup> In its Draft Articles on responsibility of States for

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<sup>4</sup> See also Baldwin, F. L. Jr, “II. Organized crime, terrorism, and money laundering in the Americas”, 15 *Florida Journal of International Law* (2002–2003), at 3.

<sup>5</sup> See also “Protection of human rights and fundamental freedoms while countering terrorism”, UN GA Res. of 8 August 2003, A/58/266, para.16.

<sup>6</sup> Over 2,600 people lost their lives when hijacked planes crashed into the North Tower of the World Trade Centre in Lower Manhattan at 08.46 and the South Tower at 09.03. Another 125 people lost their lives when another hijacked plane crashed into the Western face of the Pentagon at 09.37. A further 256 people lost their lives on the hijacked planes. See the 9/11 Commission Report, available on US Government Printing Office website, <http://www.gpoaccess.gov/911/pdf/execsummary.pdf> (visited 9 June 2006).

<sup>7</sup> The London bombings of 7 July 2005 were a series of coordinated suicide attacks on the public transport system during the rush hour. Around just after 08.50, three bombs went off within 50 seconds of each other at three different locations on the London underground. A fourth bomb went off on a bus in Tavistock Square at 09.47. At least 57 people lost their lives and a further 700 were injured in the attack.

<sup>8</sup> *Judgments – A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)*, n. 3, para. 97.

<sup>9</sup> See Article 13, Draft Declaration on Rights and Duties of States, II *YILC* (1949), at 286.

internationally wrongful acts, the International Law Commission (ILC) has restated general international law<sup>10</sup> as follows:

Article 12: There is a breach of international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.

Article 26: Nothing in this Chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.<sup>11</sup>

Therefore, to purchase legitimacy, national laws, especially those adopted in this poisoned and hysteric post 9/11 and 7/7 policy-making atmosphere, ought always to succumb to a higher morality. That morality is encapsulated in international human rights law. This is also the view of the United Nations. In Resolution 54/110 of 2 February 2000 on measures to eliminate international terrorism, the UN General Assembly called upon States to take further counter-terrorism measures “. . . in accordance with relevant provisions of international law, including international standards of human rights”.<sup>12</sup>

In Resolution 1368 (2001) of 12 September 2001 adopted at its 4,370th meeting, the UN Security Council declared its determination to “. . . respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism, *in accordance with its responsibilities under the Charter of the UN*”.<sup>13</sup> The UN Declaration on the Occasion of the Fiftieth Anniversary of the United Nations<sup>14</sup> describes the UN Charter as the embodiment of the common values and aspirations of humankind. This is because, firstly, human rights have become the index to the recognition of the dignity inherent in individuals *qua* human beings. Secondly, States’ primary obligation is to ensure the recognition, promotion and protection of that dignity.<sup>15</sup>

In recent cases that challenged certain UK counter-terrorism strategies, the House of Lords reached a similar conclusion by holding that while it was the legislature’s prerogative to determine counter-terrorism strategy for the UK, it could not

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<sup>10</sup> Dixon writes that the reliance by arbitral tribunals on the original ILC Draft Articles on State responsibility recommends the view that the Draft Articles now represent customary international law. *Textbook on International Law*, 6th ed., OUP, 2007, at 254.

<sup>11</sup> International Law Commission, 53rd session (2001) submission to the General Assembly of the United Nations. See UN General Assembly 56th session, supplement No. 10 (A/56/10). For commentary on these Draft Articles, see especially Harris, D. J., *Cases and Materials on International Law*, 6th ed., London: Sweet & Maxwell, 2004, at 504–653.

<sup>12</sup> A/RES/54/110, para. 3.

<sup>13</sup> S/Res/1368 (2001), para. 5.

<sup>14</sup> Available on the UN website, at <http://www.un.org/UN50/dec.htm> (visited 20 July 2007).

<sup>15</sup> See Chigara, B., “To discount human rights and inscribe them with *fakeness* and unreliability, or to uphold them and engrave them with integrity and reliability? – UK experiences in the age of international terrorism”, 25 *Nordic Journal of Human Rights* (2007), at 1–16.

exercise that right in a manner that breached the human rights of individuals. Lord Nicholls stated in *Judgments – A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)*:<sup>16</sup>

In the present case I see no escape from the conclusion that parliament must be regarded as having attached insufficient weight to the human rights of non-nationals. The subject matter of the legislation is the needs of national security. This subject matter dictates that, in the ordinary course, substantial latitude should be accorded to the legislature. But the human right in question, the right to individual liberty, is one of the most fundamental of human rights. Indefinite detention without trial wholly negates that right for an indefinite period. With one exception all the individuals currently detained have been imprisoned now for three years and there is no prospect of imminent release.

This article examines the limitations that the law imposes on government's strategies to combat international terrorism. These limitations indicate that government must act not only to combat terrorism but also to ensure fulfilment of its obligation to grow and strengthen human rights protection. In this sense human rights and national security are mutually reinforcing. An alternative view is that the pair is mutually exclusive and the one will have to be privileged over the other. The latter view suggests that government has the complex and difficult task of ensuring national security on the one hand and guaranteeing human rights and freedoms on the other.

## THE CHALLENGE

Malta's response to the UN High Commissioner for Human Rights' request for States' views on human rights and the "War on Terror" succinctly sums up the problem.

While striking a balance between the need to protect society from the horrifying effects of terrorism and protecting the fundamental human rights of the individual is not an easy task, it is indispensable if the personal freedom that terrorism seeks to destroy is to be preserved. There is therefore a need for reflection on this issue with a view to articulating agreed guidelines to provide States with clear criteria and elements upon which to design counter-terrorism measures that do not overstep the bounds of what is necessary and lawful in the area of human rights protection.<sup>17</sup>

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<sup>16</sup> [2004] UKHL 56. Available on UK parliament website, <http://www.publications.parliament.uk/pa/ld200405/ldjudgmt/jd041216/a&oth-5.htm> (visited 30 July 2007).

<sup>17</sup> UN GA Res. of 8 August 2003, A/58/266, n. 5, para. 10.

It is arguable that the foremost responsibility of this generation is to move the human rights project forward and to fulfil the requirements of justice in order to ensure the rule of law, equality and social justice. The UN Charter (1945) had already premised the pursuit of international peace and security on human rights.<sup>18</sup> However, emergent State practice shows that individuals merely suspected of involvement in terrorist activity are threatened with a significant reduction of their human rights *qua human beings*, including the threat of torture and of being shot dead in public by law enforcement agents.<sup>19</sup> According to the US Department of Justice's Inspector General,<sup>20</sup> physical abuse of terrorist suspects has in fact occurred.

The short-term problem this creates is that it perpetuates the public fear already ignited by terrorism. The long-term problem is that it engenders a cycle of violence for a miserably unpredictable and long time to come. According to Martin Luther King Jr, the means by which we fight our battles are themselves seeds that germinate, grow and colour the seasons of our victories.<sup>21</sup> Therefore, we cannot escape violence in the immediate or remote future if we pursue our causes by violent means. We cannot expect a human rights-filled future if we sow with anti-human rights counter-terrorism strategies.

History must find that in spite of the uniqueness, novelty and undesirability of the challenges posed by the growing threat of international terrorism, this generation would not compromise human rights. Instead it fought and overcame terrorism with human rights – the UN's preferred and foremost strategy for the pursuit of international peace and security. However, such a favourable finding is at risk because governments across the world appear to be too eager to apply quick fixes to the menace of international terrorism. The Secretary-General of the UN regretted that “. . . international human rights experts, including those of the UN system, are unanimous in finding that many measures which States are currently

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<sup>18</sup> Preamble to the UN Charter (1945), 59 Stat. 1031, T.S. 993, 3 *Bevans* 1153. The Universal Declaration of Human Rights (1948) proclaims that human rights are “. . . a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.”

<sup>19</sup> See BBC News website, “Shoot to kill policy will remain”, 25 July 2005, available on <http://news.bbc.co.uk/1/hi/uk/4713199.stm> (visited 9 June 2006)

<sup>20</sup> Fine, Glenn A., “The September 11 detainees: A review of the treatment of aliens held on immigration charges in connection with the investigation of the September 11 Attacks”, available on United States Department of Justice website (2003): <http://www.usdoj.gov/oig/testimony/0506b.htm>

<sup>21</sup> See Armstrong, J.B. et al. (eds.), *Teaching the Civil Rights Movement: Freedom's Bittersweet Song* (London: Routledge, 2002), at 16.

adopting to counter terrorism infringe on human rights and fundamental freedoms".<sup>22</sup>

## THE PRINCIPAL FUNCTION OF THE STATE UNDER INTERNATIONAL LAW

It is beyond dispute that the main function of the State under international law is to ensure the rule of law.<sup>23</sup> That duty includes the protection of human rights of persons under their jurisdiction. Human rights protection has become the yardstick for distinguishing between civilized and uncivilized States, so that those that violate them with impunity or with recklessness find that they court for themselves international condemnation and possible isolation unless they quickly amend their ways. This shows that human rights have indeed become the index of human dignity. Therefore, they should not be altered flippantly.

Except for a few limited and temporary cases,<sup>24</sup> international law prohibits States from limiting the minimum human rights guarantees to individuals.<sup>25</sup> In Articles 3, 6 and 7 the Universal Declaration of Human Rights (UDHR) states respectively that:

3. Everyone has the right to life, liberty and security of the person.
6. Everyone has the right to recognition everywhere as a person before the law.

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<sup>22</sup> See Secretary-General's keynote address to the Closing Plenary of the International Summit on Democracy, Terrorism and Security – "A global strategy for fighting terrorism", Madrid, Spain, 10 March 2005, available at <http://www.un.org/apps/sg/sgstats.asp?nid=1345> (visited 20 February 2006).

<sup>23</sup> Per Lord Browne-Wilkinson, *ex parte Pinochet Ugarte* [2000] 1 A.C. 147. For a comprehensive and succinct examination and analysis of the legal issues, see Woodhouse, D. (ed.), *The Pinochet Case: A Legal and Constitutional Analysis*, Oxford: Hart Publishers, 2000; and Sugarman, D., "The Pinochet case: International criminal justice in the Gothic style?" 64 *Modern Law Review* (2001), at 933–44. See also the ILC Draft Articles on State responsibility, UN GA Res. 56/83; Crawford, J. et al., "The ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the second reading", 12 *EJIL* (2001), at 963; and Rosenstock, R., "The ILC and State responsibility", 96 *AJIL* (2002), at 792.

<sup>24</sup> See UN Human Rights Committee General Comment No. 29 on Article 4 of the ICCPR (1966), UN Doc. CCPR/C/21/Rev.1/Add.11 (2001).

<sup>25</sup> The defence of necessity is thoroughly examined in the ICJ's Advisory Opinion on the Legal Consequences of the Construction of a wall in the occupied Palestine Territory, *ICJ Rep. 2004; Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, *ICJ Rep. 1997*, at 7. For commentary, see Rogoff, Martin A. and Collins, Edward Jr, "The Caroline incident and the development of international law", 16 *Brooklyn J. Int'l L.* (1990), at 493. See also Report of the Special Rapporteur of the Commission on Human Rights, John Dugard, on the situation of human rights in the Palestinian territories occupied by Israel since 1967, submitted in accordance with Commission Res. 1993/2 A. Available on UN website, [http://www.unhchr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.2004.6.En?Opendocument](http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.2004.6.En?Opendocument) (visited 26 February 2006).

7. All people are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

These obligations are notably impressed upon in the European Convention on Human Rights (1950) and the International Covenant on Civil and Political Rights (1966), the American Convention on Human Rights (1969). They are less fervently solemnized in the Banjul Charter (1981) because of its infamous “claw back clauses” that appear to take away most of the human rights guarantees previously recognized.

Jurisprudence of treaty bodies established to monitor State compliance with the respective universal and regional human rights agreements and of national tribunals overwhelmingly confirms the view that under modern international law States do not recognize immunities for States’ acts that oppose the international human rights agenda. This is because the multilateral<sup>26</sup> and regional<sup>27</sup> human rights regimes impose on States the duty to recognize, promote and protect the human rights of individuals on their territories.

General Comment 18 of 10 November 1989<sup>28</sup> summarizes the Human Rights Committee’s jurisprudence on the right to equal treatment of individuals before the law (Article 26 ICCPR). It states that this right:

. . . not only entitles all persons to equality before the law as well as equal protection of the law but also prohibits any discrimination under the law and guarantees to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

General Comment 8 of 30 June 1982<sup>29</sup> on the right to life, liberty and security of the person (Article 9, ICCPR) clarifies the remit of the provision. According to the Human Rights Committee:

. . . paragraph 1 is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc. It is true that some of the provisions of article 9 (part of para.2 and the whole of para.3) are only applicable to persons

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<sup>26</sup> Article 2 of the International Covenant on Civil and Political Rights (1966).

<sup>27</sup> See Article 1 of the European Convention on Human Rights (1951); Article 1 of the American Convention on Human Rights (1969); and Article 1 of the African Charter on Human and Peoples’ Rights (1981).

<sup>28</sup> Available on UN website <http://www.ohchr.org/english/bodies/hrc/comments.htm> (visited 18 February 2006).

<sup>29</sup> See *ibid.*

against whom criminal charges are brought. But the rest, and in particular the important guarantee laid down in paragraph 4, i.e. the right to control by a court of the legality of the detention, applies to all persons deprived of their liberty by arrest or detention. Furthermore, States parties have in accordance with article 2 (3) also to ensure that an effective remedy is provided in other cases in which an individual claims to be deprived of his liberty in violation of the Covenant.

General Comment 20 of 10 March 1992<sup>30</sup> indicates that Article 7 of the ICCPR protects both the dignity and the physical and mental integrity of the individual. According to the Human Rights Committee, high contracting State parties are obliged:

... to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by Article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity. The prohibition in article 7 is complemented by the positive requirements of article 10, paragraph 1, of the Covenant, which stipulates that "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person".

Even more, high contracting States parties cannot derogate from Article 7:

... even in situations of public emergency such as those referred to in Article 4 of the Covenant, no derogation from the provisions of Article 7 is allowed and its provisions must remain in force. The Committee likewise observes that no justification or extenuating circumstances may be invoked to excuse a violation of Article 7 for any reasons, including those based on an order from a superior officer or public authority.

The European Court of Human Rights,<sup>31</sup> Inter American Court of Human Rights<sup>32</sup> and the African Commission on Human Rights<sup>33</sup> all insist on similar standards.

In the *Case of Iovchev v. Bulgaria* (2006) the applicant alleged *inter alia* that after his arrest he had not been brought before a judge or a judicial officer, that his pre-trial detention had been unjustified and excessively lengthy, and that the criminal proceedings against him had exceeded a reasonable time, contrary to Article 5(3) of the European Convention on Human Rights. The European Court of Human Rights held that Bulgaria had breached Article 5 of the European Convention on

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<sup>30</sup> See <http://www.ohchr.org/english/bodies/hrc/comments.htm> (visited 18 February 2006).

<sup>31</sup> See *Case of Iovchev v. Bulgaria*, Application No. 41211/98.

<sup>32</sup> See for instance, the Court's judgment in *Bulacio v. Argentina* (2003), available at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_100\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_100_esp.pdf) (visited 30 July 2007).

<sup>33</sup> *Alhassan Abubakar v. Ghana*, African Commission on Human and Peoples' Rights, Comm. No. 103/93 (1996).

Human Rights in respect of the applicant because<sup>34</sup> the applicant's detention had been ordered by an investigator and confirmed by a prosecutor without either of them having seen the applicant. It could not be imputed from the facts that either the investigator or the prosecutor was sufficiently independent and impartial as required under Article 5(3). Moreover:

The persistence of a reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention, but after a certain lapse of time it no longer suffices. In such cases, the Court must establish whether the other grounds given by the authorities continued to justify the deprivation of liberty. Where such grounds were relevant and sufficient, the Court must also ascertain whether the competent authorities displayed special diligence in the conduct of the proceedings.<sup>35</sup>

In *Bulacio v. Argentina* (2003) the Inter-American Court of Human Rights found that Argentina had violated Walter David Bulacio's right to personal liberty – Article 7 of the American Convention on Human Rights. The police had illegally and arbitrarily detained Bulacio during a *razzia* operation without a court order. They neither informed him of his rights as a detainee, nor did they advise either his parents or the Juvenile Judge of his detention.<sup>36</sup>

In *Alhassan Abubakar v. Ghana* (1996) the applicant alleged that Ghana had breached Article 6 of the African Charter on Human and Peoples' Rights (1981), which provides that:

Every individual shall have the right to liberty and security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

The applicant, a Ghanaian citizen resident in Côte d'Ivoire, had been arrested on 16 June 1985 for allegedly cooperating with political dissidents in Ghana. He was detained without charge or trial for seven years until his escape from a prison hospital on 19 February 1992. The African Commission found that Ghana had violated Articles 6 and 7(1)(d) of the Banjul Charter in respect of the applicant.<sup>37</sup>

Consistency among human rights monitoring bodies regarding the application of recognized human rights standards recommends the view that modern international law privileges above everything else the recognition, promotion and protection of the dignity inherent in individuals *qua* human beings. Moreover, the majority

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<sup>34</sup> n. 31, para. 98.

<sup>35</sup> *Ibid.*, para.104.

<sup>36</sup> n. 32, para. 38(a).

<sup>37</sup> *Alhassan Abubakar v. Ghana*, African Commission on Human and Peoples' Rights, Comm. No. 103/93 (1996), para.15.

of UN organs and agencies established since 1945 are human rights oriented. This suggests that conceptions of State authority that oppose human rights may be unsustainable under modern international law because it is simply not the function of States to erode, cap or minimize the human rights of individuals. Rather, States are under the obligation under international law to ensure recognition, promotion and protection of the dignity that is inherent in individuals *qua* human beings.

## THE THREAT OF TERRORISM

Although the enduring concerns of intra-State conflict, poverty, the quest for lasting peace in the Middle East and enforcement of international human rights appeared to have captured international focus at the start of the millennium,<sup>38</sup> nothing else has concentrated the UN's thinking since quite like the increasing threat of international terrorism posed by non-State political actors.

Between 11 September 2001 when the terrorist attack on New York occurred and 11 January 2006, the UN General Assembly discussed and adopted over two dozen resolutions on international terrorism alone.<sup>39</sup> In the same period, the Security Council discussed and adopted at least 21 resolutions on the matter and established the Counter-Terrorism Committee (CTC), which is made up of all 15 members of the Security Council. The task of the CTC is to monitor the implementation by all States of Security Council Resolution 1373 and to increase the capability of States to fight terrorism.<sup>40</sup> In the same period, the Secretary-General of the United Nations gave numerous reports on human rights and terrorism.<sup>41</sup>

International terrorism will not just melt away into its nest and die a natural death. It has to be addressed, controlled and if possible annihilated from our midst. But to pursue this goal at the expense of what we hold dearest in a free society would be suicidal. In the UK, the question of how the State deals with the growing threat of international terrorism has brought the judiciary and the legislature into a theatrical show that law students have hitherto theorized under the doctrine of separation of powers but not witnessed in this way before. The theme for the two actors is "The UK's strategy for combating terror". The roles are clearly defined.

Parliament is the dominant actor. It must present a coherent, logical and legal strategy for combating terror and actually implement it. The judiciary has only one

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<sup>38</sup> See the UN Millennium goals, available on UN website, <http://www.un.org/millenniumgoals/index.html> (visited 3 March 2006).

<sup>39</sup> See UN Action against Terrorism, available on UN website, <http://www.un.org/terrorism/sc.htm> (visited 3 March 2006).

<sup>40</sup> S/Res/1373 (2001). Available on UN website, <http://www.un.org/Docs/sc/committees/1373/> (visited 3 March 2007).

<sup>41</sup> The seminal one for this purpose is his report titled "Protection of Human Rights and Fundamental Freedoms while Countering Terrorism", 8 August 2003, UN Doc A/58/266.

part to play, that is to ensure that executive action in the war on terror is legal and consistent with values of a free and democratic society.

Therefore, the executive retains the authority to determine how the UK will prosecute the war on terror while the judiciary is mandated to supervise the exercise of that authority in order to ensure constitutional guarantees of liberty, freedom and human rights.

## CRITERIA UPON WHICH COUNTER-TERRORISM MEASURES SHOULD BE JUDGED

Although the consensus among States is that terrorism poses the biggest threat to national security, they have not yet agreed a definition of that threat. The UN Secretary-General has volunteered an illuminating definition of the threat as follows:

Action constitutes terrorism if it is intended to cause death or serious bodily harm to civilians and non-combatants, with the purpose of intimidating a population or compelling a government or an international organization to do or abstain from any act.<sup>42</sup>

In countering this threat, States must not overstep the bounds of what is necessary and lawful in the area of human rights protection. Counter-terrorism strategies overstep that mark if they:

- (1) are irrational, discriminatory and contrary to the rule of law,<sup>43</sup>
- (2) are disproportionate to the threat sought to be controlled, or
- (3) offend democratic values (rule of law, justice, equality before the law).

### **Prohibition against counter-terrorism strategy that is irrational, discriminatory and contrary to the rule of law**

In *Judgments – A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)*<sup>44</sup> the House of Lords held that Part 4 of the Anti-terrorism, Crime and Security Act 2001 was irrational, discriminatory and anti-constitutional to the rule of law. If its intended aim was to placate a possible danger to national security, then its consequences had very much been incongruous to its purpose because firstly, it deprived the detained person of the protection that a

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<sup>42</sup> See *Judgments – A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)*, n. 3.

<sup>43</sup> *Ibid.*

<sup>44</sup> [2004] UKHL 56, para. 86–88. Available on UK parliament website, <http://www.publications.parliament.uk/pa/ld200405/ldjudgmt/jd041216/a&oth-5.htm> (visited 30 July 2007).

criminal trial is intended to afford.<sup>45</sup> For that reason, it “. . . is anathema in any country which observes the rule of law”.<sup>46</sup> Secondly, it results in discriminatory treatment of terrorist suspects principally according to their nationality regardless of their actual perceived risk to the UK’s security interests. It is arguable that the legislation’s non-compliance with the basic requirement of equal treatment of persons under international human rights law is its strongest weakness.<sup>47</sup> Basic human rights have been classified as one of the five categories of norms *jus cogens* under international law.<sup>48</sup> Therefore, legislation that offends basic human rights of individuals could not be relied upon to establish and maintain national security. Generally such legislation is repulsive to the instincts of fairness and justice.

Terrorism seeks to frustrate democracy by undermining human freedom. Counter-terrorism strategies stand to facilitate the terrorist’s effort if they minimize or erode the rights of individuals. According to the UN Secretary-General:

Every time we advance the protection of human rights, we deal a blow to the evil designs of terrorists, and we remove a sense of injustice, which can cause the oppressed to channel their frustration into illegitimate violence. If we compromise on human rights in seeking to fight terrorism, we hand terrorists a victory they cannot achieve on their own. If we build on these fundamentals, I believe we can develop a new vision of global security: a vision that respects human rights while confronting the threats of our age – including the threat of terrorism.<sup>49</sup>

The tension between the aim and the effect in practice of Part 4 of the Anti-terrorism, Crime and Security Act 2001 makes it an “irrational” piece of legislation. This piece of legislation empowered the Home Secretary to detain people indefinitely without charge or trial. “Nothing could be more antithetical to the instincts and traditions of the people of the United Kingdom [than]. . . a power of detention confined to foreigners . . . [It] is irrational and discriminatory. . . such a power in any form is not compatible with our constitution.”<sup>50</sup>

If the judiciary were so confident about the inappropriateness of this legislation, why was parliament so confident to pass it? There is no gain to be had from speculating about parliament’s intention in this or any other circumstance. However, the fact that it passed this irrational piece of legislation is indicative of the panic and the desperation that the issue of international terrorism has generated among

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<sup>45</sup> *Ibid.*, para.74.

<sup>46</sup> *Ibid.*

<sup>47</sup> Discussing obligations arising from the Universal Declaration of Human Rights (1948); The International Covenant on Civil and Political Rights (1966); and The International Convention on the Elimination of All Forms of Racial Discrimination (1966), *see ibid.*, paras. 58–65.

<sup>48</sup> *See Hannikainen, L., Peremptory Norms (jus cogens) in International Law: Historical Development, Criteria, Present Status*, Helsinki: Finnish Lawyers Publishing, 1988, ch. 7.

<sup>49</sup> UN GA Res. of 8 August 2003, A/58/266, n. 5, para. 56.

<sup>50</sup> Per Lord Hoffman, n. 44, para. 97.

governments since 9/11 and 7/7. If the adoption of irrational and discriminatory legislation continues, then we have more to fear from States where the judiciary has not yet achieved the high degree of independence that the judicial systems of the free world enjoy.

The House of Lords had to consider also the question of whether evidence procured through torture by officials of a foreign State without the complicity of British authorities was now admissible in UK courts. It is very disturbing that a UK government should be taken to court to ascertain whether it could rely on evidence obtained through torture. The *jus cogens* nature of the prohibition against torture and the universal application of the principle *aut dedere aut punire* – either you extradite or you punish – should have been better applied by the Labour government, particularly after the *Pinochet* decision.<sup>51</sup>

Firstly, the prohibition against torture is absolute. *Chahal v. United Kingdom*<sup>52</sup> ruled that:

Article 3 enshrines one of the most fundamental values of democratic society. The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 even in the event of a public emergency threatening the life of the nation.

This appears to proscribe the possibility that English courts could ever turn a blind eye to the fruits of torture if presented before them.

Secondly, Article 15 of the Convention Against Torture charges States parties to the Convention to “. . . ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made”.

Moreover, evidence gathered through torture is often unreliable.<sup>53</sup> Therefore, precluding the fruits of torture from legal proceedings enhances significantly the chances of ensuring a fair trial.

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<sup>51</sup> For judgment and commentary, see Woodhouse, *op. cit.*, n. 23.

<sup>52</sup> 23 EHRR (1996), at 413, para. 79. See also *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)* (2004); and *A and others (Appellants) (FC) and others v. Secretary of State for the Home Department (Respondent) (Conjoined Appeals)*, n. 44, para. 40.

<sup>53</sup> *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)* (2004), *A and others (Appellants) (FC) and others v. Secretary of State for the Home Department (Respondent)* n. 44, para. 39.

### Prohibition against counter-terrorism strategies that conflict with States' obligations under international law

In *Chahal v. United Kingdom* (1996)<sup>54</sup> the European Court of Human Rights considered *inter alia* the question of whether the threat that a foreign individual might pose to the national security of the host State entitled the latter to extradite the former even if that would expose the former to a real risk of being subjected to torture or to inhumane or degrading treatment contrary to Article 3 of the European Convention on Human Rights – itself a norm of *jus cogens*, i.e. a peremptory norm of general international law that is “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted”.<sup>55</sup>

The Court replied in the negative, stating that the Convention prohibits torture or inhuman or degrading treatment or punishment in absolute terms, “. . . irrespective of the victim’s conduct”. The idea is simple, yet so difficult sometimes for States to appreciate: where individuals fail (and become public enemy number one, for instance), the State should not and must not fail in a similar fashion by not recognising, promoting and protecting the human dignity inherent in the perceived or actual “public enemy number one” *qua* human being. Having a bad father does not entitle one to become a bad son or daughter. According to the European Court of Human Rights:

Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the contracting State to safeguard him or her is engaged in the event of expulsion. In these circumstances, the activities of the individual in question, however undesirable or even dangerous, cannot be a material consideration.<sup>56</sup>

The absolute quality of the prohibition against torture, inhumane or degrading treatment of individuals under international law of *jus cogens* compels States to desist from sacrificing on the altar of national security their duty to recognize, promote and protect the dignity inherent in all individuals present on their territories. The free world has for a long time recognized and upheld this view. The threat of international terrorism appears to be a mere test for modern States’ commitment to this principle. Their corporate response to this scourge will either devalue or enhance the international human rights project.

It is desirable that the free world’s response to this evil enhances rather than devalues the international human rights project because the international human rights project has become the barometric test for democracy everywhere.

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<sup>54</sup> 23 EHRR 413.

<sup>55</sup> See Article 53 of the Vienna Convention on the Law of Treaties (1969), 8 ILM 679.

<sup>56</sup> *Chahal v. United Kingdom*, n. 54, confirmed by the House of Lords in *A and others v. Secretary of State for the Home Department*, [2005] 2 WLR 87, para. 9.

However, if the free world were to respond to the threat of international terrorism in a manner that undermined the international human rights project, that would make the international human rights project a fair-weather friend to be abandoned at the first appearance of inconvenience. In an extensive analysis and development of the jurisprudence on fundamental, derogable and non-derogable human rights standards in *Judgments – A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)*,<sup>57</sup> the House of Lords ruled that “. . . the right of personal freedom, fundamental though it is, cannot be absolute”.

Certainly international treaty bodies and national courts of democratic States regard the international prohibition against torture, inhumane or degrading treatment as a prime example of a non-derogable international human rights standard. Such standards constrain States’ choices in their design of strategies for countering international terrorism even at a time of national emergency.

### **Prohibition against counter-terrorism strategies that are disproportionate to the mischief or risk, in this case – terrorism**

The human rights culture that has evolved until now authorizes States temporary derogation from its *standard provisions* but not from its *elite and non-derogable provisions* and then only in times of national emergency.<sup>58</sup> This raises the question of what qualifies as a national emergency that might entitle a State to justifiably derogate from international human rights law. Since 9/11 only the UK has claimed that the circumstances justified it to derogate from the European Convention guarantee to liberty and security of the person, citing a public emergency purportedly generated by the 7/7 attack on London as a reason.

To pass the test of legality the plea to national emergency requiring derogation from the European Convention on Human Rights must actually threaten the life of the whole nation. That situation is reached when “. . . an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the State is composed”<sup>59</sup> has arisen. Such a situation must also be actual or imminent and exceptional, so that the normal measures or restrictions permitted for the maintenance of public safety, health and order are plainly inadequate.<sup>60</sup> This *dire self-defence come necessity test* is not easily

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<sup>57</sup> [2004] UKHL 56. Available on UK parliament website, <http://www.publications.parliament.uk/pa/ld200405/ldjudgmt/jd041216/a&oth-5.htm> (visited 30 July 2007).

<sup>58</sup> See, e.g. Article 15 of the European Convention on Human Rights (1950); Article 4 of the ICCPR (1966); and Article 27 of the American Convention on Human Rights (1969).

<sup>59</sup> See *Lawless v. Ireland (No. 3)* (1961) 1 EHRR 15, confirmed in *A and others v. Secretary of State for the Home Department*, [2005] 2 WLR 87, para. 17.

<sup>60</sup> See *The Greek Case* (1969) 12 YB 1; upheld in *A and others v. Secretary of State for the Home Department*, [2005] 2 WLR 87, para. 18.

assailed.<sup>61</sup> The US administration has inspired understanding and application of the doctrine.

The exchange of notes between the US administration, a neutral power in the 1837 insurrections in Canada, and the British government regarding the destruction of the American vessel *The Caroline* and the loss of life and limb to American citizens, *The Caroline Incident*<sup>62</sup> has set the parameters for the application of the doctrine of self-defence and necessity.

It will be for that government to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show, also, that the local authorities of Canada – even supposing the necessity of the moment authorized them to enter the territories of the United States at all – did nothing unreasonable or excessive; since the act justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it. It must be shown that admonition or remonstrance to the persons on board the “*Caroline*” was impracticable, or would have been unavailing; it must be shown that daylight could not be waited for; that there could be no attempt at discrimination, between the innocent and the guilty; that it would not have been enough to seize and detain the vessel; but that there was a necessity, present and inevitable, for attacking her, in the darkness of the night, while moored to the shore, and while unarmed men were asleep on board, killing some, and wounding others, and then drawing her into the current, above the cataract, setting her on fire, and, careless to know whether there might not be in her the innocent with the guilty, or the living with the dead, committing her to a fate, which fills the imagination with horror. A necessity for this, the government of the United States cannot believe to have existed.<sup>63</sup>

Similarly, the International Court of Justice referred in the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*<sup>64</sup> to the exceptional applicability of the defence of necessity. More importantly, it referred to the strict application of the doctrine, which is determined by the cumulative satisfaction of criteria similar to those listed in *The Caroline Incident*. Others and not just the State claiming the justification of necessity must be satisfied that the requisite criteria have been satisfied.

In *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*<sup>65</sup> the International Court of Justice stated that the action taken could not be justified under the doctrine of necessity because it was not the only way

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<sup>61</sup> See also “*The Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR*”, 7 *Human Rights Quarterly* (1985), at 3, endorse also in *ibid.*, para. 19.

<sup>62</sup> 29 *BFSP* 1137–1138; 30 *BFSP* 195–6.

<sup>63</sup> See also The Avalon Project at the Yale Law School, available at <http://www.yale.edu/lawweb/avalon/diplomacy/britain/br-1842d.htm> (visited 3 February 2006).

<sup>64</sup> *I.C.J. Rep.* 1997, at 40, para. 51.

<sup>65</sup> *ICJ Rep.* (2003–2004).

by which Israel could safeguard “. . . an essential interest against a grave and imminent peril”. Consequently, the construction of the barrier was held to be disproportionate to the exigencies of the crisis. This is consistent with scholarly opinion. The *Siracusa Principles*<sup>66</sup> recommend that: “The principle of strict necessity shall be applied in an objective manner. Each measure shall be directed to an actual, clear, present or imminent danger and may not be imposed merely because of an apprehension of potential danger.”

In *Judgments – A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)*<sup>67</sup> the House of Lords held that an increased risk of terrorist activity post 9/11 could not on its own justify derogation from Convention rights. In other words, derogation was a disproportionate reaction to the challenge of increased terrorist activity.

## CONCLUDING REMARKS

This essay examines the limitations that the law imposes on governmental strategies for the combating of international terrorism. It analyzes the dynamic between the twin objectives of national security and development of the human rights regime. Both objectives are in contradistinction to the terrorist ideology and risk being compromised unless the menace is overcome. It shows that the increasing threat of international terrorism in the new millennium has panicked States into taking short cuts in their effort to combat terrorism.

The counter-terrorism strategies introduced by the UK parliament in the immediate aftermath of 9/11 appear to erode, minimize and curtail the human rights of individuals. This has resulted in a clash between parliament and the judiciary.

While demonstrating deference to parliament’s legislative authority to determine the UK’s counter-terrorism strategy, the House of Lords has insisted that it has a constitutional duty to supervise parliament’s exercise of that authority in order to ensure that the UK does not breach its international law obligations, particularly the requirements of international human rights law. This makes the role of the judiciary difficult because in this poisoned policy-making climate practice shows that governments cannot be relied upon to put the human rights of individuals first.

Decisions of the House of Lords on the matter indicate that in framing counter-terrorist strategy government ought to respect its constitutional and international human rights obligations. The House of Lords will not condone counter-terrorism strategies that are irrational, antithetical to the British notions of justice or unconstitutional. This means that proportional human rights are out of the question for the following reasons:

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<sup>66</sup> “*The Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR*”, 7 *Human Rights Quarterly* (1985), at 3.

<sup>67</sup> [2004] UKHL 56. Available on UK parliament website, <http://www.publications.parliament.uk/pa/ld200405/ldjudgmt/jd041216/a&oth-5.htm> (visited 30 July 2007).

- (1) The international human rights project has become the barometer for the health of democracy everywhere.
- (2) They are the yardstick for distinguishing between politically and socially developed States from developing and primitive ones.
- (3) Commitment to the recognition, promotion and protection of the dignity inherent in individuals *qua* human beings is now recognized as the basis on which international peace and security will be pursued.

To be valid, counter-terrorism strategies must comply with the rule of law in a democratic society and with the requirements of international human rights law.

SELECTED PAPERS, INTERNATIONAL  
SYMPOSIUM OF THE ASIAN SOCIETY OF  
INTERNATIONAL LAW, 7–8 APRIL 2007



SPEECH DELIVERED AT THE INAUGURATION OF THE  
ASIAN SOCIETY OF INTERNATIONAL LAW ON 7 APRIL 2007  
AT THE FACULTY OF LAW, NATIONAL UNIVERSITY OF  
SINGAPORE

Dr Kevin Y. L. Tan

GREETINGS

Our host, Dean Tan Cheng Han  
the Honourable Chief Justice Chan Sek Keong  
the Honourable Attorney-General Chao Hick Tin  
Judge Hisashi Owada, President of the Asian Society of International Law  
Mr Philip Jeyaretnam, President of the Law Society of Singapore  
Your excellencies, the distinguished judges of the International Court of  
Justice

Esteemed colleagues, ladies and gentlemen.

I am deeply honoured to be here today, on behalf of the Governing Board of the Foundation for the Development of International Law in Asia (DILA) to congratulate you on the formation of the Asian Society of International Law.

First, let me tell you a little bit about DILA. The last time we had such a huge gathering of international law scholars in Singapore was at the DILA Conference in 2001, and I am truly happy to see so many old friends and familiar faces again.

Just now, our Chief Justice told me that he never knew that we had a Foundation for the development of international law in Asia right here in Singapore. I had to inform him, rather embarrassingly, that the foundation for the development of international law in Asia was not in fact headquartered in Asia but in the Netherlands.

DILA was established some 20 years ago by a group of Asian emigre legal scholars based in Holland. Among the leading lights were Professor Ko Swan Sik, now Professor Emeritus of the University of Rotterdam, Professor JJ Syatauw, and Dr Christopher Pinto, Secretary-General of the US–Iran Claims Tribunal. As Judge Owada pointed out in his address just now, the need for some kind of an organization to promote the study, research, teaching and dissemination of international law in Asia was long felt and these leading lights worked together to establish DILA.

In deciding on an appropriate vehicle, the structure and institution of a society was eschewed in favour of a foundation mainly because at that time, it was felt that there were insufficient resources and infrastructure available to support and

coordinate a society across Asia, especially from Holland. As a result, DILA was registered as a foundation or *stifting*.

## INTERNATIONAL LAW SOCIETIES

The birth of any organization begins with an ideal and an inspiration. The same can be said about societies of international law. While the practice of international law has been internationally acknowledged since the fifteenth century – and certainly at the time Hugo Grotius published his great work *On the Law of War & Peace (De Jure Belli ac Pacis)* – communities of international law scholars did not form societies for the promotion of international law till the latter part of the nineteenth century.

It took the international community a long time to recognize the importance of international law in the law student's curriculum. Sitting here in 2007, it is easy to forget that the first chair in international law at Oxford – the Chichele Chair in International Law and Diplomacy – was only established in 1859 even though the university itself dates from the twelfth century. The same can be said of Cambridge, where the Whewell Professorship in International Law was established 10 years later in 1869.

## THE FIRST SOCIETY OF INTERNATIONAL LAW

### *The Institut de Droit International*

The very first society of international law was formed in 1873 as a result of the idea of a German scholar (Francis Lieber of Columbia Law School) and the inspired energies of a Belgian scholar and government official, Gustav Rolin-Jaequemyns. Rolin-Jaequemyns was then the founding editor of the first scholarly international law review, the *Revue de Droit International* (1869). A group of 10 eminent scholars and Rolin-Jaequemyns met in Ghent in 1873 and there established what is now known as the Institut de Droit Internationale. These facts are quite well known, but what is perhaps less known is Rolin-Jaequemyns' Asian connection.

When the government with which he was affiliated was ousted from power, Rolin-Jaequemyns found himself jobless and on a trip to Egypt, met Prince Damrong of Siam who was looking for an advisor from a small country. Rolin-Jaequemyns served as Special Advisor to King Chulalongkorn from 1892 to 1901 and was made the equivalent of a prince with the title of Chao Phya Abhai Raja, the highest accolade for a *farang* or foreigner.

## OUR HOPES FOR ASIA

Rolin-Jaequemyns died in 1902, the same year a group of Japanese scholars, led by Professor Sakuye Takahashi, established the *Review of International Law (Revue de*

*Droit Internationale*) and the Japanese Society of International Law. This was the very first society of international law to be established in Asia and it is perhaps fitting that the prime movers and initiators of the Asian Society of International Law should be our friends from Japan.

My colleagues wish me to say how gratified we are that the same core ideals that led to DILA's foundation over 20 years ago have inspired ASIL's initiators and promoters to even greater heights. Our hopes and aims are similar, if not identical, even if we have chosen different vehicles by which to further these ideas. It thus our hope that as we grow together in the coming years, we will have many opportunities to collaborate and cooperate on joint projects and meetings. For a start, a selection of papers to be presented at this conference will be published in the next issue of our flagship publication, the *Asian Yearbook of International Law*.

## CHALLENGES

Today, as you gather here for two days of discussions of important issues in international law in Asia, you can take pleasure in knowing that you've already done far more and far better than Rolin-Jaequemyns and his group of 10 in 1873. Yet, a number of important challenges remain.

The first is one of resources. It is ironic that in a region as populous as Asia with over 1,000 law schools, there are so few individuals in the who are able to spare the time and energy to mobilise the international legal community to promote the research, teaching and dissemination of international law in the region. The causes and many and varied and it is not my intention to speculate or offer part solutions. What we need to guard against is the fragmentation of energies and efforts in our respective quests.

The second is finance. Today, we are fortunate that the promoters of the Asian Society have secured the support of the Faculty of Law of the National University of Singapore, as well as the financial assistance of some very generous sponsors. This is no mean feat as most Asian businesses and corporations do not find a natural affinity with international law or its objectives. The challenge is to continue to secure this kind of infrastructural and financial support from the community throughout Asia.

Finally, the sheer size and diversity of Asia makes it difficult for any organization to mobilize its members and even more difficult to forge a consensus.

## CONCLUSION

That said, it is our sincere hope that the accidental co-location of both DILA's principal officers and ASIL's office in Singapore will prove beneficial to the realization of our common aims and purposes. DILA and ASIL can and must cooperate toward the achievement of our common goals, whether it is to find a common voice or forge a common philosophy with respect to international law and affairs.

I started my speech with the remarkable Gustave Rolin-Jacquemyns, so let me end by quoting him:

The moment appears to have come to found a permanent institution, purely scientific, which, without proposing the realization of far distant Utopias or an immediate reform, can nevertheless aspire to serve as the organ, in the realm of the law of nations, of the legal conscience of the civilized world.

It leaves me now to join my colleagues in DILA in wishing ASIL a great beginning. Congratulations, and may it long serve our peoples.

# INTERNATIONAL LAW IN ASIA: THE LIMITS TO THE WESTERN CONSTITUTIONALIST AND LIBERAL DOCTRINES

Dr Jean d'Aspremont\*

## INTRODUCTION

Although the practice of international law pre-existed its inception in European legal thought, it is not disputed that, as an autonomous set of rules and principles, international law was conceptualized in Europe.<sup>1</sup> It is also uncontested that, following its systematization by European scholars, international law was incrementally extended to non-European nations, sometimes with some imperialistic aspirations.<sup>2</sup> It is not only international law that was disseminated around the world on this occasion but also the European legal thought. The universalization of international law that was partly achieved following decolonization<sup>3</sup> has not totally fettered the monopoly of the Western legal scholarship as the contemporary international legal scholarship still borrows extensively from Western legal scholars. There is, however, one particular aspect of the contemporary Western legal doctrine that fails to permeate the international legal scholarship as a whole. This pertains to the importance ascribed to the role played by values in the international legal order along the lines

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\* Assistant-Professor of International Law, University of Amsterdam. This paper was presented on the occasion of the inaugural meeting of the *Asian Society of International Law* that took place at the National University of Singapore on 7–9 April 2007 on the topic “International Law in Asia: Past, Present and Future”. The author wishes to thank Prof. J. Klabbers, Prof. Yasuaki Onuma and Dr Frank Haldemann for sharing their thoughts with him on this topic.

<sup>1</sup> See generally, Onuma, Yasuaki, “When was the law of international society born?”, 2 *Journal of the History of International Law* 63–79 (2002). See also Sornarajah, M., “Power and justice in international law”, 1 *Singapore Journal of International Law* 28 (1997), esp. at 28–33; Shahabuddeen, M., “Developing countries and the idea of international law” in MacDonald, R.J. (ed.), *Essays in Honour of Wang Tieya*, The Hague: Martinus Nijhoff, 1994, at 721–736. See also Orakhelashvili, A., “The idea of European international law”, 17 *EJIL* 315–347 (2006).

<sup>2</sup> For an emphasis on Asia, see Thomas, J.A., “International law in Asia: An initial review”, 13 *Dalhousie L. J.* 683 (1990).

<sup>3</sup> See, however, the challenging opinion formulated by Koskenniemi, M., *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960*, Cambridge: CUP, 2004.

of the theories of Western constitutionalist and liberal scholars. More particularly, it is argued in this paper that the liberal and constitutionalist values-oriented views of the international legal order – which have proven very popular among Western scholars – have not been unanimously embraced in Asia.

Minimizing the role of values in the international legal order does not equate to a defiance of the idea that international law can be directed at the promotion of the public good.<sup>4</sup> It is utterly conceivable that one may recognize the extent to which a significant number of international legal rules nowadays serve the public good without endorsing the idea that these rules rest on global values. This paper does accordingly not challenge the finding that international rules may promote the public good. It rather zeroes in on the controversy that arises as to foundations of those norms that serve the wellbeing of all. The first seminal works that alluded to an international lawmaking directed at the public good are probably those of Wilfred Jenks,<sup>5</sup> Schwarzenberger,<sup>6</sup> Friedmann<sup>7</sup> or R.-J. Dupuy.<sup>8</sup> However, their understanding of the international legal order was already, in a way or another, linked to the existence of *values*. Without denying the oversimplification inherent to the following categorization of scholars, this values-oriented conception of the legal order has been further underpinned by the more recent contributions of Western constitutionalist scholars<sup>9</sup> – or those whose discourse is tinged with constitutionalism – like Christian Tomuschat,<sup>10</sup> Erika de Wet,<sup>11</sup> Hermann Mosler,<sup>12</sup> Jost Delbrück,<sup>13</sup> Bruno Simma,<sup>14</sup>

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<sup>4</sup> Simma, B., “From bilateralism to community interest”, 250 *RdC* 234 (1994-VI). On the reinforcement of the public character of international law through the promotion of the public good, see d’Aspremont, J., “Contemporary rulemaking and the public character of international law”, *Institute for International Law and Justice Working Papers Series*, 2006/12.

<sup>5</sup> Jenks, C. Wilfred, *The Common Law of Mankind*, London: Stevens, 1958.

<sup>6</sup> Schwarzenberger, G., *The Frontiers of International Law*, London: Stevens, 1962, at 29.

<sup>7</sup> Friedmann, F., *The Changing Structure of International Law*, New York: Columbia University Press, 1964.

<sup>8</sup> Dupuy, R.-J., “Communauté internationale et disparités de développement”, 165 *RdC* 9 (1979-IV).

<sup>9</sup> On constitutionalism in general see von Bogdandy, A., “Constitutionalism in international law: Comment on a proposal from Germany”, 47 *Harv. Int’l L.J.* 223 (2006).

<sup>10</sup> Tomuschat, C., “International law: Ensuring the survival of mankind on the eve of a new century: General Course on public international law”, 281 *RdC* 10 (1999), esp. at 237, 306.

<sup>11</sup> De Wet, E., “The international constitutional order”, 55 *ICLQ* 51–76 (2006); *ibid.*, “The emergence of international and regional value systems as a manifestation of the emerging international constitutional order”, 19 *Leiden J. Int’l L.* 611–632 (2006).

<sup>12</sup> Mosler, H., *The International Society as a Legal Community*, Alphen aan den Rijn: Sijthoff & Noordhoff, 1980, at 17–18. See also “Der ‘Gemeinschaftliche Ordre Public’ in Europäischen Staatengruppen”, 21 *Revista de Derecho Internacional* 523, 532 (1968).

<sup>13</sup> See in general Delbrück, J. (ed.), *New Trends in International Lawmaking – International “Legislation” in the Public Interest*, Berlin: Duncker & Humblot, 1997, esp. at 18–19.

<sup>14</sup> Simma, B., “From bilateralism to community interest”, 250 *RdC* (1994-VI), at 217–384, esp. at 233.

Anne Peters,<sup>15</sup> Pierre-Marie Dupuy,<sup>16</sup> Nico Schrijver,<sup>17</sup> George Abi-Saab,<sup>18</sup> Verra Gowland-Debbas,<sup>19</sup> Jonathan Charney,<sup>20</sup> Robert McCorquodale<sup>21</sup> or Joseph Weiler.<sup>22</sup> (Neo-) liberals like Louis Henkin,<sup>23</sup> T. Frank,<sup>24</sup> Fernando R. Tesón<sup>25</sup> or Anne-Marie Slaughter<sup>26</sup> – to name only a few – also analyze the legal order through the lens of values.

This paper submits that the Asian international legal scholarship provides a cogent alternative to the aforementioned constitutionalist and liberal approaches as many prominent Asian scholars base international lawmaking on *interests* rather than values. In this sense, many Asian scholars challenge the *Kantian* or *Grotian* conceptions of international law and provide a *Vattelian* vision of the legal order.<sup>27</sup> It must be acknowledged that any endeavour to devise the international legal order on interests rather than values inescapably echoes a (neo-) Hobbesian vision of the legal order. Such a vision of international law has undoubtedly taken

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<sup>15</sup> Peters, A., “Compensatory constitutionalism: The function of potential of fundamental international norms and structure”, 19 *L. J. Int’l L.* 579–610 (2006).

<sup>16</sup> See for instance, Dupuy, P.-M., “Some reflections on contemporary international law and the appeal to universal values: A response to Martti Koskeniemi”, 16 *EJIL* 131–137 (2005).

<sup>17</sup> On the question of the United Nations and the development of global values, see Schrijver, N., “The future of the United Nations”, 10 *Max Planck United Nations Yearbook of International Law* 1–34 (2006); *ibid.*, “Les valeurs générales et le droit des Nations Unies” in Chemain, R. and Pellet, A., *La Charte des Nations Unies, Constitution Mondiale?* Paris: Pedone, 2006, at 85–88. See also the research project carried out at Leiden University on the “United Nations and the evolutions of global values”, [http://www.law.leidenuniv.nl/org/publiekrecht/ipr/nieuw\\_onderzoeksproject.jsp](http://www.law.leidenuniv.nl/org/publiekrecht/ipr/nieuw_onderzoeksproject.jsp).

<sup>18</sup> Abi-Saab, G., “International law and the international community: The long road to universality” in MacDonald, *op. cit.*, n. 1, at 31–41.

<sup>19</sup> Gowland-Debbas, V., “Judicial insights into fundamental values and interests of the international community” in Muller, A.S. et al. (eds.), *The International Court of Justice*, The Hague: Kluwer Law International, 1997, at 327–366.

<sup>20</sup> Charney, J., “International lawmaking – Article 38 of the ICJ Statute reconsidered” in Delbrück, *op. cit.*, n. 13, at 171–191, esp. at 189; *ibid.*, “Universal international law”, 87 *AJIL* 529 (1993).

<sup>21</sup> McCorquodale, R., “An inclusive international legal system”, 17 *Leiden J. Int’l L.* 477–504 (2004).

<sup>22</sup> Weiler, J.H.H., “The geology of international law – governance, democracy and legitimacy”, 64 *ZaöRV*, 547–562 (2004), esp. at 556–557.

<sup>23</sup> See Henkin, L., *International Law: Politics and Values*, The Hague: Martinus Nijhoff, 1995, esp. ch. X.

<sup>24</sup> Franck, T., *Fairness in International Law and Institutions*, Oxford: Clarendon Press, 1995.

<sup>25</sup> Tesón, Fernando R., “The Kantian theory of international law”, 92 *Colum. L. Rev.* 53 (1992).

<sup>26</sup> Slaughter, Anne-Marie, “A liberal theory of international law”, 94 *ASIL Proc.* 240 (2000); “The liberal agenda for peace: international relations theory and the future of the United Nations”, 4 *Transnational Law and Contemporary Problems* 377 (1994); and “International law in a world of liberal States”, 6 *EJIL* 503 (1995).

<sup>27</sup> For an account of the various traditions of international law, see Simma, B. and Paulus, A., “The ‘International Community’: Facing the challenge of globalization”, 9 *EJIL* 266–277 (1998).

the back seat in contemporary Western *legal* scholarship.<sup>28</sup> It is however important to stress from the start that the Hobbesian understanding of the legal order which underlies the Asian view of the international legal order is alien to the widespread (neo-) realist interpretations of Hobbes.<sup>29</sup> The (neo-) realist school has always centred on the Hobbesian “State of nature” as a breeding ground for the vying for power.<sup>30</sup> Even though it does not deny the overarching importance of self-interests in contemporary lawmaking, this understanding of the international legal order depicted in this paper is at odds with the (neo-) realist theories and rests on a conceptualization of Hobbes that focuses on the role played by common interests – which is a feature that realists like Hans Morgenthau<sup>31</sup> or even Neo-Realists like Kenneth Waltz<sup>32</sup> adamantly disputed. It is argued here that Hobbes, although he might have been “guilty of gross and dangerous crudities”,<sup>33</sup> did not rule out that common interests were playing a role in international relations.<sup>34</sup> In that sense, the Asian approach of the foundations of the international legal order provides an Hobbesian understanding of the international legal order which somehow borrows from the rationalist approach of the English school of international relations although the latter has not always be entirely estranged from a Grotian vision of the world order.<sup>35</sup>

In the first part, this paper tries to capture the mainstream position on the role of values and interests within the Asian legal scholarship (1). Building on the seminal works of some prominent Asian scholars, it then depicts in broad lines the features of contemporary international lawmaking with a view of demonstrating

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<sup>28</sup> *Ibid.*

<sup>29</sup> For a criticism of the neo-realist understanding of Hobbes, see Hanson, D.W., “Thomas Hobbes’s ‘Highway to Peace’”, 38 *International Organization*, 329–354 (1984).

<sup>30</sup> Morgenthau, H., *Politics Among Nations*, 4th ed., New York: Alfred A. Knopf, 1967, at 113.

<sup>31</sup> See the depiction of Realists by Koskenniemi, M., “Image of law and international relations” in Byers, M. (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law*, Oxford: OUP, 2000, at 28.

<sup>32</sup> Kenneth Waltz is said to be a neo-realist in the sense that he is not endorsing the conservative and pessimistic analysis of men and favours a more top-down analysis of international relations based on the deficiencies of the international system (whereas Morgenthau, Kennan and Niebuhr construe the behaviour of States as a magnification of the flawed human nature). This said, Neo-Realists yet treat States as self-interested. For an overview of the different strands of realism, see Shimko, K.L., “Realism, neorealism and American liberalism”, 54 *The Review of Politics* 281–301 (1992).

<sup>33</sup> Catlin, G.E.G., “Thomas Hobbes and contemporary political theory”, 82 *Political Science Quarterly*, 1–13 (1967).

<sup>34</sup> In the same vein, see May, L., *Crimes against Humanity – A Normative Account*, Cambridge: CUP, 2005, at 14–16. See also Williams, M.C., “Hobbes and international relations: a reconsideration”, 50 *International Organization* 213–236 (1996).

<sup>35</sup> Bull, H., *The Anarchical Society*, London: Macmillan, 1977, at 4–5. On the appeal held by Grotius for Hedley Bull and the discrepancies between the former and the latter, see Kingsbury, Benedict, “A Grotian tradition of theory and practice?: Grotius, law and moral skepticism in the thought of Hedley Bull”, 17 *QLR* 3 (1997–1998).

that the international legal order does not rest on values but on a particular understanding of individual and common interests (2).

#### ASIAN SCHOLARSHIP AND THE ROLE OF INTERESTS: A BRIEF ACCOUNT

Asian scholarship is of course not a unitary set of legal scholarship. As there are many “Asias”, there is not a single Asian scholarship.<sup>36</sup> There is inescapably an ample diversity among authors and it is acknowledged that any portrayal of an “Asian scholarship” is beset with some overgeneralization. However, to the author of this paper, it does not seem exaggerated to claim that some common ground can be found among Asian scholars in connection with their conception of the public character of international law and, especially, as regards the way in which they construe the common interest.

There is not much doubt that most Asian international legal scholars acknowledge that modern international law can serve a public interest. Accordingly, they do not thwart the idea that international law is also public because it is attuned to some form of public good. However, many Asian scholars discount the idea that international lawmaking is driven by global values. In that sense, their position differs from Western constitutionalist and liberal traditions. They arguably lean towards the belief that rules of international law that serve the public good are the emanation of individual and common States interests. In that respect, one may say that the conception of the common interest conveyed by Asian international legal scholars dovetails with that expressed by most Asian governments.<sup>37</sup>

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<sup>36</sup> On this question, see Ghai, Y., “Asian perspectives on human rights”, 23 *Hong Kong L.J.* 342 (1993). See also Onuma, Y., “In quest of intercivilizational human rights: ‘universal’ vs. ‘relative’. Human rights viewed from an Asian perspective”, 1 *Asia-Pac. J. on Human Rights & Law* 53 (2000), esp. at 55–56.

<sup>37</sup> See for instance the Report of the Regional Meeting for Asia of the World Conference on Human Rights, Bangkok, 29 March–2 April 1993, A/Conf.157/ASRM/8 and A/Conf.157/PC/59, 7 April 1993: “expressing concern that [international human rights mechanisms] relate mainly to one category of rights”; “recognize that while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious background.” See more generally the paper issued by the Chinese government, “Human rights in China” (1991), 34 *Beijing Review* (4–10 November 1991), at 9. See also the statement by Mr Nirupan Sen, Permanent Representative on “Justice and the rule of law: The United Nations role” at the Security Council on 6 October 2004, available at [www.un.int/india](http://www.un.int/india) <statement<Security Council<2004: “The UN should play a supportive and facilitating role, without seeking to impose an outside optic or values of any particular country or group of countries on the delicate process of establishing the rule of law”. In the same mould, see Statement by Mr V.K. Mambiar, Permanent Representative on non-proliferation of weapons of mass destruction at the Security Council on 22 April 2004, available at [www.un.int/india](http://www.un.int/india) <statement-<Security Council<2004: “India will not accept externally prescribed norms or standards, what

This is not to say that the scepticism of Asian scholars towards a conception of legal order based on values merely boils down to a cultural relativism.<sup>38</sup> Neither is their resentment to global values in lawmaking tantamount to the “Asian Values” argument to which it is occasionally resorted by governments of that region to fend off criticisms over their human rights policies.<sup>39</sup> Indeed, claiming that international lawmaking is based on individual as well as common interests is not in any way incompatible with the universality of rules like human rights whether or not global moral values in lawmaking be felt in Asia as a form of moral or ideological superiority of the West.<sup>40</sup>

It is not surprising that not all Asian scholars have provided an assessment of the driving forces of international lawmaking. However, a few of them have clearly voiced their attachment to the idea that international rulemaking is not driven by values but rather by interests.

R.P. Anand is probably the Asian scholar that has been the Asian beacon of this understanding of international lawmaking. Although he has not denied the existence of a world society, he has rightly construed international rulemaking as the outcome of a conflict of interests.<sup>41</sup> Probably under the influence of Carr, he contended that international law originates in each State’s view of its own interest and those of the community.<sup>42</sup> According to him, interests prevail over values in international lawmaking.<sup>43</sup>

When grappling with questions like Antarctica, M.C.W. Pinto has also expressed

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ever their source, on matters pertaining to domestic jurisdiction of its parliament, including national legislation, regulations or arrangements which are not consistent with its Constitutional provisions and procedures or contrary to its national interests, or infringe on its sovereignty”.

<sup>38</sup> Klein, R., “Cultural relativism, economic development and international human rights in the Asian context”, 9 *Touro Int’l L. Rev.* 1; Yee, S., “The role of law in the formation of regional perspectives in human rights and regional systems for the protection of human rights: The European and Asian models as illustrations”, 8 *Singapore Yearbook of International Law* 157–164 (2004). For a discussion on the discrepancies between Asian and European values, see Ghai, Y., “Asian perspective on human rights”, 23 *Hong Kong L.J.*, 342 (1993), esp. at 351–352. See also Donnelly, J., *Universal Human Rights in Theory and Practice*, Ithaca, New York: Cornell University, 2003, esp. at ch. 6.

<sup>39</sup> On this debate, see Davis, M.C., “Constitutionalism and political culture: The debate over human rights and Asian values”, 11 *Harv. Hum. Rts. J.* 109 (1998); or Engle, K., “Culture and human rights: The Asian values debate in context”, 32 *NYU J. Int’l & Pol.* 291 (1999–2000). See also Donnelly, *op. cit.*, n. 38, esp. at ch. 7.

<sup>40</sup> Yee, *loc. cit.*, n. 38, 163.

<sup>41</sup> Anand, R.P., “Attitude of the Asian-African States toward certain problems of international law”, 15 *ICLQ* 55 (1966), at 70 and 72.

<sup>42</sup> *Ibid.*, at 70. See also *ibid.*, “Role of the ‘New’ Asian-African countries in the present international legal order”, 56 *AJIL* 383 (1962).

<sup>43</sup> Anand, R.P., “The role of Asian States in the development of international law” in Dupuy, R.-J., *The Future of International Law in a Multicultural World*, The Hague/Boston/London: Martinus Nijhoff, 1984, at 112–113.

views that bespeak an understanding of international lawmaking based on the self-interest and common interest rather than on values.<sup>44</sup>

Although he has voiced his wish for a normative world order<sup>45</sup> and has been close to see Humanitarian Law as reflecting values<sup>46</sup>, M. Sornarajah has generally painted the international legal order in terms of interests, being that of the peoples or the community. Likewise, his conception of justice in the international sphere is based on the interest of the community rather than international values.<sup>47</sup> He has even claimed that justice must be supported because it stands in the interest of any hegemonic power.<sup>48</sup>

More bluntly, Yasuaki Onuma has taken aim at the Westcentric modern civilization and criticized the “cultural imperialism”<sup>49</sup> that plagues international human rights law. In doing so, he has artfully spoken of human rights law in terms of “usefulness”<sup>50</sup>, highlighting that human rights have proven to be the most effective way to protect human interests and fulfil the universal quest for human wellbeing.<sup>51</sup>

When dealing with issues related to the law of the sea and the concept of common heritage, Wang Tieya did not seem to resort to global values to underwrite what he deemed to be a welcome development of international law.<sup>52</sup> In his writings, he also refrained from analyzing human rights in terms of values<sup>53</sup>, a leaning that seems to be confirmed by his later work as an international judge.<sup>54</sup>

Although he acknowledges that moral considerations are not necessarily insignificant, N. Singh has also been a proponent of an international *lawmaking* based on the individual and common interest of States, irrespective of any value.<sup>55</sup> According to him, the legal order stems from the mutual interests of States which, although they remain “slave of their own interest”, can be amenable to the

<sup>44</sup> Pinto, M.C.W., “The International community and Antarctica”, 33 *U. Miami L. Rev.* 475 (1978–1979); *ibid.*, “Governance in Antarctica” in MacDonal, *op. cit.*, n. 1, at 587–609.

<sup>45</sup> Sornarajah, *loc. cit.*, n. 1, at 40.

<sup>46</sup> *Ibid.*, “An overview of the Asian approaches to international humanitarian law”, 9 *Australian Year Book of International Law* 238 (1985).

<sup>47</sup> *Ibid.*, *loc. cit.*, n. 1, at 33–35.

<sup>48</sup> *Ibid.*, at 68.

<sup>49</sup> Onuma, *loc. cit.*, n. 36, at 79.

<sup>50</sup> *Ibid.*, at 72.

<sup>51</sup> *Ibid.*, at 55. *Comp.* with Donnelly, *op. cit.*, n. 38, at 63–64.

<sup>52</sup> “On the concept of the common heritage of mankind”, *Chinese Yearbook of International Law* (1984). On the work of Wang Tieya on the Law of the Sea, see Zhang, H., “Professor Wang Tieya and the law of the sea”, 4 *Journal of History of International Law* 204–208 (2002).

<sup>53</sup> On the work of Wang Tieya on Human Rights, see Heuser, R., “China and developments in international law: Wang Tieya as a contemporary”, 4 *Journal of the History of International Law* 142–158 (2002), at 153.

<sup>54</sup> See the Joint and Concurring opinion of Judge Wang Tieya and Judge Rafael Nieto-Navia in the ICTR case *Joseph Kanyabashi v. The Prosecutor*, ICTR-96-15-A, 3 June 1999.

<sup>55</sup> Singh, S.S., “The absence of a sovereign legislature and its consequences for international law”, 12 *Malaya Law Review* 277 (1970).

“community interest”.<sup>56</sup> Authors like M.L. Sarin<sup>57</sup> and M. Miyoshi<sup>58</sup> have also expressed a similar view.

By the same token, the Third World Approaches to International Law (TWAAIL) – with which many Asian legal scholars are in line, such as B.S. Chimni – probably rests on an understanding of the international legal order that is based on the interests and needs of nations and rather than values.<sup>59</sup> Likewise, many of the visions of the legal order that are reflected in the academic discourse in India seem also devoid of reference to global values.<sup>60</sup>

It is worth stressing that, even if he has been a staunch proponent of the universal foundations of human dignity, Yash Ghai – a prominent Kenyan scholar who has written much on international law and human rights law in Asia – has asserted, especially referring to debate about the universality of human rights taking place in Asia, that human rights boil down to a mechanism for “balancing different interests that surround the right”<sup>61</sup> and has focused on the “function” of human rights.<sup>62</sup> Such a vision of human rights does not primarily rest on global values and leans towards a more functional understanding of this set of international rules.

Eventually, the contributions of Asian judges in the case-law of various international judicial bodies reflect the same approach. In some of its opinions accompanying decisions of the International Court of Justice, Judge Oda has expressed an understanding of the international lawmaking that falls short of recognizing world values.<sup>63</sup> Likewise, Judge Shi has never voiced any support for the idea that rules serving a common interest were based on values.<sup>64</sup>

One can probably not reduce Asian international legal scholarship to the few aforementioned authors. As previously explained, Asian scholarship is replete with different strands and some Asian scholars have enthusiastically endorsed the idea of a legal order based on values. For instance, Judge Ranjeva has expressed the idea

<sup>56</sup> *Ibid.*, at 291.

<sup>57</sup> Sarin, M.L., “The Asian-African States and the development of international law” in Dupuy, *op. cit.*, n. 43, at 137.

<sup>58</sup> Miyoshi, M., “Curricula for teaching of international law in Asia – an Asian perspective”, 5 *Sing. J. Int’l & Comp. L.* 355 (2001).

<sup>59</sup> Anghie, A. and Chimni, B.S., “Third world approaches to international law and individual responsibility in internal conflicts”, 2 *Chinese J. Int’l L.* 77 (2003), esp. at 98.

<sup>60</sup> Chimni, B.S., “Alternative visions of just world order: six tales from India”, 46 *Harv. Int’l L.J.* 389 (2005). See also “Teaching, research and promotion of international law in India: past, present and future”, 5 *Sing. J. Int’l & Comp. Law* 368 (2001).

<sup>61</sup> Ghai, Y., “Universalism and relativism: human rights as a framework for negotiating inter-ethnic claims”, 21 *Cardozo L. Rev.* 1095 (1999–2000).

<sup>62</sup> Ghai, Y., “Asian perspective on human rights”, *loc. cit.*, n. 38, at 355. See also “Human rights and governance: the Asia debate”, 15 *Australian Year Book of International Law* 1 (1994), at 21.

<sup>63</sup> See, for instance, the dissenting opinion of Judge Oda in the *Legality of the Threat or Use of Nuclear Weapons* case, ICJ Rep. 1996.

<sup>64</sup> See, for instance, the declaration of Judge Shi, *Legality of the Threat or Use of Nuclear Weapons* case, ICJ Rep. 1996.

that the law regulating nuclear weapons rests on the values of all the members of the International community.<sup>65</sup> Similarly, Judge Owada has also recognized the existence of international values in lawmaking although in a pluralistic manner.<sup>66</sup> Leaving these well-respected and distinguished scholars aside, the author of this paper however believes that, on the whole, Asian scholarship has not espoused the Western constitutionalist and liberal understandings of international lawmaking, *i.e.* the existence of global values in rulemaking. Drawing on the work of Asian scholars and the practice by Asian States, the next section elaborates on the idea that international lawmaking is driven by individual and common interests of States rather than values.

### INTERESTS IN INTERNATIONAL LAWMAKING AND THE ABSENCE OF VALUES

Together with the Asian scholars that have been mentioned above, this paper argues that values are absent from international lawmaking. This means that rules are made to serve individual and common interests and, in particular, that those rules that are dedicated to the public good do not rest on universal values.

It is anything but surprising that States first strive to promote their own interest. As States are both primary lawmakers and subjects of international law<sup>67</sup>, they naturally act to maximize the interest of their constituency given their perception of the interests of other States and the distribution of State power.<sup>68</sup> International cooperation first stems from a *convergence* of individual interest as explained by De Visscher.<sup>69</sup> This convergence entices States to cooperate and adopt a multilateral framework for their action.<sup>70</sup> Even liberals – some under the banner of “State values” – come to terms with this phenomenon.<sup>71</sup>

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<sup>65</sup> Ranjeva, M., Individual opinion, *Legality of the Threat or Use of Nuclear Weapons* case, ICJ Rep. 1996.

<sup>66</sup> Owada, H., “Some reflections on justice in a globalizing world”, 97 *ASIL Proc.* 181 (2003), esp. at 184–189.

<sup>67</sup> Charney, *loc. cit.*, n. 20 (87 *AJIL* (1993)), at 533.

<sup>68</sup> In that sense, I agree with Goldsmith, Jack L. and Eric A. Posner, *Limits of International Law*, Oxford: OUP, 2005, at 3 and 6: “State interests are not always easy to determine, because the State subsumes many institutions and individuals that obviously do not share the identical preferences and outcomes. Nonetheless, a State – especially one with well-ordered political institutions – can make coherent decisions based upon identifiable preferences, or interest, and it is natural and common to explain State action on the international plane in terms of the primary goal or goals the State seeks to achieve.”

<sup>69</sup> This is discussed by De Visscher, C., *Theory and Reality of International Law*, translated by P. E. Corbett, Princeton: Princeton University Press, 1957, at 144–153; *see also* Goldsmith and Posner, *op. cit.*, n. 68, at 13 and 88–90.

<sup>70</sup> Shahabuddeen, *loc. cit.*, n. 1, at 733.

<sup>71</sup> Henkin, *op. cit.*, n. 23, esp. at ch. VI.

One should not bemoan the fact that States primarily seek the satisfaction of their individual interest. Their own interest is not especially that of the State as an independent abstract entity. It may also come down to the interest of the people within its constituency, whether it is for the sake of their welfare or the more cynical desire to gain their support. One could say that the foregoing is consistent with the essence of *representation*. It could even be argued that the reinforcement of the liberal democratic structure of governance at the national level on the heels of the Cold war<sup>72</sup> has enhanced the tendency for a government to strictly advocate the interest of its people on the world plane, especially in international lawmaking.

This paper does not however construe international lawmaking exclusively through the individual interest of States. Contrary to what realist theorists have contended, States are not inherently self-interested.<sup>73</sup> They are sometimes prone to promote the interest of all and not only their pure self-interest. It is nonetheless true that, in many respects, States promote a common interest because they feel that they will individually benefit from it also. Such an understanding of the common interest is probably what Niebuhr depicted as the “wise” or “enlightened” self-interest.<sup>74</sup> It is also somewhat similar to J. Bentham’s famous aggregative definition of the public interest.<sup>75</sup> As has been explained by McDougal and Reisman, “the most important ‘national’ interests of a particular State may be its inclusive (‘international’) interests with other States”.<sup>76</sup> Friedmann himself noted that it is “possible to work for the strengthening of international law and authority from the standpoint of ‘enlightened national interest’, as being the best or even the only way of ensuring national survival”.<sup>77</sup> This is what I have called somewhere else the “mutualized interests”.<sup>78</sup>

Even though a common interest may only amount to a mutualized interest, there

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<sup>72</sup> On democracy in International Law, see d’Aspremont, J., *Les Etats non démocratiques et le droit international*, Paris: Pedone, 2008. See also *ibid.*, “Legitimacy of governments in the age of democracy”, 38 *N.Y.U. J. Int’l L. & Pol.* 877 (2006); See generally Fox, G.H. and Roth, B.R., *Democratic Governance and International Law*, Cambridge: CUP, 2000.

<sup>73</sup> Wendt, A., *Social Theory in International Politics*, Cambridge: CUP, 2004, at 234.

<sup>74</sup> Quoted in Good, R.C., “The national interest and political realism: Niebuhr’s ‘Debate’ with Morgenthau and Kennan”, 22 *The Journal of Politics* 597–619 (1960), at 601.

<sup>75</sup> See Burns, J.H. and Hart, H.L.A., (eds.), *An Introduction to the Principles of Morals and Legislation*, London: Athlone Press, 1970, at 12: “The community is an abstract construction, composed of the individual persons who are considered as constituting as it were its members. The interest of the community then is, what? – the sum of the interest of the several members who compose it.” Bentham’s conception of the public interest as a “sum-of-particular-interests” has usually been criticized for failing to distinguish private interests from the welfare of the community and leaving no room for the interest of the society. For a rehabilitating understanding of Bentham, see Gunn, J.A.W., “Jeremy Bentham and the public interest”, 1 *Canadian Journal of Political Science* 398–413 (1968).

<sup>76</sup> McDougal, M.S. and Reisman, W. M., “The changing structure of international law”, 65 *Colum. L. Rev.* 810 (1965), at 813. See also Simma, *loc. cit.*, n. 14, at 242.

<sup>77</sup> Friedmann, *op. cit.*, n. 7, at 48.

<sup>78</sup> D’Aspremont, *loc. cit.*, n. 4.

are hypotheses where States are truly and genuinely amenable to the interest of all, irrespective of the benefit that they can reap from the rule concerned. It can be argued that States sometimes seek to pursue the general wellbeing of human beings, wherever the beneficiaries may be located. Indeed, all States share the quest for wellbeing of individuals and can, accordingly, realize, as shrewdly explained by Yasuaki Onuma<sup>79</sup>, the “usefulness” of the protection of human beings or that of the environment to give but a few examples.<sup>80</sup> So constructed, the common interest that may drive international lawmaking is thus devoid of any values-oriented foundations.

One may question what eventually differentiates values and interests. This is why it is of the utmost relevance to stress that interests of States are in no way subject to an objective determination as there are no *a priori* individual or common interests.<sup>81</sup> In particular common interests are not objective standards which can be subject to some sort of objectivation. This is precisely the essential conceptual difference between values and interests. It is argued here that what drives international lawmaking is the way in which States *perceive* and *construe* their interests, the interests of their peers and the interests of the group. There are probably some structural individual interests (to Realists, this comes down to survival, autonomy and wellbeing<sup>82</sup>). It could also be said that the maintenance of *order* is structurally in the interest of all States.<sup>83</sup> But even a structural interest cannot drive the lawmaking if it is not *perceived* as such. The subjective perceptions of the parties are thus not irrelevant and must be taken into account. This means that, as regards the common structural interests, for instance, each State has its own understanding of what this order is or should be. The impossibility of an objectivation of the driving forces of international lawmaking surely condemns us to a deep relativism. Such a relativism should, however, not be seen with a dim look as Asian scholars have tried to convince us.

Having in mind the possibility of diverging perceptions of interests and their intrinsically relative character, four categories of rules that arguably serve the public good are examined here with a view of demonstrating that their adoption has not been dragged by global values. Mention will be made of rules that pertain to

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<sup>79</sup> Onuma Yasuaki, *loc. cit.*, n. 36, at 76–77.

<sup>80</sup> Liberals have made a similar argument. See, for instance, Henkin, *op. cit.*, n. 23, at 284.

<sup>81</sup> Oxman, B.H., “The international commons, the international public interests and new modes of international law making” in Delbrück, *op. cit.*, n. 13, at 27.

<sup>82</sup> See, for instance George, A. and Keohane, R., “The concept of national interests: uses and limitations” in George, R., *Presidential Decisionmaking in Foreign Policy*, Boulder: Westview, 1980, at 217–238. Clinton, D., “The national interest: normative foundations”, 48 *Review of Politics* 495–519 (1986), esp. at 497–505. For A. Wendt, see *op. cit.*, n. 73, at 236.

<sup>83</sup> De Visscher, *op. cit.*, n. 69, at 71 and 100; See also Tomuschat, *loc. cit.*, n. 10, at 78 (he tends to make a difference between peace and order). This is also echoed in liberal literature: see Henkin, *op. cit.*, n. 23, esp. at ch. VI.

the preservation of peace (a), the efficiency of the international system (b), the protection of the environment (c) and the protection of human beings (d).

### Rules pertaining to the preservation of peace

It is not much disputed that peace constitutes a public good and that rules related to the preservation of peace serve a common interest. It is submitted here that those rules, as Anand explained<sup>84</sup>, do not reflect any value but rest on a mere mutualization of interests as previously defined.

The prohibition of the use of force is probably the embodiment of this type of rule. States may have consented to such a rule for self-serving reasons. Indeed, States whatever their power and their clout seemed to believe that the scourge of war can, in one way or another, be detrimental to them and their own population. Small nations which were not backed by any major power must probably have construed the rule prohibiting the use of force primarily as a means to protect themselves against greater powers. In that sense, the rules pertaining to the use of force reflect the interests of the weaker States.<sup>85</sup> Major powers – whose might can deter other powers from threatening them – probably realized that their power could wane or be insufficient to prevent harmful actions against them. Likewise, they have most likely understood that violence on the international plane that is geographically remote from them can also impinge on their prosperity and the wealth of their population.<sup>86</sup> Leaving these self-serving motives aside, there are some weighty reasons to believe that States also agreed to relinquish their right to resort to force to promote the welfare of all, which is a common interest. Even in this case, it is not a value that has prompted the consensus on the general prohibition of the use of force, but interests. Such a view is classically supported by Asian governments.<sup>87</sup>

There is little doubt that the key rule that serves the preservation of peace, *i.e.* the prohibition of aggression, constitutes a rule of *jus cogens*. Many scholars may be inclined to believe that the *jus cogens* character of a norm is the emanation of moral values.<sup>88</sup> Conceiving those norms that serve the public good as based on

<sup>84</sup> Anand, *loc. cit.*, n. 41, esp. at 75.

<sup>85</sup> Hurrell, A., “Society and anarchy in the 1990s” in Roberson, Barbara (ed.), *International Society and the Development of International Relations Theory*, London: Pinter, 1998, 17–42, at 20. See also Friedmann, *op. cit.*, n. 7, at 32–35; or Shahabuddeen, *loc. cit.*, n. 1, at 722.

<sup>86</sup> See, for instance, the reactions and speeches formulated on the occasion of the 60th anniversary of the International Court of Justice, available at <http://www.icj-cij.org/60/index.htm>.

<sup>87</sup> See the statement by Mr V.K. Mambiar, *loc. cit.*, n. 37: “We believe that meeting new proliferation challenges requires fresh approaches, pooling together the efforts and resources of the international community. In the 1992 Security Council Summit on Non-proliferation, in which India participated, we had called for a new international consensus on non-proliferation. We renew that call today, with the hope that our endeavors will spur common efforts for mutual benefit and in the interests of a safe and secure world.”

<sup>88</sup> See de Visscher, C., “Positivisme et ‘jus cogens’”, 75 *RGDIP* 5 (1971), at 9.

interests is, however, not incompatible with the concept of *jus cogens*. A rule may well be hierarchically superior and belong to the international public order. This does not mean that it rests on global values. The “fundamental principles” that they enshrine are deemed fundamental precisely because they serve the interest of all, and not because they reflect some sort of values. Moreover and more fundamentally, in the international legal order, the public order has been created among sovereign States *in a conventional and contractual manner*.<sup>89</sup> This largely explains why, in the international legal order, a rule may be hierarchically superior but still rests on States’ individual and common interests.

There exist other rules which serve a similar purpose and which similarly do not rest on values. For instance, rules pertaining to the peaceful dispute settlement mechanisms are intertwined with the prohibition to use force. The settlement of a dispute certainly serves the interest of the States involved in the dispute.<sup>90</sup> As Anand explained, one of the strictly individual interests that it promotes relates to the confidence-building effect that a commitment to a binding dispute settlement mechanism conveys.<sup>91</sup> But these rules also promote a common interest in that they bolster international peace. These rules are not adopted on the basis of any value (like an idea of corrective “justice”). They aim at preventing or toning down international disputes whose fallout could be harmful to all States. It also seems that Asian States share such an understanding of dispute settlement.<sup>92</sup>

The situation of mixed dispute settlement mechanisms whereby a standing is granted to individuals may be different. Indeed, monitoring bodies like the European Court of Human Rights or the Human Rights Committee – to name only a few – are not primarily aiming at the maintenance of peace but rather at ensuring the respect for human rights. The same can be said as regards the international criminal law enforcement mechanisms which ensure compliance with international criminal law.<sup>93</sup> These mechanisms thus seek to shore up the protection of human beings, which, as is explained below, do not correspond to value but merely to a common interest.

Eventually, rules regarding disarmament call for a few remarks as some could contend that they probably fall into the same category. This is well illustrated by

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<sup>89</sup> On this point, see Kennedy, D., “A new world order: yesterday, today, and tomorrow”, 4 *Transnational Legal and Contemporary Problems* 329–375 (1994), esp. at 370.

<sup>90</sup> Hobbes, Th. *Leviathan*, ch. 13.

<sup>91</sup> Anand, *loc. cit.*, n. 42, at 403.

<sup>92</sup> See Murty, B.S., *Diplomacy and Resolution of International Disputes*, cited by Rao, P.S. “The Indian position on some general principles of international law”, in Patel, B.N. (ed.), *Indian and International Law*, Leiden: Martinus Nijhoff, 2005, at 64.

<sup>93</sup> As regards the International Criminal Court, the International Criminal Tribunal for the former Yugoslavia or the International Criminal Tribunal for Rwanda, see in general Sands, P., Mackenzie, R. and Shany, Y., *Manual on International Courts and Tribunals*, London: Butterworths, 1999, at 253–300. See also Shabas, W.A., *An Introduction to the International Criminal Court*, 2nd ed. Cambridge: CUP, 2004.

the Treaty on the Southeast Asia Nuclear Weapon-Free Zone that reflects the desire of Southeast Asian States to maintain peace and stability in the region.<sup>94</sup> To a certain extent, these rules can be seen as a means to bolster the peace as they restrict the means available to States to wage disastrous war on each other. But it could even be argued that disarmament treaties only serve self-interests of States and are alien to any common interest. When agreeing on a curtailment of their weaponry, States rather want a constraint to be imposed upon the other parties' powers. In so doing, one could posit that they can be seen as trying to cut back the cost of their own weaponry. The purpose of insuring a safer world or enhancing peace by limiting weaponry is accordingly not necessarily their overriding concern.<sup>95</sup> Be that as it may, these rules are not created following the belief of the States concerned in any sort of values. They originate in their (mostly individual) interests.

### Rules pertaining to the efficiency of the entire system

The international legal order is replete with rules that ensure the stability, the efficiency and the predictability of inter-State relations.<sup>96</sup> So are the rules pertaining to diplomatic or consular relations, for instance.<sup>97</sup> The same conclusion probably applies to the rules providing immunity to heads of States and governments as well.<sup>98</sup> On the one hand, there is little doubt that these rules serve a common interest as explained by the International Court of Justice in the *Diplomatic and Consular Staff*

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<sup>94</sup> Beckman, R.C., "South East Asia and international law – I. treaty on the Southeast Asia nuclear weapon-free zone", 1 *Singapore Journal of International and Comparative Law* 414–420 (1997).

<sup>95</sup> One could even argue that weapons do not necessarily hamper the peace but can, under some circumstances, buttress it, as illustrated by the Cold War's policy of mutual assured destruction (MAD). See Gray, C.S., "Nuclear strategy: the case for a theory of victory", 4 *International Security* 54–87 (1979); Garthoff, R.L., "On mutual deterrence: a reply to Donald Brennan", 3 *International Security* 197–199 (1979); Afheldt, H. and Sonntag, P., "Stability and deterrence through strategic nuclear arms", 10 *Journal of Peace Research – Special Issue: Peace Research in the Federal Republic of Germany* 245–250 (1973); Art, R.J., "Between assured destruction and nuclear victory: the case for the 'Mad-Plus' posture", 95 *Ethics – Special Issue: Symposium on Ethics and Nuclear Deterrence* 497–516 (1985); and McCanles, M., "Machiavelli and the paradoxes of deterrence", 14 *Diacritics* 11–19 (1984).

<sup>96</sup> Charney, *loc. cit.* (87 *AJIL* (1993)), n. 20, at 532.

<sup>97</sup> See the Vienna Convention on Diplomatic Relations of 18 April 1961 and the Vienna Convention on Consular Relations of 24 April 1963. On the interests underlying diplomatic privileges and immunities, see Henkin, *op. cit.*, n. 23, at 170.

<sup>98</sup> *Arrest Warrant case (Congo v. Belgium)*, 12 February 2002, ICJ Rep. 2002, at 22, para. 53. On this case, see d'Aspremont, J. and Dopagne, Fr., "La loi de compétence universelle devant la Cour internationale de justice (aff. République démocratique du Congo c. Belgique)", *Journal des Tribunaux*, 13 April 2002, at 282–288.

case<sup>99</sup> in that they help keep the international system working (for instance by ensuring the protection of high-ranking representatives). On the other hand, it can be argued that these types of rules merely stem from the individual interest of each State that predictability and stability of international relations should be ensured. In that sense, they thus originate in the aggregation of each States' individual interest as each State is interested in having its high-ranking representatives protected. Whether they serve individual or common interest, they are not based on values.

The same conclusion must be drawn as regards the rules of the Law of Treaties. The Vienna Conventions on the Law of Treaties contain rules that can also be seen as dedicated to a better functioning of the entire system. On the footing that "the ever-increasing importance of treaties as a source of international law and as a means of developing peaceful co-operation among nations, whatever their constitutional and social systems"<sup>100</sup>, it could be contended that the 1969 Vienna Convention on the Law of Treaties for instance "promote[s] the purposes of the United Nations set forth in the Charter, namely, the maintenance of international peace and security, the development of friendly relations and the achievement of co-operation among nations".<sup>101</sup> The codification of the law of treaties is also a means to reduce the legal uncertainty which previously crippled international conventional relations.<sup>102</sup> In that sense, the Vienna Convention has clarified various aspects of the conventional relationships ranging from elaboration to termination. For these reasons, it can be submitted that the adoption of a set of rules regulating treaties has rested on interests, not on values.

The rules of States' responsibility fall under the same category.<sup>103</sup> Like the rules of the Vienna Convention on the Law of Treaties, rules pertaining to international responsibility – and, probably, all secondary rules of international law<sup>104</sup> – have been adopted to satisfy the same sort of interests as they provide legal clarity as regards the consequences of a breach.<sup>105</sup> The need of all States for legal clarity and legal security together with the interest that the whole legal system be running efficiently constitutes the prime motivation for adopting these rules. For that reason, it is posited here that these rules fall short of enshrining any value.

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<sup>99</sup> ICJ Rep. 1980, at 43, para. 92: "[The violation by Iran of its obligation under the Vienna Convention on Diplomatic Relations due to the United States] cannot fail to undermine the edifice of law carefully constructed by mankind over a period of centuries, the maintenance of which is vital for the security and well-being of the complex international community of the present day, to which it is more essential than ever that the rules developed to ensure the ordered progress of relations between its members should be constantly and scrupulously respected."

<sup>100</sup> Preamble.

<sup>101</sup> *Ibid.*

<sup>102</sup> Goldsmith and Posner, *op. cit.*, n. 68, at 95–98.

<sup>103</sup> Charney, *loc. cit.* (87 *AJIL* (1993)), n. 20, at 532.

<sup>104</sup> See Combacau, J. and Alland, D., "Primary and secondary rules in the law of State responsibility", 16 *Netherlands Yearbook of International Law* 81 (1985).

<sup>105</sup> See, for instance, the First report of the Special Rapporteur, Mr Roberto Ago (21st session of the ILC (1969)), UN Doc. A/CN.4/217 and Corr.1 and Add.1.

### Rules pertaining to the protection of the environment

It is commonplace to assert that rules pertaining to the protection of the environment serve a common interest. Such a belief is probably too all-embracing as there may be some environmental treaties that serve only individual interests of States. For instance, those rules dedicated to the prevention of the deterioration of a State's environment by activities taking place outside the limits of its jurisdiction do not necessarily aim at the promotion of a common interest. Some of them are meaning to avert "transfrontier pollution" as illustrated by the Convention on Long-range Transboundary Air Pollution of 13 November 1979.<sup>106</sup> Instruments of that kind are understood as protecting States themselves. Leaving this peculiar type of rules, it is true that most environmental rules serve a common interest and Asian States are usually attuned to that argument.<sup>107</sup>

Although these rules serve a common interest, they do not rest on values. This has been explained by M. Sornarajah, who construes international environmental law in terms of "advantages".<sup>108</sup> That States want the survival of mankind is not the upshot of a value judgment. It is merely because it is the interest of all States, and that of their governments and their peoples, that mankind be preserved. As explained above, States are capable of seeking the satisfaction of an interest beyond their own interest as an abstract entity. The most cynical view could support that lawmaking in the field of environmental law is also a way in which States satisfy their constituency in alleviating the fears that life on the planet be hindered.<sup>109</sup>

To illustrate the idea that environmental law serves individual and common interests rather than values, one could think of the protection of endangered fauna and flora<sup>110</sup> or the protection of cultural heritage in time of peace.<sup>111</sup> It is hard to infer any global value from these sets of rules. Even the regulation of outer space,<sup>112</sup>

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<sup>106</sup> Kiss, A., "The international protection of the environment" in McDonald, R. and Johnston, D. M., *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory*, The Hague: Martinus Nijhoff, 1983, at 1071.

<sup>107</sup> See generally, Mushkat, R., *International Environmental Law and Asian Values. Legal Norms and Cultural Influences*, Vancouver: UBC Press, 2004.

<sup>108</sup> Sornarajah, *loc. cit.*, n. 1, at 38, n. 44.

<sup>109</sup> See the comments of B. H. Oxman on the occasion of the International Symposium of the Kiel Walther-Schücking-Institute of International Law, March 1996, reproduced in Delbrück, *op. cit.*, n. 13, at 112.

<sup>110</sup> Convention on International Trade in Endangered Species of Wild Fauna and Flora, Washington, 3 March 1973; and Convention on the Conservation of Migratory Species of Wild Animals, Bonn, 23 June 1979.

<sup>111</sup> UNESCO Convention Concerning the Protection of World Cultural and Natural Heritage, Paris, 23 November 1972.

<sup>112</sup> Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space.

the moon,<sup>113</sup> Antarctic,<sup>114</sup> the seabed,<sup>115</sup> ozone layer,<sup>116</sup> and Kyoto protocol regime<sup>117</sup> are not values-oriented.<sup>118</sup> They only protect those areas that States believe should be left untouched. As regards outer space and the Antarctic, this was made clear respectively by C. Jayaraj<sup>119</sup> and M.C.W. Pinto.<sup>120</sup>

One can focus on the Kyoto Protocol regime in particular.<sup>121</sup> States agree to curb their CO<sub>2</sub> emissions because they acknowledge climate change is a global threat. Even though some States would probably be more affected by it than others, all States recognize that stemming climate change serves the interest of all, including their own interest. In doing so, they are not driven by any sort of global value. They just follow what they perceive to be in the interest of all, including their own interest and that of their population.

It is the same as regards the seabed provisions of UNCLOS that were so well known to Professor Wang Tieya<sup>122</sup> and to which Asian scholars have widely contributed.<sup>123</sup> States agreed that resources of the seabed are “the common heritage of mankind”<sup>124</sup> and that “the activities in the Area should be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States, whether coastal or land-locked”.<sup>125</sup> That it has been reaffirmed “that the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction [ . . . ] are the common heritage of mankind” and “the importance of the Convention for the

<sup>113</sup> Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, 18 December 1979, article 4: “The exploration and use of the moon shall be the province of all mankind and shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development. Due regard shall be paid to the interests of present and future generations as well as to the need to promote higher standards of living and conditions of economic and social progress and development in accordance with the Charter of the United Nations.”

<sup>114</sup> Antarctic Treaty, Washington, 1 December 1959 and the Protocol to the Antarctic Treaty of 4 October 1991. See Verhoeven, Joe, Philippe Sands, Maxwell Bruce, *The Antarctic Environment and International Law*, London: Graham & Trotman, 1992.

<sup>115</sup> See UNCLOS, part IX.

<sup>116</sup> Vienna Convention for the Protection of the Ozone Layer, 22 March 1985.

<sup>117</sup> See Pardo, A. and Christol, C.Q., “The common interest: tension between the whole and the parts” in McDonald and Johnston, *op. cit.*, n. 105, at 647.

<sup>118</sup> Oxman, *loc. cit.*, n. 81, at 30–33.

<sup>119</sup> Jayaraj, C., “The law of outer space and India”, in Patel, *op. cit.*, n. 92, at 265.

<sup>120</sup> Pinto, *loc. cit.* (“The International community and Antarctica”), n. 44; *ibid.*, *loc. cit.* (“Governance in Antarctica”), n. 44, at 587–609.

<sup>121</sup> All documents are available at <http://unfccc.int/>.

<sup>122</sup> See, for instance, his study, “On the concept of the common heritage of mankind” carried in the *Chinese Year Book of International Law* (1984).

<sup>123</sup> The UNCLOS III – whose second chairmen were Tommy Koh and Amersinghe – is seen by many as a watershed moment in the visibility of Asian Scholarship. See Thomas, J.A., *loc. cit.*, n. 2, at 718.

<sup>124</sup> Article 136 UNCLOS.

<sup>125</sup> Article 140 UNCLOS.

protection and preservation of the marine environment and of the growing concern for the global environment” in no way implies that values have constituted the driving forces of these groundbreaking regulations.<sup>126</sup> It is the perception that it was in the interest of all States that led States to leap towards international protection of the seabed.<sup>127</sup>

Last but not least, the concept of *sustainable development* illustrates this idea given that it is purporting to strike a balance between opposing kinds of interests and does not in any way reflect a universal value.<sup>128</sup>

### Rules pertaining to the protection of human beings

The idea that international lawmaking rests on the promotion of value is probably mostly associated with these rules that protect human beings, namely international human rights law and international humanitarian and criminal law.<sup>129</sup> It is beyond doubt that these rules serve a common interest.<sup>130</sup> In that sense, this paper does not bear upon realist theories which construe the adoption of human rights regimes as the outcome of the coercion by mighty States. It is simply argued that such a common interest does not originate in values but in a common agreement that pursuing the wellbeing and the welfare of human beings is in the interest of all. The proponents of the value-approach could be lured by a few pronouncements of the International Court of Justice. For instance, in the *Corfu Channel* case, the Court famously recognized the existence in international law of “certain general and well-recognized principles, namely: elementary considerations of humanity.”<sup>131</sup> Likewise, in its advisory opinion on the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the Court recognized that the Convention

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<sup>126</sup> See the preamble of the Agreement relating to the implementation of Part XI of UNCLOS, available at: [http://www.un.org/depts/los/convention\\_agreements/texts/unclos/closindxAgree.htm](http://www.un.org/depts/los/convention_agreements/texts/unclos/closindxAgree.htm).

<sup>127</sup> See Oda, S., “Some reflections on recent developments in the law of the sea”, 27 *Yale J. Int'l L.* 217 (2002), at 219–220.

<sup>128</sup> See Ambrose, A.D., “International environmental law and India” in Patel, *op. cit.*, n. 118, at 252–255; Chowdhury, S.R., “Intergenerational equity substratum of the right to sustainable development” in Chowdhury, S.R., Denters, E. M. G., and de Waart, P., (eds.), *The Right to Development in International Law*, Dordrecht: Martinus Nijhoff, 1992, at 234. See generally Schrijver, N., *Sovereignty over Natural Resources: Balancing Rights and Duties*, Cambridge: CUP, 1997.

<sup>129</sup> See, for instance, the liberal theories of international law, *loc. cit.*, nn. 23–26. See also Judge Owada, Hisashi, *loc. cit.*, n. 66, or Seita, A.Y., “Globalization and the convergence of values”, 30 *Cornell Int'l L. J.* 429 (1997).

<sup>130</sup> Friedmann, *op. cit.*, n. 7, at 63 and 69.

<sup>131</sup> ICJ Rep. 1949 at. 22.

endorsed in legal form “elementary principle of morality”.<sup>132</sup> A similar statement was made in the *Nicaragua* case as regards the fundamental general principles of humanitarian law.<sup>133</sup> The advocates of the idea that international lawmaking is driven by values, especially when human rights are at stake, may be inclined to find further support in the declaration of the Court in the *South West Africa* cases according to which “humanitarian considerations may constitute the inspirational basis for rules of law”.<sup>134</sup>

This paper argues it would be misleading to infer from the aforementioned *dictums* of the courts that rules pertaining to the protection of human beings were adopted to promote values. It is submitted here that the Court only meant that these instruments were not serving individual States’ interests but a common interest. As stressed by the Court itself in its opinion on the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the “States do not have any interests of their own; they merely have, one and all, a common interest”.<sup>135</sup> Moreover, even if the Court also asserted that the aforementioned rules mirror some kind of existing international moral principles, it did not claim that values had been the driving force for adopting the rules concerned. Indeed, that the moral principles “constitute the inspirational basis for rules of law” does not mean that States adopted these rules to promote any corresponding values. Various normative orders can coexist without interfering with each other.<sup>136</sup> Should there be global moral values as regards human dignity and the protection of human beings – what is far from certain – corresponding international legal norms are not necessarily an offshoot of them. In other words, global moral principles do not automatically constitute what prods the international lawmakers to act when they adopt corresponding legal principles. In adopting rules that enshrine “elementary considerations of humanity”, States simply believe that promoting humanity is in all States’ interests as well as in the interest of all individuals.

More importantly, it is posited here that construing the common interest that permeates the entering into a treaty related to the protection of individuals as based

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<sup>132</sup> ICJ Rep. 1951, at 23: “The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object, on the one hand, is to safeguard the very existence of certain human groups and, on the other, to confirm and endorse the most elementary principle of morality. In such a convention, the contracting States do not have any interests of their own; they merely have, one and all, a common interest, the accomplishment of those high purposes which are the *raison d’être* of the convention. Consequently, in a convention of this type, one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties.”

<sup>133</sup> ICJ Rep. 1986, at 112–114.

<sup>134</sup> (Second Phase), Judgment, ICJ Rep. 1966, at 34.

<sup>135</sup> ICJ Rep. 1951, at 23.

<sup>136</sup> On the coexistence of normative order, see Klabbbers, J., *The Concept of Treaty in International Law*, The Hague: Kluwer International, 1996, at 121–156. See *contra* Gowlland-Debbas, *loc. cit.*, n. 19, at 344–347.

on global values is fundamentally flawed. The most serious flaw of such an assertion relates to the presupposition that there is something like global values. It is contended here that there is no agreement on what constitutes global values. Even the provisions like the prohibition of torture that is almost unanimously accepted do not reflect pre-existing values. If there were such global universal values pertaining to human rights, how to explain that there are so many reservations to the treaties where these rules are enshrined? As shrewdly explained by J. Klabbers, we can well *in abstracto* agree that torture is bad and should be prohibited without necessarily agreeing *in concreto* on what justifies that it be prohibited.<sup>137</sup> It is accordingly submitted here that human rights only reflect an agreement on the quest for human wellbeing, not an agreement on any sort of values.<sup>138</sup> In other words, the pursuit of the wellbeing of human beings cannot, as such, be considered as a value.

If the *ratio* of regulations protecting human beings is thus interest and not value, it remains to expound what are the individual and collective interests that drive lawmaking with respect to human rights. This paper does not attempt to exhaust this question that deserves a more extensive empirical analysis. Only a few ideas are sketched out in the following paragraphs.

The existence of interests in international human rights lawmaking undoubtedly hints at Andrew Moravcsik's theory whereby he construes human rights as the result of instrumental calculations about domestic policies. Drawing on the experience of the postwar European democratization, Moravcsik argues that States are ready to relinquish a part of sovereignty by adhering to human rights regimes in order to constrain the behaviour of subsequent domestic governments. Applying his theory beyond the European framework, he claims that newly established democracies use human rights regimes – in the broad sense – to “lock in” credible domestic policies through international commitments.<sup>139</sup> It is probably true that some States adopted international human rights law with a view to ceasing to be pariahs and to be able to join the “family of Nations”.

Moravcsik's theory is, however, insufficient to explain all the motives lurking behind human rights lawmaking. The interests of States in human rights law surely go beyond that hypothesis as other sorts of interests may constitute an enticement. For instance, States may be induced to make, sign and ratify human rights conventions because of the image conveyed by these instruments. In an era where democracy and human rights are among the significant criteria of “good governance”, there is little doubt that refusing to adhere to the major human rights conventions

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<sup>137</sup> Klabbers, J. “On human rights treaties, contractual conceptions and reservations” in Ziemele, E. (ed.), *Reservations to Human Rights Treaties and the Vienna Convention Regime: Conflict, Harmony or Reconciliation*, Leiden: Martinus Nijhoff, 2004, at 155.

<sup>138</sup> Onuma, *loc. cit.*, n. 36, at 76.

<sup>139</sup> Moe, T., “Political institutions: the neglected side of the story”, 6 *Journal of Law, Economics and Organizations* 227 (1990); and Moravcsik, A., “The origin of human rights regimes: democratic delegation in postwar Europe”, 54 *International Organization* 217–252 (2000).

makes a State run the risk of becoming a pariah on the international plane and undermining the international legitimacy of its government.<sup>140</sup> This is why it is plausible that some States, reluctant to be bound by those kinds of rules, will finally consent to them in order not to be labelled in such a way.

States may also feel that it serves their interest to promote human rights, as massive violations of human rights may prove destabilizing and debilitating. These violations can also change the structure of societies whose conservation is sought by every State.<sup>141</sup> Likewise, infringements on human rights can sully the reputation of allies with which it can then prove politically difficult to cooperate. Abuse of individual rights can also shock the conscience of each State's population which may feel uncomfortable with the view of blatant violations of human rights. There is probably some grain of truth in the argument that respect for human rights bolsters peace and security in which each State is interested.<sup>142</sup> Eventually, the decision-makers of each State may wish to soothe their conscience and appear as the guardian of some sort of international morality. If the foregoing is true, there is hardly any global value in human rights lawmaking. There is only the belief that it is in the interest of the international lawmakers that human dignity and fundamental human rights be respected.

The interests of States as autonomous abstract entities do not suffice to explain all the dimensions of contemporary lawmaking in the field of the protection of the rights of individuals. On top of the aforementioned self-serving motives, States are capable of seeking the satisfaction of the interests of those individuals "under their jurisdiction". In that sense, States can be driven by the desire to protect their own population and to make sure that it never suffers from violations by any future government. As liberals are also arguing, it may be in the interest of States to ensure the respect for human rights.<sup>143</sup> There is nothing astounding in the finding that most States wish to improve the quality of life of their own population.<sup>144</sup> Furthermore, and probably more cynically, it could also be asserted that States can wish to offer protection to individuals to stifle the entreaties of groups or minorities living on their territory.<sup>145</sup>

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<sup>140</sup> Roth, B., *Governmental Illegitimacy in International Law*, Oxford: OUP, 2000; see d'Aspremont, J., "Legitimacy of governments in the age of democracy", *op. cit.*, n. 72, at 877; See also *ibid.*, *Les Etats non démocratiques et le droit international*, Paris: Pedone, 2008.

<sup>141</sup> See, for instance, the preamble of the SAARC Convention on Regional Arrangement for the Promotion of Child Welfare in South Asia that recognizes the need to protect families as the fundamental unit of society.

<sup>142</sup> Sharma, V. D., "International criminal law: crime prevention and punishment", in Patel, B.N. (ed.), *India and International Law*, Leiden: Martinus Nijhoff, 2005, at 189–190.

<sup>143</sup> Henkin, *op. cit.*, n. 23, at 284.

<sup>144</sup> See the preamble of the Charter of the South Asian Association for Regional Cooperation, available at <http://www.sarc.sec.org>.

<sup>145</sup> On the relationship between protection of minorities and human rights, see generally Verhoeven, J., "Les principales étapes de la protection internationale des minorités", *Revue trimestrielle des droits de l'homme* 177–203 (1997).

More or less the same interests prod States to adopt rules related to the conducts of belligerents during hostilities – which are a *lex specialis* of human rights law according to the International Court of Justice<sup>146</sup> – as well as rules pertaining to the international criminalization of a string of individual behaviours (international criminal law).<sup>147</sup> In the field of international human rights and criminal law, the protection of each States' soldiers and people<sup>148</sup>, the will to alleviate public opinions' concerns and the insurance not to be accused of some form of complicity have convinced States to set up rules and institutions to judge war criminals.<sup>149</sup>

As alluded to earlier, it is not denied here that, ultimately, States are capable of pursuing the general well-being of human beings, wherever the beneficiaries may be located. It could even be cogently argued that the quest for wellbeing of individuals is shared by all States and that they all come to realize, as shrewdly explained by Yasuaki Onuma, the “usefulness” of human rights law. It is in the interest of all that wellbeing and welfare be improved, human rights being only one of the many instruments to reach that goal.<sup>150</sup> Human rights could even constitute the most effective legal mechanisms ever found so far to achieve that end.<sup>151</sup> If conceived along these lines, human rights can thus be thought in terms of “usefulness” and interest. It thus becomes possible to strip the human rights lawmaking of all its value-trappings and envisage a legal order that is really universal.

## CONCLUDING REMARKS

Drawing on the driving forces of international lawmaking, this paper has tried to capture an alternative understanding of the international legal order that differs from the Western constitutionalist or liberal views. In doing so, it has relied on the work of Asian scholars with a view to construing a legal order based on individual and common interests rather than values. In particular, it has showed that Asian scholars have been more amenable to the idea that international lawmaking, even in the field of human rights and the protection of the environment, is driven by interests, thereby rejecting values as the foundations of the international legal order.

The interests-based understanding of the lawmaking offered by Asian scholars ultimately requires scholars to come to terms with the inter-subjective and fickle

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<sup>146</sup> Advisory opinion of 8 July 1996 on the *Legality of the Threat or Use of Nuclear Weapons*, ICI Rep. 1996, at 240, para. 25; see also Advisory opinion of 9 July 2004 on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Rep. 2004, paras. 105–106.

<sup>147</sup> Friedmann, *op. cit.*, n. 7, at 167.

<sup>148</sup> This is also acknowledged by liberals like Henkin, *op. cit.*, n. 23, at 171.

<sup>149</sup> See Mégret, F., “The politics of international criminal justice”, 13 *EJIL* 1261–1284 (2002). See also Beigbeder, Y., *Judging War Criminals: The Politics of International Justice*, New York: St Martin's Press, 1999.

<sup>150</sup> This idea can also be found in Donnelly, *op. cit.*, n. 38, at 63–64.

<sup>151</sup> Onuma, *loc. cit.*, n. 36, at 76–77.

character of the forces that drive the lawmaking and underlie the international legal order. Such an approach inevitably leads to some sort of relativism as it inextricably calls for a continuing debate about what the public good is. This is precisely what the proponents of values-oriented approaches of the international legal order like Western constitutionalists and liberals fear or bemoan. Avoiding this debate may even constitute the very motive why they advocate an unchallengeable and intangible table of values. It is argued here that the view of the international legal order which is backed by many prominent Asian authors, on the contrary, teaches us that international legal scholars, instead of trying to bridle the debate about what constitutes the public good, should rather devote their energy to devising the tools that ensure its transparency. In that sense, one of the greatest lessons that can be inferred from the Asian legal scholarship is that an ongoing discussion about what constitutes the public good offers a more significant leverage to promote the universality of international law than any predefined table of allegedly global values which inextricably contains imperialist overtones.



# REGIONAL INTEGRATION AND THE PROMOTION AND PROTECTION OF DEMOCRACY IN ASIA: LESSONS FROM ASEAN

Dr Richard Burchill\*

## INTRODUCTION

In 2007 the Association of South East Asian Nations (ASEAN) celebrated its 40th anniversary as a regional arrangement. It is a time to mark the accomplishments to date but it is also a time of numerous changes and challenges facing the region and its organizational architecture. The challenges facing the region are multifarious and are not necessarily unique to ASEAN and its Member States as they involve issues facing States, regional arrangements and the international system as a whole. A crude summarization of these challenges would be the impact the forces of globalization is having upon the way in which societies are governed. It is clear that discrete territorially bound State units cannot act in isolation and no longer have exclusive control over the processes of governance pertaining to the societies that live in a particular bounded territory. In turn it is necessary to find appropriate responses to these challenges.

In this regard there are two prevailing trends in the international system which will be examined in this contribution. These trends are the ever increasing range of integration activities among States in order to deal with the challenges in the international system and the ongoing concern for democracy as a legal obligation and principle in international relations. Writing in the *American Journal of International Law*, Eric Stein examined these trends and, as the title of his article makes clear, there is “no love at first sight” between the two. Increased integration is seen as a necessary pursuit for States, but at the same time it is commonly associated with a lessening or weakening of democracy.<sup>1</sup> The question then becomes how to reconcile the two?

The diminution of democracy appears inevitable when international organizations or supra-State institutions become involved in governance. At the same time,

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<sup>1</sup> Stein, E., “International integration and democracy: no love at first sight”, 95 *AJIL* 489 (2001).

there is no natural connection between increased integration and a lessening of democracy.<sup>2</sup> In fact it is possible to argue that integration projects provide for increased opportunities for democratic governance through the creation of multiple institutional frameworks accessible to individuals and groups. Furthermore, cooperation and integration projects among States are commonly built upon constitutive treaties that elaborate a range of norms and principles to guide behaviour. Increasingly the norms and principles being elaborated include the promotion and protection of democracy and human rights as fundamental priorities. As these trends continue it is imperative to address the influence and role of democratic principles in the development of integration projects and the impact these forces have upon the ways in which societies are governed and the prospects they hold out for human development. To this end this paper will use the recent developments regarding ASEAN to demonstrate how future integration activities do not necessarily weaken democracy but in fact can work to further promote and protect democracy in the region.

At the present moment ASEAN finds itself at a major point in its development as it begins to move from a loose cooperation arrangement that has been more about diplomatic relations among the Member States' governments, or more accurately, the individual leaders of those States, towards the furthering of integration and deepening of involvement in governance based upon democratic principles. This process has been building for a number of years and took a major step with the 2006 Report of the Eminent Persons Group on the ASEAN Charter (ASEAN Charter Report) which set out a bold vision for the future of the organization and directly addressed a number of crucial issues regarding democratic governance in the region.<sup>3</sup> The recommendations in the Report are substantial for the importance given to the promotion and protection of democracy and human rights in the context of preserving the social and cultural characteristics of the region based on the idea of a people-orientated approach to regional integration and governance.

In November 2007 ASEAN adopted the Charter of the Association of South East Asian Nations (ASEAN Charter).<sup>4</sup> In its final form the ASEAN Charter is not as bold as the ASEAN Charter Report, but at the same time it does commit the Member States to a range of obligations regarding democratic governance in the overall context of increased integration. Even though these commitments are feeble in many respects, especially with regard to compliance measures, they remain important for the future of governance in the region and are bound to have an influence on future developments. The States of ASEAN do not have a strong

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<sup>2</sup> This rather simplistic correlation is directly due to the continued prominence of the State unit. For a general overview of this issue, see Goodhart, M., *Democracy as Human Rights: Freedom and Equality in the Age of Globalization*, London: Routledge, 2005, part I.

<sup>3</sup> Report of the Eminent Persons Group on the ASEAN Charter (December 2006) (hereinafter ASEAN Charter Report) available at <http://www.aseansec.org/19247.pdf>.

<sup>4</sup> A copy of the Charter and related documents may be found at <http://www.aseansec.org/AC.htm>.

historical record of democratic or people-orientated approaches to governance, something that was further demonstrated by the lack of any widespread consultation on the Charter. But now the Member States have publicly agreed to international legal obligations on the promotion and protection of democracy and human rights along with the establishment of institutional structures for integration and regional governance. The adopted ASEAN Charter may be more about window dressing than an actual commitment to democracy but it has at least introduced a rhetoric in favour of democracy and human rights that will now become part of the discussions about governance in the region.

## MULTI-LEVEL GOVERNANCE AND REGIONAL INTEGRATION

The dominant trends in the international system of increased integration and concerns for democracy are inextricably tied up with the broader phenomenon commonly described as globalization. There exists a wide range of views about what globalization is – for the purposes here it is understood as the “shift or transformation in the scale of human organization that links distant communities and expands the reach of power relations across the world’s regions and continents”.<sup>5</sup> It is both as a response to, and as a result of, these shifts that concerns over governance and democracy have arisen. As two leading commentators on globalization and the international system accurately summarize – “the globalization debate projects, into a new context, the cardinal questions of political life concerning power and rule”.<sup>6</sup>

A major factor in the ongoing process of globalization is the presence of international organizations. On the surface it appears that international organizations propagate globalization and with respect to many well-known international organizations, such as the World Bank, International Monetary Fund or even the United Nations, they are seen as responsible for the negative impacts that ensue. Furthermore when international organizations take on supranational responsibilities and authority, such as the European Union or the International Criminal Court, they are seen as threats to State power and as undermining democracy. All of this leads to concerns about the position of international organizations as they appear to undermine the link between society and the ability to hold decision-makers accountable and ensure they are responsive to the needs of society, when it comes to the exercise of power.

At the same time international organizations may be seen in a different light, as bodies that contribute to the strengthening of democratic governance. International organizations support the promotion and protection of democracy through the articulation and elaboration of legal obligations and principled statements and declarations of commitment. For example, the Council of Europe requires all Member

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<sup>5</sup> Held, D. and McGrew, A., *Globalisation/AntiGlobalisation*, Oxford: Polity, 2002, at 1.

<sup>6</sup> Held and McGrew, *op. cit.*, n. 5, at 58.

States to be democratic and adhere to the European Convention on Human Rights.<sup>7</sup> The European Court of Human Rights, as the monitoring body for the European Convention, works to ensure the promotion and protection of democracy in the Member States as the most effective means for meeting their Convention obligations.<sup>8</sup> These efforts, alongside the European Union's proclamations on the importance of democracy and its own membership requirements,<sup>9</sup> have created a regional norm of democracy.<sup>10</sup> This norm is not confined to States only as it has proven to be equally applicable to the regional organizations directly involved in governance.<sup>11</sup> In this respect international organizations have an important role to play in norm creation and ensuring compliance with obligations concerning democratic governance.

As with globalization, governance can mean many things. For the purposes here governance is understood as:

the sum of the many ways individuals and institutions, public and private, manage their common affairs. It is a continuing process through which conflicting or diverse interests may be accommodated and co-operative action may be taken. It includes formal institutions and regimes empowered to enforce compliance, as well as informal arrangements that people and institutions either have agreed to or perceive to be in their interest.<sup>12</sup>

Governance consists of the variety of channels that exist where individuals and groups pursue goals and policies.<sup>13</sup> By speaking of governance rather than government it is possible to understand more clearly the fragmentation of authority and policy activities across the various actors involved and the attempts to coordinate these activities.<sup>14</sup> The actual nature and structure of a government is central to the

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<sup>7</sup> Statute of the Council of Europe (3 August 1949), Articles 3 and 8, CETS No. 001, available at <http://conventions.coe.int>

<sup>8</sup> For more on the work of regional human rights courts see Burchill, R., "The role of democracy in the protection of human rights – lessons from the European and Inter-American human rights systems" in Forsythe, D. and McMahaon, P. (eds.), *Human Rights and Diversity: Area Studies Revisited* Lincoln: University of Nebraska Press, 2003, at 137–156.

<sup>9</sup> Treaty of European Union (1992), Articles 6 and 7, OJ C 191 (29 July 1992).

<sup>10</sup> Wheatley, S., "Democracy in international law: a European perspective", 51 *ICLQ* 225–248 (2002).

<sup>11</sup> For discussion see Burchill, R., "The European Union and European democracy: social democracy or democracy with a social dimension?" 17 *Canadian Journal of Law and Jurisprudence* 185–207 (2004).

<sup>12</sup> Commission on Global Governance, *Our Global Neighbourhood*, New York: Oxford University Press, 1995, at 2.

<sup>13</sup> Rosenau, J., "Governance in the twenty-first century", 1 *Global Governance* 13–14 (1995); Weiss, T., "Governance, good governance and global governance: conceptual and actual challenges", 21 *Third World Quarterly* 795–798 (2000).

<sup>14</sup> See Krahmman, E., "National, regional, and global governance: one phenomenon or many?", 9 *Global Governance* 331 (2003).

overall tenor of the process of governance, but as the discussion here is concerned with a wide range of factors involving power and rule, giving attention to the wider phenomenon of governance is more appropriate.

International law has not easily grasped the idea of governance as it remains tied to the idea of the discrete State entity as the fundamental source of power and authority over individuals and societies in territorially bound units. Even though human organization and interaction has taken on global dimensions the State continues to be a primary focus for much of the exercise and study of governance and authority. The position of the State with regard to the human condition remains crucial, but it is also necessary to account for the political, economic and social forces beyond the State that impact upon individuals and society. International law is slowly coming to grasp this reality of social organization beyond the State. As international law is concerned with the welfare of individuals and society, be it through trade measures, environmental protection or human rights, it has become necessary to look beyond State governments and to deal with the existence of power, as well as responsibility for the exercise of power at a variety of levels. A concern for multi-level governance is not a major conceptual leap for international law as many of the existing principles international law seeks to uphold are applicable.

The creation of the United Nations was seen as a major first step towards some system of global governance; but the pursuit of global governance on a universal scale has proven difficult. On the other hand, regional arrangements that have concerned themselves with governance, such as ASEAN, the Organization of American States, the African Union, the European Union, Council of Europe and Organization for Security and Cooperation in Europe, have, with mixed results, carved out particular positions in the process of governance and have established various forms of institutional architecture based on expressed norms and principles. The pursuit of governance at the regional level is a more limited approach than universal global governance but does provide tangible and workable alternatives for addressing the various concerns prominent in the world today. In particular it is at the regional level where international legal obligations for the promotion and protection of democracy, as well as human rights, are the most developed.

Pursuing international organization at the regional level has a number of positive and negative considerations. On the positive side regional arrangements will often be more conducive for agreement and action as the States involved will often possess common history, traditions and cultures and characteristics giving rise to greater levels of cooperation.<sup>15</sup> Due to size, proximity and shared beliefs and values regional arrangements possess a higher degree of flexibility in the pursuit of activities which may be missing from the actions of a global body. Commonly, the relatively small geographical area involved with a regional arrangement allows for a

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<sup>15</sup> Frey-Wouters, E., "The prospect for regionalism in world affairs" in Black, C. and Falk, R. (eds.), *The Future of the International Legal Order*, vol. 1., Princeton: Princeton University Press, 1969, at 553–554; MacFarlane, N. and Weiss, T., "The United Nations, regional organizations and human security: building theory in Central America", 15 *Third World Quarterly* 283 (1994).

more efficient allocation of resources and delegating of tasks when it comes to problem solving procedures.<sup>16</sup> Governments and people will likely be more inclined to follow the directives of a regional arrangement since the supervisory bodies created will possess greater legitimacy being seen as having a greater understanding of the local conditions.<sup>17</sup> The inability of a global arrangement to understand or take into consideration the particularities unique to the members of a regional arrangement often results in action being seen as outside interference.<sup>18</sup> Regional arrangements increase the range of options available for addressing common problems or for pursuing common objectives and encourage a greater sense of lasting commitment to achieve these goals.<sup>19</sup>

While these are the attractive possibilities of regional arrangements there are equally a number of negative factors to consider.<sup>20</sup> Within regions the actual commitment of the Member States is not always as deep as perceived, for States may selectively use regional or universal organizations depending upon individual needs. Homogeneity among States and societies is not a given within any region and the closeness of States may result in deep-seeded antagonisms and continued physical conflict.<sup>21</sup> Regional superpowers may be able to manipulate the regional arrangement in the pursuit of their own self-interested goals.<sup>22</sup> Regional arrangements may not always possess the necessary resources and knowledge that would be available with a global organization.<sup>23</sup>

The positive and negative considerations above will exist in varying degrees within all regional organizations and despite the potential drawbacks of regional organizations there continues to be concerted action in pursuing and developing regional integration arrangements to achieve common purposes and respond to common challenges.<sup>24</sup> However, as increased integration at the regional level continues, there are equally increasing concerns about democratic governance. In this regard the ability of international law to provide for the promotion and protection of democracy in an effective manner is crucial.

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<sup>16</sup> Schema, R., "The OAS and the quest for international co-operation: American vision or mirage", 13 *Case Western Reserve J. Int'l L.* 101 (1981).

<sup>17</sup> Robertson, A.H. and Merrills, J.G., *Human Rights in the World*, 3rd ed., Manchester: Manchester University Press, 1992, at 223–224.

<sup>18</sup> Donnelly, J., "International human rights: a regime analysis", 40 *International Organization* 637 (1986).

<sup>19</sup> McCoubrey, H. and Morris, J., *Regional Peacekeeping in the Post Cold-War Era*, The Hague: Kluwer, 2000, at 212 and 224.

<sup>20</sup> Nye, J., "Regional Institutions" in Black and Falk, *op. cit.*, n. 15, at 433–436.

<sup>21</sup> Schreuer, C., "Regionalism v. universalism", 6 *EJIL* 479 (1995).

<sup>22</sup> McCoubrey and Morris, *op. cit.*, n. 19, at 39.

<sup>23</sup> Schreuer, *loc. cit.*, n. 21, at 479.

<sup>24</sup> Beeson, M., "Rethinking regionalism: European and East Asia in comparative historical perspective", 12 *Journal of European Public Policy* 971 (2005).

## THE PROMOTION AND PROTECTION OF DEMOCRACY IN INTERNATIONAL LAW

Democracy is often viewed as a term with no determinate content, or an essentially contested concept that precludes any widespread agreement.<sup>25</sup> It is primarily for this reason that no coherent understanding of democracy took hold in international law prior to 1989. During the Cold War democracy came to mean anything and everything, despite its grounding in a limited, but significant, range of international legal instruments (see below). Due to the definitional difficulties involved with democracy there is a tendency to understand it in minimal terms; the holding of elections, the existence of certain governmental institutions and the legal protection of a limited range of civil and political rights.<sup>26</sup> A minimalist conception of democracy perhaps provides the easiest way of verifying the existence of what is understood to be democracy and may also be the maximum level of agreement possible in the international system.<sup>27</sup> However, as has been identified by a number of scholars, both within and outwith international law, the reliance upon a minimalist conception of democracy undermines the emancipatory potential inherent in the idea and fails to harness its full potential as a major force in the development of individuals and society. Minimalist understandings of democracy fail to live up to the ideas and ideals that have long been the hallmark of democracy. Instead, minimalist forms may actually lead to a lessening of freedom and the maintenance of unequal power relations.<sup>28</sup>

It is necessary to be explicit as to the understanding of democracy being used in this paper. In this analysis democracy is understood as – the ability of individuals, on an equal basis to take part in those processes and decisions that impact upon their lives and to be given the opportunity to realise their full potential.<sup>29</sup> Admittedly, such a definition is vague and has the potential to be infinitely malleable. However, it does provide a basic framework for understanding democracy as an emancipatory project that allows for the development of individuals and society based upon widespread

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<sup>25</sup> Ball, T. and Dagger, R., *Political Ideologies and the Democratic Ideal*, New York: Harper Collins, 1991, at 22–23; Bollen, K., “Political democracy: conceptual and measurement traps” in Beetham, D. (ed.), *Defining and Measuring Democracy*, London: Sage, 1994, at 5.

<sup>26</sup> For further discussion see Beetham, D., *Democracy and Human Rights*, Cambridge: Polity Press, 1999, ch. 5.

<sup>27</sup> Franck, T., “Democracy as a human right” in Henkin, L. and Hargrove, J. (eds.), *Human Rights: An Agenda for the Next Century*, Washington: American Society of International Law, 1994, at 75.

<sup>28</sup> Marks, S., “The end of history? Reflections on some international legal theses”, 8 *EJIL* 450 (1997). Also Zakaria, F., *The Future of Freedom: Illiberal Democracy at Home and Abroad*, New York: W.W. Norton, 2003.

<sup>29</sup> The basis of this definition is derived from the following works: Marks, S., *The Riddle of All Constitutions: International Law, Democracy and the Critique of Ideology*, Oxford: Oxford University Press, 2003; Beetham, *op. cit.*, n. 26; and Held, D., *Models of Democracy*, 3rd ed., Oxford: Polity Press, 2006, chs. 10 and 11.

and active participation in a system that places the interests of individuals and society as the paramount consideration in the pursuit of governance. A wide range of institutions and practices are able to serve this definition effectively, with the result that there is no one institutional model of democracy to be adhered to by all. This does not leave open the possibility that any form of social organization can be claimed as democratic as the basic principles articulated above have to be real and obtainable. By starting with a statement of broad principles it is possible to formulate an understanding of democracy that moves beyond the predominant minimalist form to reach beyond the narrow political sphere of society and incorporate the socio-economic and cultural aspects of society as well. The human condition is not confined to the political sphere and if the pursuit of democracy is about bettering the human condition it is necessary to account for the full experience involved. Furthermore, the broad principles stated above allow us to address the existence and exercise of power wherever it is exercised providing an approach to democracy that is not confined to the State and may be utilized in addressing the impact of globalization and the proliferation of multi-level governance.

International law's concern with democracy is a recent phenomenon, only truly emerging from the end of the Cold War, despite a number of historical precedents. The Universal Declaration of Human Rights adopted in 1948 stated that the will of the people shall be the basis of authority for government.<sup>30</sup> The International Covenant on Civil and Political Rights adopted in 1966 provides protection for a wide range of civil and political rights suggesting that all signatories must have in place at least a basic democratic system.<sup>31</sup> However, these developments were overshadowed by the ideological divide which developed soon after the founding of the UN and led to the strong adherence to the principle of sovereign equality among States and non-intervention into domestic affairs based on the traditional view that international law had no concern with the way government or governance within States was carried out. In this environment international law made no substantial effort to concern itself with the nature of government and governance. All forms were accepted as legitimate and, outside the limited range of treaty-based international human rights obligations, there did not exist any accepted principles by which the nature of government and governance was judged.<sup>32</sup>

The end of the Cold War led to an upsurge of attention given to democracy as an international legal principle. In 1992 the Secretary-General of the UN presented

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<sup>30</sup> General Assembly resolution 217 A (III): "Universal Declaration of Human Rights" (10 December 1948), Art. 21.

<sup>31</sup> International Covenant on Civil and Political Rights (23 March 1976), 999 *UNTS* 171. Nowak makes the claim that for a State to adhere to its obligations under the treaty it is necessary to be a democracy. Nowak, M., *United Nations Covenant on Civil and Political Rights: CCPR Commentary*, Kehl am Rhein: Engel, 1993, at 441.

<sup>32</sup> For example see UN Committee on Economic, Social and Cultural Rights. General Comment No. 3 (1990), UN Doc. E/1991/23, stating that the International Covenants were neutral as to the form and nature of government.

the *Agenda for Peace* report where it was stated that “[r]espect for democratic principles at all levels of social existence is crucial: in communities, within States and within the community of States.”<sup>33</sup> This was followed by two more reports, the *Agenda for Development*<sup>34</sup> and the *Agenda for Democratization*,<sup>35</sup> which emphasized that peace, development and democracy are inextricably linked and that the UN has a major role to play by assisting States involved with the democratization process.<sup>36</sup> The Secretary-General also expressed the view that the ideas of self-determination and human rights as contained in the Charter provide a basis for democracy, and that the Charter is flexible and capable of incorporating change, such as an inclusion of democracy.<sup>37</sup> The Secretary-General saw the UN as having a major role in assisting in the creation of a “culture of democracy” allowing for the participation of all individuals in the decision-making process on issues which affect their lives.<sup>38</sup> The UN at this time became actively involved in election monitoring and other activities aimed at the promotion and protection of democracy.<sup>39</sup>

UN human rights institutions also began actively promoting democracy as a legal obligation in its own right and as the most effective means for realizing the obligations States have with regard to human rights. In 1993 the World Conference on Human Rights stated in its Final Declaration:

“The international community should support the strengthening and promotion of democracy, development and respect for human rights and fundamental freedoms in the entire world” and that “democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing”.<sup>40</sup>

The Commission on Human Rights followed up on this through a number of significant resolutions that describe democracy as a fundamental right as well as providing an elaboration of what democracy entails.<sup>41</sup> Treaty-based human rights monitoring bodies also took a more proactive stance on the importance of democracy for

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<sup>33</sup> *An agenda for peace: preventive diplomacy, peacemaking and peace-keeping*. UN Doc. A/47/277-S/24111, paras. 19 and 82.

<sup>34</sup> *An agenda for development*. UN Doc. A/48/935 (1993).

<sup>35</sup> *An agenda for democratization*. UN Doc. A/51/761 (20 December 1996).

<sup>36</sup> *Agenda for Democratization*, paras. 118 and 126.

<sup>37</sup> *Agenda for Democratization*, paras. 26–35.

<sup>38</sup> *Agenda for Democratization*, para. 24.

<sup>39</sup> White, N., *Keeping the Peace: The United Nations and the Maintenance of International Peace and Security*, Manchester: Manchester University Press, 1997, at 196–199.

<sup>40</sup> Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/24 (1993), para. 8.

<sup>41</sup> For example see Commission on Human Rights Resolution 1999/57, “Promotion of the right to democracy”, UN Doc. E/CN.4/RES/1999/57 (28 April 1999); Commission on Human Rights Resolution 2000/47, “Promoting and consolidating democracy”, UN Doc. E/CN.4/RES/2000/47 (25 April 2000); and Commission on Human Rights Resolution 2001/36, “Strengthening of popular participation, equity, social justice and non-discrimination as essential foundations of democracy”, UN Doc. E/CN.4/RES/2001/36 (23 April 2001).

fulfilling treaty obligations.<sup>42</sup> These developments have not led to an absolute or customary law requirement that all States must adhere to democracy,<sup>43</sup> but they have provided significant support for the idea that democracy has become the standard for assessing the legitimacy of governance.

There is further support for this assertion in a number of recent UN proclamations. The General Assembly has declared the protection of freedom as a fundamental value of the UN which is best protected through “democratic and participatory government based on the will of the people”.<sup>44</sup> In 2005 the Secretary-General released a report, *In Larger Freedom: Towards Development, Security and Human Rights for All*,<sup>45</sup> where democracy holds a very prominent position with regard to the goal and objectives of the UN. In the report it is stated that:

The protection and promotion of the universal values of the rule of law, human rights and democracy are ends in themselves. They are also essential for a world of justice, opportunity and stability. No security agenda and no drive for development will be successful unless they are based on the sure foundation of respect for human dignity.<sup>46</sup>

The 2005 World Summit produced a final outcome statement which proclaims that the UN is based on common fundamental values such as freedom, equality, tolerance and respect for all human rights,<sup>47</sup> and that the Member States declared a commitment to ensure the effective promotion and protection of human rights, the rule of law and democracy.<sup>48</sup> The Summit also declared democracy is a universal value with the common feature being the ability of people to determine their own

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<sup>42</sup> For example see the Human Rights Committee General Comment No. 25, “Article 25 (Participation in Public Affairs and the Right to Vote)”, UN Doc. CCPR/C/21/Rev.1/Add.7 (12 July 1996), para. 1; Report of the Human Rights Committee, v. 1 GAOR 49th Sess., Supp. No. 40 comments on Azerbaijan, para. 304; and Decision of the Human Rights Committee decision in *Peter Chiko Bwalya v. Zambia*. Communication No. 314/1988, UN Doc. CCPR/C/48/D/314/1988. With regard to the monitoring of the International Covenant on Economic, Social and Cultural Rights, see Burchill, R., “Democracy and the promotion and protection of socio-economic rights”, in Baderin, M. and McCorquodale, R. (eds.), *Economic, Social and Cultural Rights in Action*, Oxford: Oxford University Press, 2007, at 361–387.

<sup>43</sup> See Murphy, S., “Democratic legitimacy and the recognition of States and governments”, 48 *ICLQ* 545–581 (1999). But for a contrary argument as to the legitimacy of non-democratic arguments see Reisman, M., “Sovereignty and human rights in contemporary international law”, 84 *AJIL* 866–876 (1990).

<sup>44</sup> UN General Assembly Resolution: “United Nations Millennium Declaration”, UN Doc. A/Res/55/2 (8 September 2000).

<sup>45</sup> UN Doc. A/59/2005 (21 March 2005).

<sup>46</sup> *In Larger Freedom*, para. 128.

<sup>47</sup> UN General Assembly, *2005 World Summit Outcome*, UN Doc. A/60/L.1 (15 September 2005), para. 4.

<sup>48</sup> *2005 World Summit Outcome*, para. 119.

political, economic, social and cultural systems through the full participation of individuals in all aspects of their lives.<sup>49</sup>

Further developments in the promotion and protection of democracy in international law have come from a wide range of regional arrangements. The European Union has formulated membership obligations based on democracy along with detailed criteria for enforcement.<sup>50</sup> The Organization of American States also contains treaty-based membership obligations that have been supplemented by extensive elaboration of what democracy consists of and the creation of monitoring and support mechanisms.<sup>51</sup> The African Union is also moving in the direction of requiring democratic governance as democracy is a significant objective and principle of the organization. The significance of these regional efforts has been recognized in the Report of the High-level Panel on Threats, Challenges and Change where it is suggested that the UN build upon the experiences of regional arrangements and develop mechanisms for promoting and protecting democracy.<sup>52</sup>

The development of democracy as an international legal principle has come from a wide range of international concerns and has been furthered by international organizations at both the regional and global level. The multiple influences feeding into international law's understanding of democracy helps to formulate common ground for understanding the basic principles of democracy, demonstrating that it is a principle that has universal application. There are two important issues to note with regard to the developments discussed above. The first is that the type of democracy that emerged out of international practice immediately following the Cold War was mainly minimalist in form. Despite the euphoria attached to the so-called "victory of democracy" it quickly emerged that the type of democracy being promoted was limited in many respects. Democracy had become synonymous with free market capitalist systems based on neo-liberal beliefs. This was a problematic development as the ideas and ideals inherent in democracy discussed above were not being realized for neo-liberalism relies upon and strongly reinforces minimalist conceptions of democracy. The trend does appear to be changing as approaches to democracy, such as the one being pursued by ASEAN, are taking a more substantive approach to go beyond the minimalist forms.

The second issue to emerge from international law's embrace of democracy was the claim that the type of democracy being pursued was not universal, being particular to Western societies. This view was expressed by a President of the UN General Assembly from Malaysia who stated in 1997 that there had been a politicization of liberal global values such as human rights, democracy and free markets which were

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<sup>49</sup> *2005 World Summit Outcome*, para. 135.

<sup>50</sup> Treaty of European Union, Articles 6 and 7.

<sup>51</sup> OAS Charter (as amended), Article 9, OAS *Treaty Series*, Nos. 1-C and 61. For an overview of activity in this regard see "Key OAS issues: the democratic commitment", available at [http://www.oas.org/key\\_issues/eng/KeyIssue\\_Detail.asp?kis\\_sec=1](http://www.oas.org/key_issues/eng/KeyIssue_Detail.asp?kis_sec=1)

<sup>52</sup> Report of the High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility* (2004), available at <http://www.un.org/secureworld/>

being promoted as the answer to all of humankind's problems. In his view such values were not widely accepted in Asia or in a great number of other States in the world.<sup>53</sup> The non-applicability argument is based on the idea that democracy has its origins in Western societies and that Asian social systems differ dramatically from the West and are based on a strong adherence to hierarchy, respect for authority and that concerns for wider society take primacy over the interests of the individual. All of which makes the promotion and protection of democracy and human rights, as currently understood, not compatible with these systems. The incompatibility argument has been further bolstered by the belief in developing countries that adherence to rights commonly associated with democracy get in the way of development and should be limited to ensure prosperous development. This position has been used by individual ASEAN States, or more appropriately, their leaders, to counter any sort of external scrutiny concerning their domestic systems.<sup>54</sup>

The idea that international law is supporting an understanding of democracy that is applicable only to certain societies is an inaccurate interpretation that says more about the attempts of certain leaders to maintain their domestic position than it does about any true concern for the development of society. Recent research questions the coherence and applicability of the view that Asian values are contrary to democracy: understood as an idea and practice of Western origin. Studies have shown that while particular leaders will espouse Asian values that favour authority and hierarchy, the actual individuals who make up these societies are less inclined to believe this way.<sup>55</sup> Thinking has also turned around with regard to the issue of development and applicability of democracy and human rights. It has been stressed that development relies upon participation from all individuals in society along with human rights protection and cannot be used as an excuse to limit either.<sup>56</sup> Commentators have shown that there exists no clear and direct correlation between development and the need for the suppression of democracy and human rights.<sup>57</sup>

As discussed above the primary purpose of democracy is "to provide conditions for the full and free development of the essential human capacities of all members of

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<sup>53</sup> 4 *UN Chronicle* 13 (1997).

<sup>54</sup> Öjendal, J., "Back to the future? regionalism in South-East Asia under unilateral pressure", 80 *International Affairs* 525 (2004); Acharya, A., "Democratisation and the prospects for participatory regionalism in Southeast Asia", 24 *Third World Quarterly* 375 (2003).

<sup>55</sup> Dalton, R. and Ong, N.-N., "Authority orientations and democratic attitudes: A test of the 'Asian values' hypothesis" (February 2004), available at Centre for the Study of Democracy, [www.democ.uci.edu](http://www.democ.uci.edu)

<sup>56</sup> For example see "Consideration of the relationship between development, democracy and the universal enjoyment of all human rights, keeping in view the interrelationship and indivisibility of economic, social, cultural, civil and political rights", UN Doc. A/CONF.157/17 (23 June 1993), paras. 1–4.

<sup>57</sup> Sen, A., "Human rights and Asian values", 16th *Morgenthau Memorial Lecture on Ethics and Foreign Policy* 10–13 (1997), available at [http://www.cceia.org/media/254\\_sen.pdf](http://www.cceia.org/media/254_sen.pdf)

the society”.<sup>58</sup> This needs to be understood as the central feature for governance in general and is not particular to any society or level of development. As the United Nations Development Programme explains, it is essential to have “a conducive environment for people, individually and collectively, to develop their full potential and to have a reasonable chance of leading productive and creative lives in accord with their needs and interests”.<sup>59</sup> To achieve this goal it is necessary to ensure that “[p]olitical, social and economic priorities are based on a broad consensus in society and that the voice of the poorest and most vulnerable are heard in the decision-making over allocation of development resources”.<sup>60</sup> Furthermore, as the Commission on Human Rights has explained:

Transparent, responsible, accountable and participatory government, responsive to the needs and aspirations of the people, including members of vulnerable and marginalized groups, is the foundation on which good governance rests and that such a foundation is a sine qua non condition for the full realization of human rights, including the right to development.<sup>61</sup>

Values and principles such as these are not particular to any culture or society and efforts to move to the realization of these values and principles cannot be frustrated by arguments of incompatibility. As a former Director of the Singapore International Foundation has pointed out, the debate about democracy and human rights is not essentially a difference in ideology or foundational beliefs as everyone is “reaching for the same thing: the right mix of values which makes for good government and a good political community”.<sup>62</sup> The practice emerging from the UN is an understanding of democracy that is universal in its principles and given that this has come from the UN, the argument that it is not universally applicable becomes more difficult to sustain.<sup>63</sup>

Based on this it is asserted that if ASEAN is going to pursue a course of increased integration along with a more developed role in governance, there is a strong expectation, if not requirement, that democratic forms are to be adopted at all levels. In many respects this will require a major shift in the way in which governance has been viewed in the region as it is commonly associated with semi-authoritarian, elite-led systems. Recent developments in ASEAN have demonstrated

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<sup>58</sup> Macpherson, C.B., *The Real World of Democracy*, Oxford: Clarendon Press, 1966, at 37.

<sup>59</sup> UNDP, *Human Development Report (1990)*, Oxford: Oxford University Press, 1990, at 1.

<sup>60</sup> Weiss, F. and de Waart, P., “International economic law with a human face: an introductory view” in Weiss et al. (eds.), *International Economic Law with a Human Face*, The Hague: Kluwer, 1998, at 9.

<sup>61</sup> Commission on Human Rights Resolution 2005/68, “The role of good governance in the promotion and protection of human rights” (20 April 2005), para. 4.

<sup>62</sup> Quoted in de Jonge, H., “Democracy and economic development in the Asia-Pacific region: the role of parliamentary institutions”, 14 *Human Rights Law Journal* 302 (1993).

<sup>63</sup> Joyner, C., “The United Nations and democracy”, 5 *Global Governance* 333 (1999).

a significant shift in viewpoints providing a solid base for democratic governance in the region. Crucially the type of democracy that is being asserted is one of a substantive nature that depends upon wide-based and active participation in all spheres of society. If the ongoing rhetoric in the region concerning democracy is implemented and realized in practice, ASEAN will provide a leading model for multi-level democratic governance that overcomes the focus on the territorially bounded State and embraces a view of democracy that moves beyond the minimalist conceptions to a more substantive view that is true to the emancipatory ideals inherent in democracy.

## THE DEVELOPMENT OF ASEAN AND REGIONAL GOVERNANCE

ASEAN was officially created in 1967 when the Foreign Ministers of Indonesia, Malaysia, the Philippines, Singapore and Thailand signed the Bangkok Declaration recognizing that “mutual interests and common problems” necessitate cooperation among States in a world that was becoming “increasingly interdependent”.<sup>64</sup> The Declaration set out a belief in “the cherished ideals of peace, freedom, social justice and economic well-being” which, it is stated, are best attained through “good understanding, good neighbourliness and meaningful cooperation”.<sup>65</sup> The Declaration also set out the aims and purposes of ASEAN which included the acceleration of economic growth, social progress and cultural development through joint endeavours, the promotion of “regional peace and stability through abiding respect for justice and the rule of law in the relationship among countries of the region and adherence to the principles of the United Nations Charter” and the promotion of “active collaboration and mutual assistance on matters of common interest in the economic, social, cultural, technical, scientific and administrative fields”.<sup>66</sup> At first glance the Bangkok Declaration sets out, albeit in general terms, a strong commitment to an integration project that is wide ranging and holds human values, such as freedom, social justice and economic wellbeing as central guiding principles. However, the development of ASEAN took a different course based more on the interests of the leaders of the Member States than a concern for greater cooperation or a pursuit of human values.

At the outset ASEAN’s commitment to integration is brought into question by the fact that the initial Declaration was agreed at the ministerial level and not head of State level. The first head of State summit was held in 1976 where the Treaty of Amity and Cooperation in South-east Asia was adopted, a document which further established basic principles that would guide the development of ASEAN in a direction that did not embrace a strong integration project influenced by human values,

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<sup>64</sup> The ASEAN declaration (8 August 1967), available at <http://www.aseansec.org/1212.htm>

<sup>65</sup> The ASEAN declaration, preamble, indent 3.

<sup>66</sup> The ASEAN declaration, para. 2.

preferring instead to protect the interests of the individual Member States. Article 2 of the treaty sets out the “fundamental principles” to guide the relations among the Member States. These include:

- (a) mutual respect for the independence, sovereignty, equality, territorial integrity and national identity of all nations;
- (b) the right of every State to lead its national existence free from external interference, subversion or coercion;
- (c) non-interference in the internal affairs of one another;
- (d) settlement of differences or disputes by peaceful means;
- (e) renunciation of the threat or use of force;
- (f) effective cooperation among themselves.<sup>67</sup>

These principles are based strongly on respect for State sovereignty and non-intervention in domestic affairs and when taken to a logical conclusion they are inimical to the promotion of human interests. This resulted in an integration project that was only loosely constructed with a lack of binding obligations or significant institutional machinery and little concern for human security and development. This is evidenced by the creation of a High Council as a dispute settlement mechanism, but only with the authority “to take cognizance of the existence of disputes or situations likely to disturb regional peace and harmony”<sup>68</sup> and only recently has the body adopted its own rules of procedure. On the other hand, the protection of State sovereignty through respect of non-interference in domestic affairs has three explicit mentions in the Treaty.<sup>69</sup>

Given the political context of the region the foundations of ASEAN are unsurprising. During the post-colonial period and through the Cold War the individual States of the region faced a number of threats to their independence and security, coming from the superpowers, their own neighbours and internal insurgency. It has been remarked that the only real common ground among the States was a common reaction to the threat posed by communist insurgent groups and a rejection of outside, mainly Western, influences in the region.<sup>70</sup> This means that the first couple of decades of ASEAN’s existence saw minimal concern for an integration project and more attention to managing relations among members with ASEAN acting only as a forum for diplomatic cooperation.<sup>71</sup> This path for regional cooper-

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<sup>67</sup> Treaty of Amity and Cooperation in Southeast Asia (24 February 1976), available at <http://www.aseansec.org/1217.htm>

<sup>68</sup> Treaty of Amity and Cooperation in Southeast Asia, Art. 14.

<sup>69</sup> Treaty of Amity and Cooperation in Southeast Asia, Arts. 2, 10 and 11.

<sup>70</sup> Acharya, *loc. cit.*, n. 54, at 379.

<sup>71</sup> Kahler, M., “Legalization as strategy: the Asia-Pacific case”, 54 *International Organization* 551 (2000); and Acharya, A., *Constructing a Security Community in Southeast Asia: ASEAN and the Problem of Regional Order*, London: Routledge, 2001, at 47.

ation meant a strong reluctance against any sort of external scrutiny to the nature of the political systems of the Member States which had a direct impact on the ability of the organization to be involved in democracy and promote democracy and human rights in the region.<sup>72</sup>

The development of ASEAN with its strict adherence to respect for sovereign equality and non-intervention into domestic affairs led to a particular way of doing things in the organizational setting which has come to be labelled the ASEAN Way. This particular method of interaction has been subject to a number of interpretations but common features include the practice of mutual respect among members, respect for the sovereign equality of States, non-intervention into the domestic affairs of States, the use of discussion and dialogue over confrontation, and achieving agreement through consensus and informal discussions.<sup>73</sup> Adherence to the ASEAN Way has resulted in regional cooperation being based on loose integration, no strong institutional mechanisms and no commitment to any sort of values or principles that may have impacted upon State sovereignty. While the ASEAN Way has been attributed with success in a number of ways, it has also been seen as “a euphemism for ‘talk only’, for the pursuit of a hopelessly anachronistic non-intervention policy” that is more about “national elites protecting themselves against a possibly rebellious populace”.<sup>74</sup> Commentators have emphasized that adherence to the ASEAN Way is more about elites ensuring regime survival. The obvious result of this is that there has been no real commitment to an integration project that would limit State sovereignty. The principles of regional organization based on the ASEAN Way will not have the connection to the people that is necessary for success and will not gain the legitimacy necessary for the organization to have a significant role in governance.<sup>75</sup> It is worth noting that even though the ASEAN Way is often characterized as a particular socio-cultural approach it has been clearly based on prevailing principles and practices of general international law – a strong adherence to sovereignty, consensus decision making amongst States and non-intervention in domestic affairs. But as the international system has generally undergone a recent evolution in how areas such as sovereign equality and non-intervention are understood, the foundations of ASEAN will also need to move away from the State- or elite-centric view inherent in the current understanding of the ASEAN Way in order to engage in cooperative activities based on human values – something for which there is substantial evidence in recent practice.

As ASEAN evolved from its early beginnings, concern for democratic governance and human rights protection within Member States and for the organization itself was not a priority. The political and social systems of the Member States were maintained through strong, quasi-autocratic regimes where there was an acceptance

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<sup>72</sup> Acharya, *loc. cit.*, n. 54, at 375 and 378.

<sup>73</sup> See Acharya, *op. cit.*, n. 71, at 63–70.

<sup>74</sup> Öjendal, *loc. cit.*, n. 54, at 523.

<sup>75</sup> Acharya, *loc. cit.*, n. 54, at 376; and Kahler, *loc. cit.*, n. 71, at 549.

of strong government in the name of stability and economic performance.<sup>76</sup> At the regional level the emphasis was upon ensuring good relations among members and avoiding any sensitive issues that may create conflict.<sup>77</sup> However, at the Third Heads of State Summit in 1987 there were a number of statements directly related to ASEAN's role in governance, along with principled commitments to democracy. In the Manila Declaration it was stated there was a need to "promote increased awareness of ASEAN, wider involvement and increased participation and cooperation by the peoples of ASEAN".<sup>78</sup> It was further stated that greater effort was needed to ensure the participation of women and young people in the development process and "that ASEAN has to develop strong and efficient public administration in the region to ensure balanced and systematic coordination among economic development, social development and the environment of the region".<sup>79</sup>

This Declaration was significant for a number of reasons. In a region where participation of individuals and groups and a concern for the marginalized were not prevalent, a public declaration on the importance of widespread and active participation is noteworthy, even if it was just rhetorical posturing. Also in 1987 the international system as a whole had not taken much concern for the promotion and protection of democracy as the full-scale demise of communist regimes was still about two years away. Finally the expressed commitment to increased participation from individuals generally, and subaltern groups in particular, is a major step towards substantive democratic principles and a human-centred approach to integration, and a rejection of minimalist forms of democracy. In some respects the Manila Declaration was a prescient observation on the future of ASEAN's approach to governance in the region.

The Manila Declaration did not spur on any immediate developments in the region and the changes to the international system at the end of the Cold War with regard to the emergence of democracy as an international legal principle did not immediately have an impact upon the actions of ASEAN. In 1997 the adoption of ASEAN Vision 2020, which set out a plan for the future direction of regional organization among the Member States, marks a significant point for governance in the region.<sup>80</sup> Vision 2020 expresses the need to "develop and strengthen ASEAN's institutions and mechanisms to enable ASEAN to realize the Vision and respond to

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<sup>76</sup> Turnbull, C.M., "Regionalism and nationalism" in Tarling (ed.), *The Cambridge History of Southeast Asia. From World War II to the Present*, Vol. 4, Cambridge: Cambridge University Press, 1999, at 306.

<sup>77</sup> Acharya, *loc. cit.*, n. 54, at 380; and Narine, S., "ASEAN in the aftermath: the consequences of the East Asian economic crisis", 8 *Global Governance* 180 (2002).

<sup>78</sup> Manila Declaration of the Third ASEAN Summit (15 December 1987), para. 4, available at <http://www.aseansec.org/5117.htm>

<sup>79</sup> Joint Communiqué of the Third ASEAN Summit (14–15 December 1987), paras. 48 and 52–53, available at <http://www.aseansec.org/5107.htm>

<sup>80</sup> ASEAN Vision 2020, 2nd informal ASEAN summit (14–16 December 1997), available at <http://www.aseansec.org/5228.htm>

the challenges of the coming century". The main idea behind Vision 2020 is the creation of a Zone of Peace, Freedom and Neutrality, along with a commitment to greater economic integration, the full implementation of the ASEAN Free Trade Area, further liberalization and increased cooperation in a range of areas. Within this there is a commitment to address poverty and socioeconomic disparities and the belief that peace and stability is only possible "where the causes for conflict have been eliminated, through abiding respect for justice and the rule of law".

The most important part of Vision 2020 is the idea of a Community of Caring Societies. The Community of Caring Societies is based on the creation of conditions "where all people enjoy equitable access to opportunities for total human development regardless of gender, race, religion, language, or social and cultural background" and "where the civil society is empowered and gives special attention to the disadvantaged, disabled and marginalized and where social justice and the rule of law reign". Crucially it is stated that within this future vision of ASEAN, governance will be based on the consent and greater participation of the people, along with a "focus on the welfare and dignity of the human person and the good of the community".

Vision 2020 has become a blueprint for all future action taken with regard to regional cooperation and its broad principles have been repeated and reinforced in a variety of declarations and commitments. At the 1998 Hanoi Summit it was stated that "the ultimate objective of economic development is to raise standards of living and to promote human development in all its dimensions, so as to enable the people of ASEAN to have the fullest opportunity to realize their potential".<sup>81</sup> The Hanoi Plan of Action calls for the "exchange of information in the field of human rights among ASEAN Countries in order to promote and protect all human rights and fundamental freedoms of all peoples" in line with international human rights law.<sup>82</sup> This measure is significant at two levels. It represents one of the first attempts by ASEAN to coordinate activities of the Member States with regard to human rights protection. Secondly, it places the regional protection of human rights firmly in line with the international system demonstrating there is not a substantive divergence between the two.<sup>83</sup> The Hanoi Summit also expressed support for the traditional principles of ASEAN with a declaration that ASEAN's success in ensuring regional peace and stability was due to the "cardinal principles of mutual respect, non-interference, consensus, dialogue and consultation". Now these State-centric

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<sup>81</sup> Hanoi Declaration of the Sixth ASEAN Summit (16 December 1998), para. 21, available at <http://www.aseansec.org/8752.htm>

<sup>82</sup> Hanoi Plan of Action, paras. 4.8–4.9, available at <http://www.aseansec.org/8754.htm>

<sup>83</sup> There is no consistent position among ASEAN States with regard to participation in and engagement with international human rights law. Cambodia, the Philippines, Thailand and Vietnam have signed both international Covenants along with some of the other major UN human rights treaties. With regard to other States in Asia, it is important to note that Japan, China and Korea have subscribed to the major UN treaties, making claims that international human rights law is not applicable to Asian societies difficult to sustain.

principles are being interpreted alongside principles that work to promote and protect human values.

Two years after the adoption of the Vision 2020 a report was released by an Eminent Persons Group (Vision 2020 Report) setting out what is needed for Vision 2020 to be realized.<sup>84</sup> The Report makes its overall tenor clear at the outset where it states that:

the peoples of ASEAN must themselves be involved, i.e., take ownership, of the ASEAN Vision 2020, and that ASEAN matters should not only be the prerogative of governments, but also of businesses, the civil society and ultimately, the people. We believe that the long-term aim has to be the realization of *human security and development* in the whole ASEAN region.<sup>85</sup>

Vision 2020 introduced the idea of supporting participation and, through the idea of a Community of Caring Societies, fostering a human-centred approach to governance. The Vision 2020 Report takes this even further by placing people at the centre of the cooperation project and placing the aim of regional integration as the realization of human security. The concept of human security is important for building a system of regional governance that is based on human needs and in line with the principles of democracy discussed above. As the Vision 2020 Report explains, the concept of human security and development means “that the ultimate aim of all [ASEAN] endeavours is to improve the quality of life of ASEAN’s peoples in all its aspects”.<sup>86</sup> The Report is extremely forthright in promoting the need for democracy by stating that the leaders of the Member States need to allow for greater participation for individual processes of governance. It explains:

When there is association, people experience a sense of belonging and neighbourliness – we have the desirable social values of identity, community and social cohesion. Finally, when there is participation, and people feel involved in public affairs, and feel that they are being listened to, we will have a society that is inclusive, just and equitable.<sup>87</sup>

The views of the Vision 2020 Report are significant as they set out an approach to democratic governance that is in line with developments at the international level but placed in the context of the social and cultural conditions of the region.

Further developments in the integration project continued with the adoption of

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<sup>84</sup> Report of the ASEAN Eminent Persons Group on Vision 2020 the people’s ASEAN (hereinafter Vision 2020 Report) (22–25 November 2000), available at <http://www.aseansec.org/5304.htm>

<sup>85</sup> Vision 2020 Report, Exec. summary, para. 4 (emphasis in the original).

<sup>86</sup> Vision 2020 Report, section 2.4.

<sup>87</sup> Vision 2020 Report, section 7.

ASEAN Concord II in 2003.<sup>88</sup> This marked a major step in the regional integration project calling for the establishment of an ASEAN Community based on three pillars consisting of political and security cooperation, economic cooperation and socio-cultural cooperation. Concord II retains much of the past approach to regional relations as it confirms the importance of non-interference and consensus in decision-making. As with past agreements the Concord II did not set out specific details or obligations. Its importance lies in the expressed commitment to further ASEAN's role in regional governance and when read in the context of other documents adopted around this time, it does leave the door open for the fostering of democratic governance as a guiding principle for the region.<sup>89</sup>

The ideas of Concord II were further articulated in the Vientiane Action Programme (VAP) where there are calls for comprehensive integration, a further strengthening of ASEAN's institutional framework and, as a major factor in developing a more coherent approach to integration, the adoption of an ASEAN Charter. The VAP also sets out further details concerning the creation of the three communities agreed to in Concord II. There is also an explicit pledge to democracy in the VAP through the ASEAN Security Community (ASC) which "embodies ASEAN's aspirations to achieve peace, stability, democracy and prosperity in the region".<sup>90</sup> There remains reference to the well-established principles of non-intervention in domestic affairs, consensus-based decision-making and respect for the national sovereignty, but these have now become less intransigent through the continued reference to various human-centred norms and values that have clearly become part of ASEAN's aspirations at this stage. This is further supported through the action plan for the ASC which specifically States the need for the "promotion of a just, democratic and harmonious environment and for the promotion of human rights in the region".<sup>91</sup> One of the key aspects of the action plan for ASC is the promotion of popular participation in political systems along with the exchange of experiences in order to enhance the efforts of fostering popular participation.<sup>92</sup> This suggests not only the importance of fostering democracy within States but also brings in a transnational element that will influence regional developments as well.

At the 2005 ASEAN Summit in Kuala Lumpur the Member States took a major step in regional integration and governance by formally starting the process for an ASEAN Charter leading to the creation of the ASEAN Community.<sup>93</sup> The Charter

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<sup>88</sup> Declaration of ASEAN Concord II (7 October 2003), available at <http://www.aseansec.org/15159.htm>

<sup>89</sup> Ferguson, J., "ASEAN Concord II: policy prospects for participant regional 'development'", 26 *Contemporary Southeast Asia* 399–400 (2004).

<sup>90</sup> Vientiane Action Programme, 10th ASEAN Summit (29–30 November 2004), at 6, available at <http://www.aseansec.org/VAP-10th%20ASEAN%20Summit.pdf>

<sup>91</sup> The ASEAN Socio-Cultural Community Plan of Action, 10th ASEAN Summit (29–30 November 2004), available at <http://www.aseansec.org/16829.htm>

<sup>92</sup> Vientiane Action Programme, at 29.

<sup>93</sup> Kuala Lumpur Declaration on the Establishment of the ASEAN Charter (12 December 2005), available at <http://www.aseansec.org/18030.htm>

is described as a necessary development in order to evolve and adapt to the political and economic changes and challenges facing the region. The Charter is envisaged as providing the necessary legal and institutional framework for ASEAN to realize its goals and objectives. It is declared that the Charter will reaffirm the principles, goals and ideals of ASEAN as set out in the major agreements to date, “as well as the principles of inter-State relations in accordance with the UN Charter and established international law that promote and protect ASEAN community interests as well as inter-State relations and the national interests of the individual ASEAN Member Countries”.<sup>94</sup> This is a peculiar statement as it appears the leaders are claiming that only certain parts of international law will be applicable to the integration project. The Declaration goes on to list particular areas of international law and the list is wide ranging.<sup>95</sup> For the purposes here there are a few points worth highlighting. There is an express commitment to the “promotion of democracy, human rights and obligations, transparency and good governance and strengthening democratic institutions” and a pledge to ensure that the States in the region “live at peace with one another and with the world at large in a just, democratic and harmonious environment”. At the same time there is a call for “Mutual respect for the independence, sovereignty, equality, territorial integrity and national identity of all nations” and “The right of every State to lead its national existence free from external interference, subversion or coercion and non-interference in the internal affairs of one another”. It would be hard to judge if the listing of international law commitments in the Declaration is done with any sort of priority or hierarchy but these latter principles come well down the list. In previous ASEAN Declarations they were the first points to be made. The latter points are well established principles of international law and the promotion and protection of democracy is still an emerging area with imprecise obligations in international law. The extent to which the leaders of ASEAN have committed themselves to democracy in the Kuala Lumpur Declaration has set the scene for the next stage in the integration project through the adoption of an ASEAN Charter.

The Kuala Lumpur Summit appointed an Eminent Persons Group to start the process towards the adoption of an ASEAN Charter. The Report of the Eminent Persons Group on the ASEAN Charter (ASEAN Charter Report) was released in December 2006 and using its own terminology, it sets out a number of “bold and visionary ideas”.<sup>96</sup> The Report is a combination of proposed institutional architecture, practical suggestions for future action and an elaboration of principles to guide the future of regional integration. In terms of structure the Report calls for the creation of an ASEAN Council consisting of heads of State and government as the supreme policy-making organ; a Secretary-General and a significantly enhanced Secretariat,<sup>97</sup> and three Councils of the ASEAN Community to deal with the three

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<sup>94</sup> *Ibid.*, para. 4.

<sup>95</sup> See Kuala Lumpur Declaration on the Establishment of the ASEAN Charter, n. 93, para. 4.

<sup>96</sup> ASEAN Charter Report, exec. summary, para. 1.

<sup>97</sup> ASEAN Charter Report, paras. 36–37.

pillars of political, security and legal affairs, economic and financial affairs and socio-cultural affairs.

In the ASEAN Charter Report the importance of international legal rules and norms is continually reinforced. When charting the historical development of ASEAN integration it is noted that principles such as the sovereign equality of all Member States, respect for independence and territorial integrity, non-use of force and non-interference in internal affairs have served the organization well. It is then noted that changes in the international system have necessitated change by ASEAN and its Member States in both practical and principled terms.<sup>98</sup> It is recommended that the Preamble of the ASEAN Charter should set out the basic principles and objectives of ASEAN which are a commitment to democracy, respect for human rights and fundamental freedoms and the rule of law. These are seen as indispensable conditions for stability, peace and development in the region.<sup>99</sup> Under the heading Objectives it is suggested that the Charter “should reaffirm and codify the principle objectives contained in ASEAN’s milestone declarations, agreements, concords and treaties”.<sup>100</sup> The first such objective listed is the enhancement of peace, security, stability, democracy, good governance and equitably shared prosperity.<sup>101</sup> The inclusion of democracy and good governance demonstrates the shift in objectives that has occurred in ASEAN in recent years as these do not have a long history in the region’s priorities.

Under the heading of Principles conflicting norms are set out as there is an attempt to combine the more traditional principles of international law with ones of much more recent nature. The first principles articulated include respect for sovereign equality, national identity and freedom from external interference. These are then followed by respect for human rights and “rejection of unconstitutional and undemocratic changes of government”. Also included in the list of principles is a “commitment to develop democracy, promote good governance and uphold human rights and the rule of law, and to establish appropriate mechanisms for these purposes”. In this regard the Charter proposals also include establishing mechanisms for the monitoring of membership obligations and measures for ensuring compliance with the principles and objectives of the Charter. A monitoring system at the regional level is a noteworthy development given the long entrenched adherence to non-intervention. Monitoring systems in international organizations vary in their intensity and scope. The proposals in the Charter Report call for the use of settlement mechanisms with regard to a wide range of obligations, including democracy, with the potential for suspension.<sup>102</sup> There is also the suggestion of creating a human rights mechanism for the region.<sup>103</sup> The ASEAN Charter Report provides a relatively

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<sup>98</sup> ASEAN Charter Report, para. 7–10.

<sup>99</sup> ASEAN Charter Report, para. 55.

<sup>100</sup> ASEAN Charter Report, para. 57.

<sup>101</sup> ASEAN Charter Report, para. 58.

<sup>102</sup> ASEAN Charter Report, paras. 31–32.

<sup>103</sup> ASEAN Charter Report, para. 47.

decent balance between maintaining the interests of the Member States while attempting to address the need for democratic governance in the integration project.

Following the Charter Report a High Level Task Force was appointed to draft a Charter document for discussion at the November 2007 ASEAN Summit.<sup>104</sup> The Summit adopted the ASEAN Charter, a document which takes on some of the suggestions from the ASEAN Charter Report but is more of a compromise between new principles and old practices with the old practices having the more prominent role. At the same time the ASEAN Charter does recognize, in a legal text, the importance of democracy, human rights and more people-centred governance for the region. The Charter consists of 13 chapters and 55 articles setting out the principles and purposes of the organization, the institutional structure for ASEAN, along with provisions on decision making and dispute settlement. In the preamble the need for further regional integration is recognized as a means to respond to current and future challenges. The preamble also refers to the “collective desires” of the States in the region to live peacefully, to promote their interests and security, and to ensure sustainable development along with the wellbeing, development and welfare of the societies in the region.

Article 1 contains the purposes of ASEAN with fifteen different points set out ranging from broad, general purposes to very specific objectives. There is the maintenance of peace and security, greater regional cooperation in political, security, economic and socio-cultural fields, and increased economic integration through the creation of a single market in the region with free movement of goods, services, capital and labour. The expressed purposes also contain a range of new areas directed at human interests and concerns. There is a commitment to “strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms” and to the enhancement of the well-being and livelihood of people through “equitable access to opportunities for human development, social welfare and justice”. There is also a commitment to promote a “people-orientated ASEAN” whereby all individuals are encouraged and able to participate in the process of integration.

Article 2 sets out the principles that will guide the pursuit of the Article 1 purposes. There is a standalone entry that sets out a general reaffirmation of adherence to the fundamental principles of ASEAN as expressed in previous declarations, agreements, treaties, concords and other instruments. This is then followed by a list of 14 particular principles many of which reiterate the fundamental principles already alluded to, such as respect for independence, sovereignty, equality, territorial integrity and national identity among the Member States; an emphasis on the peaceful settlement of disputes; non-interference in internal affairs; and the right of every Member State to lead its national existence free from external interference, subversion and coercion. These State-centric principles will minimize the impact of the

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<sup>104</sup> “Cebu Declaration on the Blueprint of the ASEAN Charter” (13 January 2007), available at <http://www.aseansec.org/19257.htm>

ASEAN Charter as they can be referred to by the Member States in order to deflect any scrutiny or criticism from the regional institutions. At the same time newer principles are also articulated that mark a move away from the past State centre orientation, such as adherence to the rule of law, good governance, democracy and constitutional governance along with respect for fundamental freedoms, the promotion and protection of human rights and social justice.

The extent to which the Charter marks a change in the way governance in the region is carried out will depend heavily on the actions of the Charter institutions. The Member States retain overall control of the integration project through the ASEAN Summit which is the “supreme policy-making body of ASEAN” consisting of heads of State and government. The Summit has responsibility for overall policy guidance and decisions on key issues, including adherence to the Charter obligations.<sup>105</sup> Article 5 provides that the Member States “shall take all necessary measures, including the enactment of appropriate domestic legislation, to effectively implement the provisions of this Charter and to comply with all obligations of membership”. The ASEAN Secretary-General is responsible for monitoring the implementation of ASEAN agreements and efforts have been made to ensure the neutrality of the office. It stated that the office is not to “seek or receive instructions from any government or external party” and there is an undertaking by the Member States not to influence the Secretary-General in any way. At the same time, the Charter also provides that the Secretary-General serves at the pleasure of the heads of State and governments, which leaves open the potential of political considerations determining the functioning of the role. The extent to which Article 5 has any impact will depend on the forthrightness of the Secretary-General and how this aspect of the office is approached in practice. Article 20 deals with “serious” breaches of membership obligations where the matter will be referred to the ASEAN Summit for a decision on what action is to be taken.

For the purposes here one of the more significant developments is the call for the creation of an ASEAN Human Rights Body. It is stated that this is a necessary development for conforming to the principles and purposes of the Charter.<sup>106</sup> There are no further details provided as the specific terms of the body and its mandate are to be decided later by the ASEAN foreign ministers. This is likely to be one of the more closely watched developments of the ASEAN Charter process, for if a human rights monitoring mechanism based on international law is created it will be the first of its kind in the region and is likely to have a substantial impact on the nature of governance in the region.

The adopted Charter is not as bold in its approach to governance as the version prepared by the Eminent Persons Group. In the adopted version State values predominate and the emphasis given to democracy, human rights and participation in the ASEAN Charter Report have been toned down considerably. This is disappointing given the prominent role given in the various declarations leading up to the final

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<sup>105</sup> ASEAN Charter, Art. 7.

<sup>106</sup> ASEAN Charter, Art. 14.

Charter to the fostering of widespread participation among individuals and groups in the process of governance at multiple levels in the region. In the Charter Report, respect for democracy and human rights is seen as a fundamental principle and central to the objectives for the region based on the idea of ASEAN becoming a “people-centred organization”.<sup>107</sup>

The Charter has started off on very weak ground with regard to the idea of a people-centred organization. There was very little public consultation or involvement in the drafting of the Charter and given the unrepresentative nature of many of the Member States it was a process that was wholly elite led. This runs contrary to the Charter Report where there are several references to the need for ensuring individuals and societies have an active role to play in the region and for ensuring that the integration project works to the benefit of all individuals and not to their detriment. The Charter Report suggested the establishment of various channels allowing for differing forms of consultation, participation and interaction among various groups and actors,<sup>108</sup> but there is no evidence that this has been acted upon. In fact the government of Burma (Myanmar) was allowed to the Charter despite the recent events in that country which appear to be contrary to many of the Purposes and Principles proclaimed in the document.

It appears that the Charter has not brought about any immediate changes to the overall approach to governance in the region. If the integration project continues to be dominated by the regional elite it is unlikely it will receive the widespread support envisaged in the various declarations adopted in the run-up to the Charter. This will be further exacerbated by the pursuit of a single market based on market liberalization and competitive free-market economies.<sup>109</sup> If ASEAN follows the dominant trends in the international system this means the neo-liberalism will have a strong influence on future developments, and democracy with regards to governance will be understood in minimalist terms. A strong and unquestioning adherence to free market forces and the quest for competitiveness potentially compromise the political and social dimensions of democracy as technocratic elites pursue policies and objectives at a considerable distance from those most affected and often without regard for the impact these policies and practice have on individuals. The experience of the European Union has demonstrated that an elite-led project based on free-market ideas will result in widespread disillusionment and bring the entire integration project into question. As a result the EU has made attempts to address concerns over democracy and the impact of neo-liberalism but it has not been done in a comprehensive manner and appears more as an afterthought.<sup>110</sup>

In one sense ASEAN has already addressed this problem, as calls for greater economic integration have been accompanied by an emphasis on greater participation by the people of the region and the upholding of social welfare provisions. The

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<sup>107</sup> ASEAN Charter Report, para. 47.

<sup>108</sup> ASEAN Charter Report, paras. 47–48.

<sup>109</sup> Vision 2020 Report, section 3; and Vientiane Action Programme 9.

<sup>110</sup> See Burchill, *loc. cit.*, n. 11, at 198.

expressed commitment to ensure a Community of Caring Societies is important so long as it is constructed in a concrete way ensuring “equitable access to opportunities for total human development regardless of gender, race, religion, language, or social and cultural background”.<sup>111</sup> This will require the idea of a Community of Caring Societies being an equal priority to economic integration so that it ensures the process as a whole is undertaken “with the consent and greater participation of the people with its focus on the welfare and dignity of the human person and the good of the community”. In some respects there appears to be a strong commitment to ensuring human values are at the core of the integration project and that individuals are given the opportunity to participate in the processes that impact upon their lives.<sup>112</sup>

However, as already stated, the Charter does not mark a major shift in this direction. If the Vision 2020 agenda is to be realized two things need to occur in the region – ASEAN as a regional arrangement needs to take an active stance in governance and the Member States need to take their commitments and obligations seriously. This is going to require a major shift in attitudes and practices in the region as the Member States have long resisted any form of intervention in their affairs.<sup>113</sup> The Charter Report recognizes this challenge and concludes with the view that:

ASEAN Member States need to accord higher national priority to ASEAN in their domestic agendas as well as make a conscious effort to promote the benefits of closer regional integration.<sup>114</sup>

In the ASEAN Charter the regional organization is only given a central role with regard to external affairs.<sup>115</sup> Only time will tell the extent to which the Member States take seriously the principles and purposes contained in the Charter. As there is a mix of State-centric and human-centred approaches in the Charter it will be up to the institutions of ASEAN to move the region in the direction of human-centred governance based on principles of democracy and human rights as set out in international law. Given the nature of the final Charter document and the past history of the region this would appear to be an insurmountable task. However, the continued reference to democracy and human rights that is already in place cannot be ignored as it will become more and more difficult for State leaders and the organization itself to ignore what has been said and agreed to. Studies have shown that over time broad rhetorical principles become more influential and place increasing pressures on States to comply.<sup>116</sup> Over the past 10 years of so there has been an increasing

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<sup>111</sup> Vision 2020.

<sup>112</sup> See Vientiane Action Programme, 17.

<sup>113</sup> Narine, *loc. cit.*, n. 77, at 186.

<sup>114</sup> ASEAN Charter Report, para. 73.

<sup>115</sup> ASEAN Charter, Art. 41.

<sup>116</sup> Risse, T., Ropp, S. and Sikkink, K., *The Power of Human Rights: International Norms and Domestic Change*, Cambridge: Cambridge University Press, 1999, at 16.

momentum in support of the promotion and protection of human rights in the region, which follows on from similar developments in the international system more widely. The Charter does articulate the need for the promotion and protection of democracy and human rights in the region providing a basis for change.

## THE FUTURE OF ASEAN AND REGIONAL GOVERNANCE

As part of ASEAN's 40th anniversary celebrations it was stated that the creation of an ASEAN Charter would be a crowning achievement.<sup>117</sup> It would be hard to conclude that the agreed Charter is of this nature as it adheres strongly to past principles and practices. If the Member States are serious about entering into a new phase of regional integration it will be essential to make a clear break with the past and the traditional understanding given to the ASEAN Way – commonly understood as a façade of regional cooperation as a veil to cover the more substantive pursuit of individual national interest by the Member States.<sup>118</sup> The various reports and declarations leading up to the ASEAN Charter have brought into question the traditional approach to the ASEAN Way and have called for it to be substantively reconsidered. The Vision 2020 Report explains that for the future of regional integration the ASEAN Way is not sufficient and the time has come to shift from processes to institutional structures that will allow a more coherent approach to integration and cooperation in the region.<sup>119</sup> The ASEAN Charter Report calls for the need to improve on the ASEAN Way with less emphasis on non-interference and increased emphasis on greater cooperation in the pursuit of the common interest.<sup>120</sup>

This does not mean that the ASEAN Way is now a discredited idea. Instead there needs to be a commitment to revising it so that it not only consists of the traditional core values that have brought the region to its current position but so that it also embraces the range of human values that have been articulated in the ASEAN Charter Report and other documents. If the ASEAN Charter is to evolve into the manner suggested in the Charter Report then the ASEAN Way will become a model for other regional and universal integration projects as it strives to balance the interests of States with the interests of individuals and groups in society. As explained above, the prominence of human values in the form of substantive human rights protection, an emphasis on democracy at all levels and attention given to marginalized groups in society provide a solid foundation for the future of governance in the region. The Vision 2020 Report makes clear that these values and practices have to be placed as the centre of the integration project and not be seen as peripheral measures:

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<sup>117</sup> Cebu Declaration on the Blueprint of the ASEAN Charter (13 January 2007), available at <http://www.aseansec.org/19257.htm>

<sup>118</sup> Öjendal, *loc. cit.*, n. 54, at 525.

<sup>119</sup> Vision 2020 Report, section 6.

<sup>120</sup> ASEAN Charter Report, para. 18.

We would add that the empowerment, participation and involvement of the people in ASEAN towards building a resilient and highly cohesive and competitive ASEAN in the global environment must be implemented with the greatest sense of urgency. The forces of globalization, which may give rise to undesirable effects, should be countered by a conscious effort to cater to human security and development in all its dimensions.<sup>121</sup>

ASEAN now has a broad range of expressed principles and values that involve a communal approach to governance based on the needs and interests of the individuals and societies in the region. These principles and values have strong foundations in existing international law where they are slowly overtaking the primacy of State interests.<sup>122</sup> In the global context the Commission on Human Rights has declared that “the widest participation in the democratic dialogue by all sectors and actors of society must be promoted in order to come to agreements on appropriate solutions to the social, economic, and cultural problems of a society”. The Commission has also called for democratic systems that are

inspired by the recognition of the inherent dignity and the equal and inalienable rights of all members of the human family, promotes people’s welfare, rejecting all forms of discrimination and exclusion, facilitates development with equity and justice, and encourages the most comprehensive and full participation of their citizens in the decision-making process and in the debate over diverse issues affecting society.<sup>123</sup>

The approach of ASEAN towards a people-centred organization, if manifested in practice, will provide crucial lessons for the future of governance throughout the international system.

The move from rhetoric to actual practice will not be an easy journey. The region has a long history of avoiding binding legal obligations or confronting Member States that act contrary to agreed principles and practices. There has been a gradual evolution of monitoring mechanisms in some areas, but these have not been utilized to any great degree and views are mixed on the impact they have had on the traditional principle of non-intervention.<sup>124</sup> When Thailand experienced a non-

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<sup>121</sup> This may be contrasted with the recent steps taken by the Pacific Islands Forum in furthering integration in that part of Asia-Pacific. In the action plan agreed to, considerations of democracy and human rights do not receive the same sort of priority expressed in ASEAN initiatives. See Pacific Islands Forum Secretariat, “A pacific plan for strengthening regional cooperation and integration” (September 2005), available at <http://www.pacificplan.org>

<sup>122</sup> For a broad overview of developments of this nature, see Meron, T., *The Humanization of International Law*, Leiden: Martinus Nijhoff, 2006.

<sup>123</sup> Commission on Human Rights Resolution 2005/29, para. 14.

<sup>124</sup> Haacke, J., “ASEAN’s diplomatic and security culture: a constructivist assessment”, 3 *International Relations of the Asia-Pacific* 60–61, 74–75 (2003); and Solingen, E., “ASEAN cooperation: the legacy of the economic crisis”, 5 *International Relations of the Asia-Pacific* 22 (2005).

democratic change of government in 2006, ASEAN and its Member States remained silent. The situation in Burma has long been a delicate issue for the organization. Burma was due to hold the ASEAN chairmanship in 2006 but after a great deal of pressure from international actors and, it appears, other Member States, the government voluntarily decided to postpone its chairmanship. During this time ASEAN as an organization and the Member States were reluctant to speak publicly about Burma's position.

Things have been slightly different in response to the events at the end of 2007. ASEAN foreign ministers released a public statement condemning Burma's crack-down in uncharacteristically strong terms. The statement says the ministers were "appalled" at the actions taken by the government and expressed their "revulsion" with regard to reports on the use of violent force and resulting deaths. They further called on Burma's leaders to work towards a peaceful transition to democracy, emphasizing that the developments in Burma have a "serious impact on the reputation and credibility of ASEAN".<sup>125</sup> The message that Burma's recent actions are contrary to ASEAN principles has been reinforced by individual ASEAN members in Security Council deliberations on the matter. The representative of Indonesia expressed the view that Burma has been an active participant in the regional arrangement's developments towards democracy making the current actions all the more difficult to understand. He went on to say: "We cannot look the other way, because it is impossible to advance together if a member fails to honour the values espoused by the group."<sup>126</sup> However, the fact that Burma signed the ASEAN Charter in November 2007 raises some serious questions about the communal commitment of the region to governance based on democracy and human rights.

The history of ASEAN as a regional integration project has been described as reactionary, not purposive, an organization with no collective vision, just a collection of Member States pursuing their own self-interests.<sup>127</sup> The ASEAN Charter Report observes that "ASEAN's problem is not one of lack of vision, ideas and action plans. The real problem is one of ensuring compliance and effective implementation of decisions."<sup>128</sup> And in a rather forthright fashion the Report makes plain that the Member States have to start taking a communal approach to regional organization, and that this entails no longer placing a strong adherence on individual self-interest.<sup>129</sup> The ASEAN Charter provides the opportunity for this, but at the same time also provides for the continuance of past practices. Significantly the vision of democracy and human rights that the ASEAN Charter Report and other ASEAN documents portrays is one that is based on human interests and

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<sup>125</sup> Statement by ASEAN Chair Singapore's Minister for Foreign Affairs George Yeo (27 September 2007), available at <http://www.aseansec.org/20974.htm>

<sup>126</sup> Meeting of the UN Security Council, 5 October 2007, UN Doc. S/PV.5753, 7.

<sup>127</sup> Turnbull, *loc. cit.*, n. 76, at 266–267.

<sup>128</sup> ASEAN Charter Report, para. 44.

<sup>129</sup> ASEAN Charter Report, paras. 18–19.

not merely State interests. The emphasis on wide-based participation, the concern for marginalized groups and the overall tenor of the Community of Caring Societies in the context of regional integration offers a substantive model of democracy that, if implemented, will offer considerable lessons for integration projects elsewhere.

# EXPORT OF WAR: ISSUES OF INDIVIDUAL CRIMINAL AND STATE RESPONSIBILITY

H. Harry L. Roque, Jr.\*

*Frankly, I'd like to see the government get out of war altogether and leave the whole feud to private industry.*  
Major Milo Minderbinder, Joseph Heller, *CATCH 22*

## INTRODUCTION

The US involvement in Iraq now entails the hiring of private security forces (PSF) to guard its premises and personnel. Hiring is done through a security contractor with privity of contract with the US government. In turn, the US contractor hires the individuals to act as security forces. Among those recruited into this PSF are Filipinos. The recruitment is done openly and with the knowledge of the Philippine government.

The deployment of PSF to an occupied territory gives rise to the following issues:

- (1) Are the private security forces combatants or mercenaries?
- (2) Are the private security forces agents of the sending State or the retaining State? and
- (3) Is the sending of mercenaries by a State illegal under international law? Will it give rise to individual criminal liability?

## RECRUITMENT AND PLACEMENT OF FILIPINOS OVERSEAS

The primary laws regulating the activities of private employment agencies in the Philippines are the Labour Code (Presidential Decree No. 442), the Migrant Workers and Overseas Filipino Act of 1995 (Republic Act No. 8042) as well as the rules and regulations on local and overseas Filipino employment.

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The Labour Code and its subsequent amendments prescribed a stringent system for licensing and regulating private recruitment agencies. Only Filipino citizens or corporations whose authorized and capital stock are owned by Filipino citizens<sup>1</sup> and that have substantial capitalization were qualified to receive licences to recruit and deploy workers.<sup>2</sup> The Secretary of Labour was granted full powers to suspend or withdraw the licence of private recruitment agencies that violated the law<sup>3</sup> as well as restrict and regulate the recruitment and placement activities of these agencies.<sup>4</sup>

The Labour Code also established corresponding mechanisms for regulating the activities of recruitment agencies. These mechanisms included, among others, a ban on the direct hiring of workers by foreign employers,<sup>5</sup> regulation of the collection of placement fees by recruitment agencies from workers,<sup>6</sup> and requirement of a deposit of cash and surety bonds by recruitment agencies to guarantee compliance with the law and to ensure satisfaction of liabilities to workers.<sup>7</sup>

The Philippine Overseas Employment Administration (POEA) is the sole government agency for the formulation and implementation of policies and programmes for the systematic deployment of Filipino workers overseas.<sup>8</sup>

The POEA closely supervises and monitors private recruitment agencies and their compliance with the conditions imposed under their licence and the undertakings made by the licence holder.<sup>9</sup> A pre-licensing inspection and regular inspections of the office and of the agency's records are conducted as part of the monitoring and regulation measures.<sup>10</sup>

A licence, being a privilege granted on the basis of qualifications provided by law, cannot be transferred to another person or company in order to circumvent the prohibition against certain individuals and entities from participating in the overseas employment programme.<sup>11</sup> The recruitment activities of a licensee may be conducted only in the place indicated in the licence and only by the person or entity to which the licence was issued.<sup>12</sup> If the licence holder needs to conduct special recruitment activities outside the office, prior approval must be obtained from the POEA.<sup>13</sup>

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<sup>1</sup> Presidential Decree No. 42 (hereinafter cited as Labor Code), Art. 27.

<sup>2</sup> Labor Code, Art. 28.

<sup>3</sup> Labor Code, Art. 35.

<sup>4</sup> Labor Code, Art. 36.

<sup>5</sup> Labor Code, Art. 18.

<sup>6</sup> Labor Code, Art. 32.

<sup>7</sup> Labor Code, Art. 31.

<sup>8</sup> Republic Act No. 8042 (hereinafter cited as RA 8042), § 23 b.1.

<sup>9</sup> POEA RULES AND REGULATIONS ON THE RECRUITMENT AND EMPLOYMENT OF LAND-BASED WORKERS, Part II, (hereinafter cited as 2002 Rules), available at <http://www.poea.gov.ph/rules/POEA%20Rules.pdf>

<sup>10</sup> 2002 Rules Part II RULE II § 3.

<sup>11</sup> 2002 Rules RULE II § 7-9.

<sup>12</sup> 2002 Rules Part II RULE VI.

<sup>13</sup> *Ibid.*

Only a licensed employment agency may secure registration or accreditation, whichever is appropriate, of the foreign principal or employer from the POEA.<sup>14</sup> To be registered, employers or principals must submit certain documents for verification by the Philippine Overseas Labour Office (POLO).<sup>15</sup>

A private recruitment agency may not deploy a worker who is not covered by an employment contract in accordance with the master employment contract submitted to and approved by the POEA.<sup>16</sup>

It is the foregoing regulatory regime which makes the issue of possible State responsibility of the Philippine government for the acts done by PSF problematic. While they may not be, properly speaking, part of an official State organ, still they are deployed with the acquiescence, if not outright consent, of the Philippine government. Whether this will be sufficient basis for attribution will be discussed in a later part of this article.

## RECRUITMENT OF FILIPINOS IN IRAQ

Filipinos are taking up work at US-run facilities in Iraq, providing the US military and its affiliated contractors cheap, English-speaking manpower.<sup>17</sup> This circumvents an official employment ban by the Philippine government to Iraq since 13 July 2004<sup>18</sup> after the Philippines recalled its small humanitarian contingent following the threat by militant captors to behead truck driver Angelo de la Cruz unless Philippine troops left by 20 July 2004.<sup>19</sup> Two years later, an estimated 3,000 out of the total 7,000 Filipinos serving at four US military-run camps in Iraq were undocumented workers, according to Philippine labour officials.<sup>20</sup> Comparatively high wages have been a push factor: Filipinos in Iraq earn monthly salaries from the US military and its affiliated business interests ranging between US\$600 to \$1,000 excluding special allowances, according to the labour official.<sup>21</sup>

Despite the “not valid for travel to Iraq” advisory stamped into every Philippine passport, thousands of Filipinos are openly defying the ban and government officials are either hard-pressed or unwilling to find a solution to the subversion of the ban.<sup>22</sup> While Philippine labour officials openly admit that many overseas Filipino workers (OFW) stole into Iraq after the ban was imposed and now work openly

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<sup>14</sup> 2002 Rules Part III Rule I § 3 and § 5; and 2002 Rules Part III RULE II.

<sup>15</sup> 2002 Rules Part III RULE I § 1 and §4.

<sup>16</sup> 2002 Rules Part III RULE § 2 (b); and 2002 Rules Part V RULE I.

<sup>17</sup> Jimenez, Cher S., “US outsources war to Filipinos”, *Asian Times Online*, 15 July 2006 (hereinafter cited as Jimenez, C.).

<sup>18</sup> [http://www.poea.gov.ph/html/adv10\\_iraqBan.html](http://www.poea.gov.ph/html/adv10_iraqBan.html)

<sup>19</sup> [http://news.bbc.co.uk/2/hi/middle\\_east/3898875.stm](http://news.bbc.co.uk/2/hi/middle_east/3898875.stm)

<sup>20</sup> Jimenez, C., *supra* n. 17.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

at US-run military facilities, they do not have hard evidence to confirm that US government or wayward Philippine officials are behind the illegal deployment of workers.<sup>23</sup> Former Philippine Labour Secretary Patricia Santo Tomas said many Filipinos evade immigration authorities by using secret passage points in Dubai in the United Arab Emirates, in Kuwait and in Jordan. The Philippine government has a standing agreement with all of these countries to block OFW from travelling or crossing into Iraq.<sup>24</sup>

Reports from the first half of 2006 have filtered out of the Middle East about Filipinos working for “a private army” in Iraq. Further snooping by newsmen has revealed that Blackwater USA – once a small private security agency in North Carolina – has been recruiting Filipinos for high-paying (in Philippine terms) jobs as security operators in Afghanistan and Iraq.

In fact, Blackwater is just one of 25 contractors operating in Afghanistan and Iraq. Other companies may actually have recruited more Filipinos.<sup>25</sup> By the nature of their operations, security contractors are not known to exercise transparency.<sup>26</sup>

One Manila TV report placed a typical Filipino operator’s monthly salary at “anywhere between \$1,500 and \$2,500”.<sup>27</sup> In contrast, his American counterpart can earn as much as \$20,000 – and a good number of them do.<sup>28</sup>

Jason Cruz, a 40-year-old warehouseman, and Ernie de Leon (not their real names), a 23-year-old lifeguard, told *Asia Times Online* that they were able to enter Iraq illegally through Dubai.<sup>29</sup> Cruz said he flew to Dubai on a visit visa and then later applied for work through United Arab Emirates-based Prime Projects International (PPI), a subcontractor of US military contractor Halliburton, which provides support services to US armed forces in Iraq. Both men said they travelled to Iraq from Dubai without any hitches and suggested that this was at least partly due to their employer’s known connection to the US military.<sup>30</sup>

According to Iraq Coalition Casualty Count,<sup>31</sup> an independent organization that monitors conflict-related deaths in Iraq, a number of Filipinos have been killed in Iraq since the 2004 ban was imposed. Rey Torres, a driver and security guard with Qatar International Trading Company, was shot and killed outside Baghdad on 18 April 2005. Ponciano Loque and Benjie Carreon were killed on 11 November 2005 in a roadside bomb in eastern Baghdad. The organization listed their profession and employer as “unknown”. The following week, on 18 November, Alexander Mesa Ilocto was killed in a road accident between Iraq and Kuwait. His position and

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<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

<sup>25</sup> Mariano, D., “Big deal: soldiers of (mis)fortune”, *Manila Times Online*, 23 June 2006.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*

<sup>29</sup> Jimenez, C., *supra* n. 17.

<sup>30</sup> *Ibid.*

<sup>31</sup> iCasualties.org, *Iraq Coalition Casualty Count*, available at <http://icasualties.org/oif/Civ.aspx>

employer were likewise listed as “unknown”. On 13 August 2006, a roadside bomb killed Rogelio Saradia, a “security specialist” for AIM Group.

Recent reports have revealed that a syndicate operating through the Philippines’ Department of Foreign Affairs was selling “clean” passports for P5,000 to P25,000 (\$100 to \$500) to OFWs, with the rate scale depending on how fast the applicant desired to leave the Philippines. However, the tide of OFW flowing into Iraq has recently kicked up a legal fuss back in the Philippines.<sup>32</sup>

Mark Villacruz, who has previously claimed to represent US contractor Triple Canopy, a private security and special operations firm founded in 2003 by former US Delta Forces, allegedly recruited former members of the Philippine armed forces after the ban was imposed to work as security personnel for US officials and facilities in Iraq.

Villacruz, who is now out on bail on charges of illegal recruitment, is alleged to have employed about 300 former Philippine soldiers for Triple Canopy’s operations in Iraq since the Philippines government ban was first imposed in 2004.<sup>33</sup> Most of the recruits came from the Subic Naval Base, a former American facility in the Philippines.<sup>34</sup>

Before the ban, Villacruz ran a brisk recruiting business through Armstrong Resources Corporation, a licensed recruitment firm based in east Manila.<sup>35</sup> In March 2003, he allegedly recruited 21 former Philippine soldiers to work for Triple Canopy in Iraq.<sup>36</sup> That batch of recruits was reportedly offered six-month contracts on a \$1,000 per month salary, \$150 in special allowances and free accommodation basis.<sup>37</sup> While attractive by Philippines’ standards, the wages and benefits are considerably less than US national recruits receive.<sup>38</sup>

In June 2006, Villacruz was charged with illegal recruitment and breach of contract for failing to pay war compensation payments, which amounted to \$9,000 for each of the 21 returnees who sued him before the POEA.<sup>39</sup> They have also asked the POEA to put Armstrong Resources Corporation under preventive suspension and bar Triple Canopy from participating in Philippines overseas employment programmes.<sup>40</sup>

At least three American private security companies have reportedly recruited about 300 Filipino “private security operators” or “independent contractors” (the current euphemisms for mercenaries) for deployment in Afghanistan and Iraq.<sup>41</sup>

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<sup>32</sup> Jimenez, C., *supra* n. 17.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

<sup>41</sup> Mariano, D., “Big deal: whores of war”, *The Manila Times Internet Edition*, 28 June 2006, available at <http://www.manilatimes.net/national/2006/june/28/yehey/opinion/20060628opi2.html>

Published reports on the Filipino mercenaries have also mentioned Triple Canopy and Dyncorp, but it is Blackwater that has drawn the greatest attention.<sup>42</sup>

Blackwater president Gary Jackson was recently quoted by the online service *Virginian Pilot*<sup>43</sup> as saying his company has acquired about 25 acres, or about two hectares, in the former US naval base at Subic Bay and will have access to an adjacent jungle for conducting survival training. An application to lease the land has been submitted to the Subic Bay Metropolitan Authority by Satelles Solutions Inc., the local partner of Greystone Ltd., which in turn is described as the “international affiliate” of Blackwater. Satelle/Greystone’s business plan envisions training as many as 1,000 recruits monthly at the leased property in Subic prior to their deployment overseas, presumably in Afghanistan and Iraq.<sup>44</sup>

These reports had led to a Philippine Senate investigation on the matter. Senator Rodolfo Biazon, a former armed forces chief of staff who now heads the Senate Committee on National Defence, said he is set to begin investigating reports about the recruitment of former soldiers and policemen to serve as mercenaries in Iraq and Afghanistan.<sup>45</sup> Biazon said he has secured a copy of a contract between the Subic Bay Metropolitan Authority and Blackwater for the use of freeport grounds for the combat training of Filipino recruits.<sup>46</sup> He said the alleged contract gives premium to applicants with military and police background. He added Blackwater has manpower contracts with the Pentagon.<sup>47</sup>

The United Nations report disclosing the presence of Filipino mercenaries in Iraq will be formally made public in March 2007.<sup>48</sup> The chief of the UN working group on the use of mercenaries, Jose Luis Gomez del Prado, who gave the press advance knowledge of the report, said that many of the recruits stem from former police and military forces in the Philippines, Peru and Equador. “They are trained quickly but not prepared for armed conflict situations,” Gomez del Prado said. “They are sent there, they receive M16 (assault rifles) and are placed in very dangerous areas like the Green Zone (in Baghdad), convoys and embassies,” he added.

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<sup>42</sup> *Ibid.*

<sup>43</sup> Sizemore, B., “Backwater USA to open facilities in California, Philippines”, *Pilotonline.com*, 16 May 2006, available at <http://content.hamptonroads.com/story.cfm?story=104492&ran=12576>

<sup>44</sup> Mariano, D., “Big deal: whores of war”, *The Manila Times Internet Edition*, 28 June 2006, available at <http://www.manilatimes.net/national/2006/june/28/yehey/opinion/20060628opi2.html>

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

<sup>47</sup> Cortes, C., “Iraq and Afghan jobs under scanner”, *Gulfnews.com*, 17 June 2006, available at <http://archive.gulfnews.com/articles/06/06/17/10047459.html>

<sup>48</sup> “Pinoys recruited as mercenaries in Iraq”, *Philippine Star*, 27 February 2007.

## PSF: COMBATANTS OR MERCENARIES?

Even from a US perspective, there is no controversy that its occupation of Iraq is governed by International Humanitarian Law pursuant to Article 2 of the Geneva Convention.

In turn, mercenaries are defined under Article 47 of the Geneva Convention Protocol I. There, the definition of a mercenary is any person who: (a) is specially recruited locally or abroad in order to fight in an armed conflict; (b) does not in fact take part in the fighting; (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that party; (d) is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict; (e) is not a member of the armed forces of a party in conflict and (f) has not been sent by a party which is not a party to a conflict on official duty as a member of its armed forces. The same provision does not prohibit the use of mercenaries, although it provides that they “shall not have the right to be a combatant or a prisoner of war”.

Accordingly, mercenaries are protected by common Article 3 of the Geneva Conventions and the principle of protection, but are not immune from criminal prosecution under domestic law. In fact, only combatants are entitled to such immunity from domestic prosecution. Likewise, they also do not have the right to be released upon cessation of hostilities by express provision of the Geneva Conventions; neither are they entitled to prisoner of war (POW) status.

Thus, in international armed conflicts, they may, when captured in battle, be treated as criminals and may be prosecuted for treason, rebellion and murder. This is the consequence of their classification as “unlawful combatants”. They continue to be protected though by common Article 3 of the Geneva Conventions and by international human rights law.

In 1989, the UN established the International Convention against the Recruitment, Use, Financing and Training of Mercenaries (1989 Convention) to ameliorate these problems.<sup>49</sup> It defined the actions in its title as offences and set up extradition arrangements to deal with those who violated the Convention.<sup>50</sup> Article 1 of the 1989 Convention States the definition of a mercenary:

- (1) A mercenary is any person who:
  - (a) Is specially recruited locally or abroad in order to fight in an armed conflict;
  - (b) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to

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<sup>49</sup> International Convention against the Recruitment, Use, Financing, and Training of Mercenaries, 4 December 1989, UN GAOR, 72d plen. mtg, UN Doc A/Res/44/34 (1989).

<sup>50</sup> Singer, Peter Warren, “War, profits and the vacuum of law: privatized military firms and international, law”. 42 *Columbia Journal of Transnational Law* 521 at 529 (2004).

- combatants of similar rank and functions in the armed forces of that party;
- (c) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;
  - (d) Is not a member of the armed forces of a party to the conflict; and
  - (e) Has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.
- (2) A mercenary is also any person who, in any other situation:
- (a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:
    - (i) Overthrowing a government or otherwise undermining the constitutional order of a State; or
    - (ii) Undermining the territorial integrity of a State;
  - (b) Is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation;
  - (c) Is neither a national nor a resident of the State against which such an act is directed;
  - (d) Has not been sent by a State on official duty; and
  - (e) Is not a member of the armed forces of the State on whose territory the act is undertaken.

While the 1989 Convention for the first time makes the act of mercenaries a crime, the Convention criminalizes only the use of mercenaries where it is for the purpose of defeating the right of self-determination and the territorial integrity of a State. Therefore, the use of mercenaries for purposes outside of these may be considered still as being legal.

Unfortunately, the 1989 Convention came out just as the private military trade began to recreate itself to one being dominated by private companies today and did little to clarify the situation. Industry analysts have found that the Convention, which lacks any monitoring mechanism, has merely added a number of vague, almost impossible to prove, requirements that all must be met before an individual can be termed a mercenary and few consequences thereafter.<sup>51</sup> In fact, the consensus is that anyone who manages to get prosecuted under “this definition deserves to be shot – and his lawyer with [him]”.<sup>52</sup>

Because of inherent flaws, the Convention was ratified in September 2001 by a small number of signatories none of which was a major State player. This, as Singer concludes, “. . . combined with the fact that no one has been prosecuted under the law, the list of signatories acts almost as a form of *jus cogens* that runs counter to the

<sup>51</sup> Brooks, D. and Solomon, H., Editorial, *Conflict Trends* 1, 2 (2000), available at [http://www.accord.org.za/ct/2000-1/CT%201\\_2000%20editorial.pdf](http://www.accord.org.za/ct/2000-1/CT%201_2000%20editorial.pdf)

<sup>52</sup> Best, G., “Humanity in warfare: the modern history of the international law of armed conflicts”, 57 *International Affairs* (*Royal Institute of International Affairs*) 328 (summer 1981).

treaty – in a sense, an ‘anti-customary law’ – and further weakens the treaty’s legal impact”.<sup>53</sup>

Thus, given the murky legal waters on which Private Security Forces (PSF’s) wades, no one should be surprised about the proliferation of PSF and MPI as well as mercenaries, whose acts are often lumped together or intertwined. This confuses even the United Nations as can be seen in the reports made by the UN Special Rapporteur on Mercenaries in the succeeding paragraphs.

Mr Enrique Bernales Ballesteros, UN Special Rapporteur on the question of the use of mercenaries, concluded:

... [i]n submitting his final report to the Commission on Human Rights, the Special Rapporteur notes that despite efforts by the United Nations and inter-State regional organizations to combat mercenary activities and curtail them as far as possible, such activities have not disappeared. On the one hand, the traditional type of mercenary intervention which impedes the exercise of the right of peoples to self-determination remains; on the other hand, there are the beginnings of a process of change, in which the mercenary becomes a multi-role, multi-purpose professional, recruited, hired and trained to commit criminal acts and violate human rights.

64. Mercenary activity contravenes international law and involves a transaction that can affect persons, people and countries in terms of their fundamental rights. Whatever the modality, the use of mercenaries and mercenary activities themselves must be prohibited. Such prohibition must include effective sanctions against those who recruit, hire, train, finance and allow the gathering, assembly or transit of mercenaries.

...  
... [p]rivate companies offering military assistance, consultancy and security services on the international market should be regulated and placed under international supervision. They should be warned that the recruitment of mercenaries constitutes a violation of international law. Accordingly, the legal instruments that allow effective legal prosecution of both the mercenary agent and of the company that hires and employs him must be refined. A particular concern must be for the crimes and offenses committed by employees of such companies not to go unpunished, as is usually the case.

In view of the persistent use of mercenaries for the commission of terrorist acts and various criminal activities, the mechanisms and procedures existing in various United Nations bodies and in regional organizations to combat the presence and use of mercenaries must be strengthened. This strengthening must include such aspects as the link between mercenaries and terrorism, and the participation of mercenaries in organized crime and illicit trafficking.<sup>54</sup>

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<sup>53</sup> Singer, P.W., “War, Profits and the Vacuum of Law: Privatized Military Firms and International Law”, 42 *Columbia Journal of Transnational Law* 521 (2004) at 531.

<sup>54</sup> Ballesteros, E. B., Special Rapporteur, “The right of peoples to self-determination and its application to peoples under colonial or alien domination or foreign occupation: use of

The Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination in Lima, Peru issued the following statement on 2 February 2007:

The Working Group has observed that weak or insufficient national legislation, regulation and control of private security companies encourages companies operating in the international market to seek to recruit individuals from other countries as security guards in areas of armed conflict. It has, therefore, urged States to strengthen domestic legislation against these new forms of mercenarism-related crime. It would appear that the absence of measures to control private security companies has enabled the recruitment of large numbers of Peruvians.<sup>55</sup>

It was further reported that:

The information received demonstrates serious omissions and shortcomings in complying with obligations under international law, including labor standards, and calls into question the constitutionality of these activities. The unfavorable socio-economic situation and high unemployment which have made this sort of contract attractive in no way diminish the government's responsibility. The Working Group is concerned at the failure to act of State bodies, especially the Ministry of Labour and the National Prosecutor's Office, since this is a massive phenomenon which is common knowledge and widely reported in the media. The Ministry of Labour should at some stage have monitored the contracts to ensure that possible claims for breach of labour rights were admissible; have issued an opinion on the provisions and conditions of the contracts; and as far as possible have tried to frame the contracts under a bilateral agreement guaranteeing health services, social security and labour rights for all employees.<sup>56</sup>

Among the preliminary recommendations presented by the Working Group are the following:

- That, in the process of bringing Peru's legislation in line with the International Convention, Peru should adopt the broadest possible legal interpretation, to cover not only the traditional offence of acting as a mercenary but also mercenary-related activities. It would therefore be important to involve in the

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mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination; report submitted", United Nations Economic and Social Council, Commission on Human Rights, Sixtieth session, Item 5 of the provisional agenda, E/CN.4/2004/15, GE.03-17313 (E) 100204 120204, 24 December 2003, at 20.

<sup>55</sup> United Nations, "UN Working Group on Use of Mercenaries concludes visit to Peru", 5 February 2007, available at <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/3DECD663E807F07AC1257279003494FE?opendocument>

<sup>56</sup> *Ibid.*

drafting process the various Ministries and government bodies concerned, as well as . . . sectors of civil society working to protect human rights;

- That the authorities maintain transparent registers of private security companies including all matters concerning ownership, statutes, purposes and functions as well as a system of regular inspections. The authorities should also adopt legislation and regulations to avoid possible conflicts of interest when serving State officials act as owners or managers of these companies;
- That the competent authorities promptly provide the information requested of them by the oversight bodies charged with investigations to determine the respective responsibilities of the State and the private security companies and individuals concerned, bearing in mind possible issues of extraterritorial jurisdiction.<sup>57</sup>

It appears though that while International Humanitarian Law and treaty law deprive mercenaries of “combatant” status and thus of “POW” status, the law itself does not expressly prohibit the use of mercenaries. In fact, in the *Nicaragua* case, the court did not dwell on the legality *per se* of the “contras”. Instead, it ruled that the low level of support granted to the group by the US could not result in attribution since it was bereft of “effective control” and consequently could not be characterized as an “armed attack” on the territory of Nicaragua.<sup>58</sup>

The shortcomings of the treaty regimes on mercenaries become even more apparent when applied to PSF. In short, the privatized military industry lies outside the full domain of all of these existing legal regimes.<sup>59</sup> For example, PSF recruits employees for long periods or work on contracts not tied to a specific armed conflict. This goes around the assumption that the agent will be linked to a specific conflict on the definition on the hiring of the private agent. Thus, Blackwater, one of several private security firms employed following the invasion of Afghanistan by the United States found violating government regulations<sup>60</sup> prior to its involvement in Iraq, could not be considered mercenaries covered by international law.

Note that PSF carry out military-type functions in conflict zones, often against armed groups not part of the armed forces of the State in which PSF operate.<sup>61</sup> Because they are not part of the military, the legal codes, which seek to create a sharp delineation between civilians and soldiers, are not readily useful.<sup>62</sup> Neither do

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<sup>57</sup> *Ibid.*

<sup>58</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, ICJ Rep. 1986 (hereinafter cited as *Nicaragua*).

<sup>59</sup> Abraham, G., “The contemporary legal environment” in Mills, G. and Stremlau, J. (eds.), *The Privatisation of Security in Africa*, Braamfontein: South African Institute of International Affairs, 1999, at 99.

<sup>60</sup> Witte, G., “AFGHANISTAN: Blackwater Broke Rules, Report Says”, *Washington Post* 5 October 2005, available at <http://www.corpwatch.org/article.php?id=12693>

<sup>61</sup> <http://www.odi.org.uk/HPG/papers/hpgreport21.pdf>

<sup>62</sup> Singer, P.W., “The Private Military Industry and Iraq: What have we learned and Where to Next?”, available at [http://www.dcaf.ch/\\_docs/pp04\\_private-military.pdf](http://www.dcaf.ch/_docs/pp04_private-military.pdf)

PSF meet the international definition of a “mercenary” in either legal or analytical terms, thus creating a legal vacuum.<sup>63</sup>

It also means that PSF may not always receive the rights and protections afforded to participants in armed conflict.<sup>64</sup> If PSF are not incorporated into the armed forces of a State but nonetheless carry out activities that amount to taking a direct part in hostilities, they could be judged to be “unlawful combatants”.<sup>65</sup> If they were captured during an international armed conflict, they would be entitled to the protection of the Fourth Geneva Convention or Article 75 of Additional Protocol I. If captured during a non-international armed conflict, they are entitled to the protection of common Article 3 of the Geneva Conventions, Additional Protocol II if applicable and the rules of international humanitarian law applicable in non-international armed conflict. Thus, their status, and how to interpret it, would be up to their captors; as the designation of inmates by the United States at Guantanamo Bay as “unlawful combatants” has shown, such interpretation is a matter of dispute.

If PSF commit a crime or undertake an action that causes local harm, it is unclear how far responsibility extends.<sup>66</sup> Another open legal area concerns how far contract law extends into conflict zones.<sup>67</sup> Given that there is no legal precedent on PSF, the civil courts are grappling with these legal areas, as the lawsuits are being filed against these PSF. Current cases range from Iraqis suing CACI and Titan for their role at Abu Ghraib, to a lawsuit against Blackwater launched by the families of employees killed in Fallujah.<sup>68</sup>

Another aspect of defining PSF is the exact nature of membership in the armed forces. PSF are part of corporations that organize their activities and are liable to superiors bound by formal contracts with the corporation’s clients. Thus, arguably, the firms “represent quasi-State actors in the international arena, which takes them outside the mercenary concerns of the international community”.<sup>69</sup>

Further, the methods used by private Western security companies to recruit mercenaries in poor countries and send them into dangerous areas like Iraq are deeply worrying, according to the UN report mentioned previously. Private security guards employed by Western companies make up the second highest number of armed forces currently posted in Iraq, after the US military but ahead of British

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<sup>63</sup> *Ibid.*

<sup>64</sup> “Resetting the Rules of Engagement Trends and Rules in military-humanitarian relations”, Humanitarian Policy Group Research Report No. 21, March 2006, edited by Victoria Wheeler and Adele Harmer, at 76, available online at: <http://www.odi.org.uk/resources/hpg-publications/reports/21-rules-engagement-trends-issues-military-humanitarian-relations.pdf>

<sup>65</sup> Singer, P.W., “The Private Military Industry and Iraq: What have we learned and Where to Next?”, available at [http://www.dcaf.ch/\\_docs/pp04\\_private-military.pdf](http://www.dcaf.ch/_docs/pp04_private-military.pdf)

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*

<sup>68</sup> Singer, P.W., “Humanitarian principles, private military agents: Some implications of the privatized military industry for the humanitarian community” in *Resetting the Rules of Engagement*, available at [http://www.odi.org.uk/hpg/papers/hpgreport21\\_singer.pdf](http://www.odi.org.uk/hpg/papers/hpgreport21_singer.pdf), at 73.

<sup>69</sup> Zarate, J. C., “The emergence of a new dog of war: private international security companies, international law, and the new world order”, 34 *Stan J. Int’l L.* 145 (1998).

troops, according to Jose Luis Gomez del Prado, the head of a United Nations working group on the use of mercenaries. He further stated on the sidelines of a second working group session in Geneva in February 2007:

At least 160 companies are operating in Iraq. They probably employ 35,000 to 40,000 people . . . More than 400 of these private employees have died in Iraq since 2003, putting their casualties below the number suffered by US armed forces but ahead of British military deaths . . . And a lot more have been injured.<sup>70</sup>

Americans and Europeans working in war zones for private security companies often make as much as \$10,000 ( 7,600) a month. One firm pays Filipino mercenaries \$60,000 to \$80,000 a year, half of what it pays American mercenaries with equivalent qualifications and for the same assignments (although this is still more than the salaries of most active duty US military personnel). An interview by ABS-CBN, a leading Filipino television station, in June 2006 confirmed that 3,000 Filipinos are currently employed in Iraq as “shotgun riders” (security back-up) for supply convoys. Sniper (an alias used by the source) said that they earn as much as \$2,500 a month. He added that they are no different from US military personnel and serve as augmentation security forces. Sniper said that there are more openings for “security aides” and encourages Filipinos to try to apply for these jobs. However, he added that the “job” is quite dangerous and that he recently lost a driver during a “milk run”. Fire-fights are common and they too have to fend off their ambushers from time to time. He stressed that with the lack of opportunity in the Philippines, Filipinos would be enticed by the high pay their employers give them.<sup>71</sup>

The number of private security companies working in war zones like Iraq has exploded in recent years, with one private security employee for every four US soldiers currently stationed in Iraq. According to Gomez del Prado, that number is up from one private security guard for every fifty American soldiers who took part in the first Gulf War in the early 1990s.<sup>72</sup>

## PSF AND THE PRINCIPLE OF STATE RESPONSIBILITY

Sovereign States stand on equal footing in terms of rights as well as the corresponding duties to respect the rights of other States. When a State violates the rights of another State and causes injury, the former is responsible for the injury and must fully compensate the latter for damages incurred. As held by the Permanent Court of

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<sup>70</sup> “Mercenaries in Iraq include Filipinos”, *The Manila Times*, 27 February 2007, available at [http://www.manilatimes.net/national/2007/feb/27/yehey/top\\_stories/20070227top1.html](http://www.manilatimes.net/national/2007/feb/27/yehey/top_stories/20070227top1.html)

<sup>71</sup> “Shadow warriors: soldiers of (mis)fortune”, 9 June 2006, available at [http://schumey.blogspot.com/2006\\_06\\_01\\_archive.html](http://schumey.blogspot.com/2006_06_01_archive.html)

<sup>72</sup> ABS-CBN Interactive, “UN raises alarm on mercenary recruitment by Western firms”, available at <http://www.abs-cbnnews.com/storypage.aspx?StoryId=68103>

International Justice in *Chorzow*:<sup>73</sup> “It is a principle of international law, and even a greater conception of law, that any breach of an engagement involves an obligation to make reparation.” State responsibility had been codified into the Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001).<sup>74</sup> This codification is a reflection of customary international law that binds all States.<sup>75</sup> These provide that “every internationally wrongful act of a State entails the international responsibility of that State”.<sup>76</sup>

The responsibility arises from conduct that (1) is attributable to that State under international law and (2) constitutes a breach of an international obligation of the State.<sup>77</sup> Failure to satisfy these requirements creates no internationally wrongful act and the State cannot be held responsible for the action in question. Thus, it must first be established that a person has acted as an agent of a particular State and his acts qualify as action of that State.

Traditionally, the conduct of non-State entities is not attributable to the State under international law.<sup>78</sup> However, where the State has a duty to prevent private harm or to abstain from any support for it, its responsibility is engaged when it violates these obligations.<sup>79</sup>

In case of PSF, it is often difficult to make that determination. If the forcible acts of a PSF are appropriately attributable to the State, it follows that the State of origin of PSF employees has violated its duty not to use armed force in its relations with other States and the injured State may have a legitimate justification to use armed force as self-defence against the State where the PSF is incorporated, the PSF itself and against the State of origin of PSF employees. It is true that self-defence has generally been associated with inter-State relations, but there is no reason that the right of States to defend themselves should be confined solely to response to attacks launched originally by States.<sup>80</sup>

At this juncture it can be theorized that both the Philippines and the United States may be held responsible for the illegal and violent acts committed by employees of PSF. The United States can be held liable because it employed them indirectly through Blackwater and other corporations providing security services in Iraq.

According to Lillich and Magraw, there are three existing rationales that under-

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<sup>73</sup> Judgment, *The Factory at Chorzów (Germany v. Poland)* – *PCIJ Series A*, No. 17 (1928) 4, at 29.

<sup>74</sup> General Assembly Resolution 56/83, 28 January 2002, Annex (hereinafter cited as Draft Articles), available at [http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf)

<sup>75</sup> Wolfrum, R., “State responsibility for private actors: an old problem of renewed relevance” in Ragazzi, M. (ed.), *International Responsibility Today*, Leiden: Brill NV, 2005, at 424.

<sup>76</sup> Draft Articles, Art. 2.

<sup>77</sup> Draft Articles, Art. 3.

<sup>78</sup> *Oppenheim's International Law*, 9th ed., Vol. 1, Harlow: Longman 1996, at 502–503.

<sup>79</sup> Becker, T., *Terrorism and the State: Rethinking the Rules of State Responsibility*, Oxford: Hart Publishing, 2006, at 3.

<sup>80</sup> Greenwood, C., “International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq”, *San Diego International Law Journal* 2003 (4), at 16–18.

lie the rules of attribution:<sup>81</sup> (1) the search for agency, (2) encouragement of control by the State of actors *de facto* exercising governmental authority and (3) encouragement of lawful behaviour through support of the continuity of responsibility, which covers the conduct of insurrectional movements. The main focus will be on the search for agency. However, reference will also be made to the encouragement of control by the State of actors exercising governmental authority.

The primary principle inherent in the rules of attribution is the search for agency. In searching for agency, one searches for a bond between the non-State actor and the State where the former may be said to have acted for, or at the direction of, the State.<sup>82</sup>

Article 5 of the Draft deals with the conduct of bodies that are not State organs under Article 4 but are authorized by municipal law to exercise governmental authority, as stated below:

The conduct of a person or entity which is not an organ of the State under Article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

Article 5 takes account of non-State entities that exercise elements of governmental authority in place of State organs.<sup>83</sup> It also covers situations where former State corporations have been privatized but retain certain public or regulatory functions.<sup>84</sup> Instances where this may occur is, for instance, when private companies (such as PSF) have been contracted to act as prison guards and, in that capacity, may exercise public powers like powers of detention and discipline. Another example is when private or State owned airlines might have delegated to them certain powers in relation to immigration control and quarantine.<sup>85</sup> Anything related to armed forces, penology and law enforcement is included in this category.

Even though the phenomenon of PSF is fairly modern, the principle embodied in Article 5 was long before recognized.<sup>86</sup> As early as 1930 at the League of Nations' Conference for the Codification of International Laws, the support from governments for the attribution to the State of conduct of autonomous bodies exercising public functions was strong.<sup>87</sup> For example, the German government held that:

[. . .] [W]hen, by delegation of powers, bodies act in a public capacity, e.g., police an area . . . the principles governing the responsibility of the State for its organs apply

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<sup>81</sup> Lillich, R. B. and Magraw, D.B., *The Iran-US Claims Tribunal: Its contribution to the law of State responsibility*, New York: Transnational Publishers, 1998, at 128.

<sup>82</sup> *Ibid.*, at 129.

<sup>83</sup> Commentary to the ILC Draft, art. 5, para. 2.

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*, art 5, para. 1.

<sup>86</sup> *Ibid.*, art 5, para. 4.

<sup>87</sup> *Ibid.*

with equal force. From the point of view of international law, it does not matter whether a State polices a given area with its own police or entrusts this duty, to a greater or less extent, to autonomous bodies.<sup>88</sup>

The justification for making conduct of non-State entities imputable to the State under international law is the fact that the State has conferred on the entity in question the exercise of certain elements of the governmental authority.<sup>89</sup> Undoubtedly, provision of security provided by PSF is integral to the police powers of a State.<sup>90</sup> Further, the United States conferred such functions when, acting through its Department of Defense (DoD), contracted with the PSF. The United States also conferred authority upon the PSF, when its government, through the DoD, approved the security services contracts with the PSF. As held in the case of *Yeager*:<sup>91</sup>

[. . .] [T]he attributability of acts of the State is not limited to acts of organs formally recognized under internal law. Otherwise a State could avoid responsibility under international law by invoking its internal law. It is generally accepted in international law that a State is also responsible for acts of persons, if it is established that those persons were in fact acting on behalf of the State.

Further, the United States is and can hold PSF accountable indirectly through the DoD, and directly by monitoring and regulating its conduct as an incorporated entity under its laws.<sup>92</sup> Finally, the failure of the United States to immediately put an end to the activities of the PSF indicates a knowing approval of its activities,<sup>93</sup> confirming the broad mandate the United States government granted to PSF.

Simply put, under the circumstances where the conduct of the PSF is attributable to the United States under Article 5, *ultra vires* acts do not prevent attribution.<sup>94</sup>

Assuming *arguendo* that the PSF do not meet the criteria of Articles 4, 5, 6 and 7 of the Draft or if those criteria cannot be determined with certainty, their conduct is still attributable to the United States, this time under Article 8 of the Draft as stated below:

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<sup>88</sup> League of Nations, Conference for the Codification of International Law, Bases of Discussion for the Conference drawn up by the Preparatory Committee, Vol. III: Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners (Doc. C.75.M.69.1929.V.), at 90.

<sup>89</sup> *Ibid.*, art. 5, para. 5.

<sup>90</sup> See Cleaver, G., "Subcontracting military power: the privatization of security in contemporary sub-Saharan Africa", 33 *Crime, Law and Social Change* 131–149 (March 2000).

<sup>91</sup> *Yeager v. The Islamic Republic of Iran* (Partial Award), Award No. 324–10199–1, 17 *Iran-US CTR* 92 (1987), 42.

<sup>92</sup> Page, M., Rynn, S. and Taylor, Z., "SALW and private security companies in South Eastern Europe: a cause or effect of insecurity?", SEESAC (2005); Prenzler, T. and Sarre, R., "Regulating private security in Australia" in *Australian Institute of Criminology: Trends and Issues in Crime and Criminal Justice* (1998); see also Australian Private Security Act.

<sup>93</sup> *Yeager*, *loc. cit.*, n. 46, at 43–44.

<sup>94</sup> See Commentary to the ILC Draft on State Responsibility, art. 7, para. 10.

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of that State in carrying out the conduct.

When the conduct is authorized by the State it does not matter whether the persons engaging in the conduct are private actors or whether their conduct involves “governmental activity”.<sup>95</sup> When acting on the instructions of the State, the conduct is attributable to that State under international law.<sup>96</sup> Most commonly cases of that kind arise where State organs supplement their own action by recruiting or instigating private persons or groups of persons who act as “auxiliaries” while remaining outside the official structure of the State.<sup>97</sup>

Imputability of the acts of a non-State entity to the State because of conduct that has been directed or controlled by the State is more complex in nature than imputability because of instructed behaviour. Only if the State directed or controlled the specific operation and the conduct complained of was an integral part of that operation can the conduct be attributable to the State under this article.<sup>98</sup>

In both cases of *Nicaragua*<sup>99</sup> and *Tadic*,<sup>100</sup> the question of the degree of control required for the conduct to give rise to State responsibility was decided: in *Nicaragua*, it was attributing the conduct of the *contras* to the United States so as to make it responsible for all the acts of the *contras*. The International Court of Justice (ICJ) held that in order for the United States to be responsible for all acts of the *contras*, it “had to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed”. A general situation of dependence and support for the *contras* was not sufficient to attribute the conduct to the State.<sup>101</sup> Thus, the ICJ in *Nicaragua* required a high degree of control. In *Tadic*, the Appeals Chamber required a degree of control distinct from *Nicaragua*. The Appeals Chamber reached the conclusion that “overall control” was enough to attribute the acts of private persons to the State.<sup>102</sup> In any event, it is a matter for appreciation in each case, whether particular conduct was or was not carried out under the control of a State.<sup>103</sup>

Thus, under Article 8 State responsibility occurs when a State has in fact authorized, directed or controlled the conduct complained of. This would be evaluated on a case-to-case basis, in particular those concerning the relationship between the

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<sup>95</sup> *Ibid.*, art. 8, para. 1.

<sup>96</sup> *Ibid.*, art. 8, para. 2.

<sup>97</sup> *Ibid.*, art. 8, para. 2.

<sup>98</sup> *Ibid.*, art. 8, para. 3.

<sup>99</sup> *Nicaragua*, n. 23, at 14.

<sup>100</sup> Case IT-94-1, *Prosecutor v. Tadić*, 38 *ILM* 1518 (1999).

<sup>101</sup> See Commentary to the ILC Draft on State Responsibility, art. 8, para. 4.

<sup>102</sup> *Ibid.*, art. 8, para. 5.

<sup>103</sup> *Nicaragua*, para. 115.

instructions given or the direction or control exercised and the specific conduct complained of.<sup>104</sup> The terms “instructions”, “direction” and “control” are disjunctive, meaning that it is sufficient to establish either one of them for the conduct to be attributed to the State.<sup>105</sup> The instructions, direction or control must, however, relate to the conduct that has amounted to the breach of an international obligation.<sup>106</sup> The phrase “person or group of persons” is intended to cover both natural and legal persons, such as a private entity or corporation.<sup>107</sup>

Until 2000, private military contractors enjoyed a loophole in the federal law of the United States that shielded them from criminal liability for their actions occurring overseas.<sup>108</sup> Contractors that violated US law abroad could essentially avoid court-martial jurisdiction and most criminal jurisdictions in US federal courts.<sup>109</sup> The United States Congress closed this loophole in 2000 with the passage of the Military Extraterritorial Jurisdiction Act (MEJA).<sup>110</sup> Under the MEJA, many US criminal laws extend to certain locations, such as military bases in other countries.<sup>111</sup> The MEJA also broadens these laws to include civilian and contractor personnel accompanying US forces abroad.<sup>112</sup> Despite implementation of the MEJA and its subsequent amendments, some have argued that other loopholes still exist.<sup>113</sup>

Thus, the failure of the United States to regulate<sup>114</sup> the activities of PSF constitutes a grave breach<sup>115</sup> of its obligations under international humanitarian law to protect other States and their nationals against injurious acts by individuals within their jurisdiction<sup>116</sup> and its correlative duty to prevent injury<sup>117</sup> and punish wrongdoers.<sup>118</sup>

<sup>104</sup> Commentary to the ILC Draft, n. 49, art. 8, para. 7.

<sup>105</sup> *Ibid.*

<sup>106</sup> *Ibid.*, art. 8, para. 8.

<sup>107</sup> *Ibid.*, art. 8, para. 9.

<sup>108</sup> Perlak, Major J.R., “The Military Extraterritorial Jurisdiction Act of 2000: implications for contractor personnel”, 169 *Mil. L. Rev.* 92, 93 (2001).

<sup>109</sup> *Ibid.*

<sup>110</sup> 18 USC §§ 3261–3267 (2000).

<sup>111</sup> Major T.J. Harder, “Recent developments in jurisdiction: is this the dawn of the year of jurisdiction?”, *Army Law* 2 (2001), at 12 (detailing the MEJA’s implementation and coverage).

<sup>112</sup> 18 USC § 3261.

<sup>113</sup> See Stein, F.A., “Have we closed the barn door yet? A look at the current loopholes in the Military Extraterritorial Jurisdiction Act”, 27 *Hous. J. Int’l L.* 579 (2005), at 606 (identifying at least five major MEJA loopholes and calling for additional amendments).

<sup>114</sup> *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, African Commission on Human and People’s Rights, Communication 155/96.

<sup>115</sup> Responsibility of States for Internationally Wrongful Acts: Report of the ILC on the work of its 53rd sess., *GAOff. Rec.*, 56th sess., Supplement No. 10 (A/56/10), chp. IV.E.1, § 44(b).

<sup>116</sup> Lillich, R.B. and Paxman, “State responsibility for injuries to aliens occasioned by terrorist attacks”, 26 *Am. U. L. Rev.* 225–230 (1997).

<sup>117</sup> *Zafiro Claim*, 6 *RIAA* 160.

<sup>118</sup> Christenson, G.A., “Attributing acts of omission to the State”, 12 *Mich. J. Int’l L.* 324 (1991); and Eagleton, C., *The Responsibility of States in International Law*, New York: New York University Press, 1928, at 87–89.

The Hague and Geneva Conventions as well as the Additional Protocol make clear that grave breaches must be punished. However, they do not themselves set out specific penalties nor do they create a tribunal to try offenders. Instead they expressly require States to enact criminal legislation to punish those responsible for grave breaches, which are considered as war crimes.

States are also required to search for persons accused of grave breaches, and either to bring them before their own courts or to hand them over for trial in another State.<sup>119</sup> States must ensure compliance with all provisions of humanitarian law including those applicable to non-international armed conflict and those regulating the use of weapons.<sup>120</sup> States must ensure compliance with rules arising under customary international law, as well as those set out in international agreements.<sup>121</sup> States must take whatever measures are necessary to prevent and suppress all violations thereof.<sup>122</sup> Such measures may include military regulations, administrative orders and other regulatory measures.<sup>123</sup> However, criminal legislation is the most appropriate and effective means of dealing with all serious violations of international humanitarian law.<sup>124</sup> A number of States have already enacted criminal law to punish violations of the provisions of Common Article 3 of the Geneva Conventions and Additional Protocol II which apply to non-international armed conflict.<sup>125</sup>

States are required to fulfil these obligations in times of peace as much as in time of armed conflict. In order to be effective the above measures must be adopted before grave breaches have the opportunity to occur<sup>126</sup>.

In sum, a State's criminal law only applies to acts committed within its territory or by its own nationals. However, international humanitarian law goes further. It requires States to search for and punish all those who have committed grave breaches regardless of the nationality of the perpetrator or where the crime was committed. The principle of *universal jurisdiction* is a key element in ensuring the effective repression of grave breaches.

The principle of *universal jurisdiction* is applicable here because of the failure of the United States to enact legislation, aside from the MEJA, that will effectively prevent future illegal and violent acts of PSF in Iraq as well as search and punish the perpetrators of said grave breaches from the time the United States occupied Iraq.

Moreover, the International Criminal Court (ICC) is competent to try the grave breaches of international humanitarian law that constitute war crimes. The ICC has jurisdiction over individuals accused of these crimes. This includes those directly responsible for committing the crimes as well as others who may be liable for the crimes, for example by aiding, abetting or otherwise assisting in the commission of a

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<sup>119</sup> [http://www.ehl.icrc.org/images/resources/pdf/penal\\_repression.pdf](http://www.ehl.icrc.org/images/resources/pdf/penal_repression.pdf)

<sup>120</sup> *Ibid.*

<sup>121</sup> *Ibid.*

<sup>122</sup> *Ibid.*

<sup>123</sup> *Ibid.*

<sup>124</sup> *Ibid.*

<sup>125</sup> *Ibid.*

<sup>126</sup> *Ibid.*

crime. The latter group also includes military commanders or other superiors whose responsibility is defined in the Statute.<sup>127</sup>

The ICC unfortunately does not have universal jurisdiction.<sup>128</sup> The ICC may only exercise jurisdiction if:

- (1) The accused is a national of a State Party or a State otherwise accepting the jurisdiction of the Court;
- (2) The crime took place on the territory of a State Party or a State otherwise accepting the jurisdiction of the Court; or
- (3) The United Nations Security Council has referred the situation to the Prosecutor, irrespective of the nationality of the accused or the location of the crime.<sup>129</sup>

The jurisdiction of the ICC is further limited to events taking place since 1 July 2002.<sup>130</sup> In addition, if a State joins the ICC after 1 July 2002, the ICC only has jurisdiction after the Statute entered into force for that State.<sup>131</sup> Such a State may nonetheless accept the jurisdiction of the ICC for the period before the Statute's entry into force.<sup>132</sup> However, in no case can the ICC exercise jurisdiction over events before 1 July 2002.<sup>133</sup>

Thus, the ICC, assuming that either one of the three requisites mentioned in the previous paragraph is met, can step into the grave breaches of international humanitarian law committed by PSF only after 1 July 2002, and the subsequent failure of the United States to prosecute and punish them can be considered as grave breaches of international humanitarian law or war crimes under the Rome Statute. If not, States like Belgium and Spain could perhaps prosecute and punish these individuals under their national legislation on universal jurisdiction. Further, the United Nations Security Council can refer the situation to the Prosecutor of the ICC as it did in the situation in Darfur. But the latter proposition may be difficult to pursue as the United States, as a permanent member of the United Nations Security Council, has veto power over decisions made by the Security Council.

The Philippines can also be held liable for allowing the deployment of its nationals. First, it failed to prevent it in strictly enforcing its own employment ban in Iraq. Second, it even allowed an affiliate of Blackwater to operate a training facility in the Subic Freeport, which is operated by the Subic Bay Metropolitan Authority, a body corporate created by law<sup>134</sup> whose chairman is a presidential appointee. Third, since the recruitment and placement of Filipinos overseas is heavily regulated by the

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<sup>127</sup> [http://www.icc-cpi.int/about/ataglance/jurisdiction\\_admissibility.html](http://www.icc-cpi.int/about/ataglance/jurisdiction_admissibility.html)

<sup>128</sup> *Ibid.*

<sup>129</sup> *Ibid.*

<sup>130</sup> *Ibid.*

<sup>131</sup> *Ibid.*

<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid.*

<sup>134</sup> § 13 Republic Act No. 7227.

POEA it is impossible for the Philippine government not to be even remotely aware of the existence of these PSF operating in the country. This implied acquiescence to the sending of Filipinos as employees of PSF would render the Philippines liable under public international law.<sup>135</sup> Furthermore, the Philippines in fact ratified the activities of the PSF in the Philippines when it did not immediately put an end to the illegal practices of the PSF.<sup>136</sup> As of yet, the Philippines has not initiated any action to repatriate Filipinos who have become PSF employees; neither has it prevented the migration of Filipinos as employees of PSF by stringent implementation of its deployment ban in Iraq or by closing down the training facility for Blackwater in the Subic Freeport. Such failure would create an instance of private individuals being allowed to act as agents of the Philippines under the discussions earlier about ILC Draft Article 8.

## CONCLUSION

Clearly, the problem is that there is no clear-cut regulation, much less prohibition, of PSF. Under public international law, the very definition used to identify mercenaries precludes PSF from being classified as such. Thus, existing legal instruments do not prohibit their operations and merely attempt to regulate them. While regulation of the firms at the municipal level, in particular by the United States, offers some hope of both superior legal definitions and enforcement, the international nature of the PSF obviously undermines the success of the one-country approach. This in turn leads to the haphazard nature of regulating the PSF.

Because of the inadequate processes to correctly and swiftly address the issues of illegal acts committed by PSF, the liability for acts committed by them is also unclear. There is, at present, no international instrument that defines the liability for illegal and violent acts committed by the PSF itself, its officers and employees, the State where the PSF is incorporated and/or the country under whose laws the PSF exists, even the country of origin of the employees of PSF. While there are municipal instruments placing the liability for illegal acts of employees of PSF, they are nonetheless few and far between.

Given this murky legal milieu, the Philippines must immediately stop the deployment of Filipinos as employees of PSF, as well as repatriate those employed by PSF, for the repercussions against the Philippines outweigh the economics.

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<sup>135</sup> *The Corfu Channel Case (merits)*, (*UK v. Albania*), ICJ Rep. 1949, at 4.

<sup>136</sup> *United States Diplomatic and Consular Staff in Tehran* case, ICJ Rep. 1979, at 56; see *Yeager*, n. 46.



# “AS IF” *ACTING* UNDER CHAPTER VII OF THE UN CHARTER? RIGIDITY OF THE THRESHOLD BETWEEN CHAPTER VII AND NON-CHAPTER VII

Sakai Hironobu\*

## INTRODUCTION

The United Nations Charter lays down mandatory measures under Chapter VII, which are extremely important to its collective security system.<sup>1</sup> The enforcement mechanisms set out by Chapter VII give wide powers to the Security Council (hereinafter SC), crucial in contending with international threats to peace. But it should be noted that when the SC convenes in response to armed conflicts and works to adopt any resolutions for criticizing those awful situations, the possibility of reference to Chapter VII in such resolutions is carefully considered during the deliberation within the SC. In other words, the Members of the SC always bear in mind the importance of contemplating the appropriateness of reference to Chapter VII in each particular case. They realize that Chapter VII authorizes the SC to exercise a variety of actions with a great margin of discretion. These measures can range from economic sanctions to the use of military force, and can restrict to some extent the sovereignty of Member States as a means of restoring and maintaining international peace and security. Consequently, the SC is particularly careful to specify the limits and applicability of Chapter VII.

A dichotomy exists between Chapter VII and non-Chapter-VII-referenced resolutions, based on a clear boundary between them in applying SC resolutions. Recognition of this boundary is a prerequisite in choosing which Chapter to apply. Due to the remarkably enlarged range of application of Chapter VII since the end of

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<sup>1</sup> Higgins, R., *Problems and Process: International Law and How We Use It*, Oxford: Clarendon Press, 1994, at 173–174, who says that it is in relation to its power under Chapter VII of the Charter, in the direct handling of peace and security issues, that the United Nations has assumed such an important role in the containment of disputes. Still the UN purports to adapt itself in the recent changing circumstances.

the Cold War, the SC has been repeatedly activated, resulting in, perhaps, a blurring of the boundary on the two dimensions. One is reflected by the fact that the power of the SC has increased due to cooperation, in particular, among its five permanent members. The SC has also had its authority spread over a variety of operations that the drafters of the Charter would not have assumed it could ever exercise. This mainly concerns the interpretation of the UN Charter as well as the limits set on the power of the SC. Another is related to the exact opposite, that is to say, deprivation of the SC's power to act. In the latter case, sovereign States may act in place of the SC in the maintenance of international peace and security. However, it might be safer to say that such action could ignore or even break the boundary rather than make it vague. Thus, the boundary would seem to be obscured by an offensive creeping in from both sides.

This article will focus on the implication of action taken under Chapter VII, to illustrate the crossing point of these two directions: the UN-centred and multi-national action making use of Chapter VII and strengthening the UN collective security system on the one hand, and the State-centred, unilateral action extending self-discretion and undermining the UN collective system, on the other.

## BIPOLARIZATION OF THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY

### Activation of the United Nations Security Council

#### *Expanded role of the Security Council*

In the field of maintaining international peace and security, the SC has vast formal power to enforce measures under Chapter VII. Its functions may be divided into roughly two categories: making decisions as to the "existence of any threat to the peace, breach of the peace, or act of aggression" under Article 39, and adopting the enforcement measures under Articles 41 and 42. Particularly since the end of the Cold War, the scope of both the functions has been tremendously expanded by the SC.

As for the decision by the SC under Article 39 on what constitutes a "threat to the peace", this has been considerably expanded and so situations characterized as such by the SC have been very varied in its practice. Some international lawyers have asserted that the original meaning of that concept was restricted to armed conflict between States,<sup>2</sup> but whether this argument is correct or not, since the end of the

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<sup>2</sup> Armz, J., *Der Begriff der Friedensbedrohung in Satzung und Praxis der Vereinten Nationen*, Berlin: Duncker & Humblot, 1975, at 110 and Schilling, T., "Die neue Weltordnung und die Souveränität der Mitglieder der Vereinten Nationen", *Archiv des Völkerrechts*, Bd.33 (1995), at 91–92. *Contra*, Tomuschat, C., "Obligations arising for States without or against their will", 241 *RdC* (1993-IV), at 335–337.

twentieth century the actual determination of the threat to peace has included not only inter-States armed conflict but also humanitarian crisis within a State, the material breach of human rights, international terrorism, etc.<sup>3</sup> This tendency is closely related to a significant change in the perception of the “peace” concept – from a “negative” to a “positive” concept of peace.<sup>4</sup> The broadened notion of peace or of threat to peace is considered to have contributed to a gradual process whereby the dividing lines between decisions and measures guided by Chapter VII and non-Chapter-VII resolutions became less clear than the drafters of the Charter had intended them to be.<sup>5</sup>

The increased power of the SC has caused a great variety of measures to be taken after decisions under Article 39.<sup>6</sup> Precisely speaking, assertive activation of its power has led to expansion of the concept of a “threat to the peace” and increased diversity of the enforcement measures under Chapter VII. This is a situation that is more logically appropriate for the UN collective security system.

#### *Logic of the UN collective security system and rhetoric of its implementation*

According to the relevant provisions under Chapter VII, it is the SC that is in charge of undertaking and implementing collective security in the UN system. As mentioned above, Article 39 is a gateway for Chapter VII measures, provided that the SC shall determine the existence of any threat to peace, and that it shall also decide what measures shall be taken in accordance with Articles 41 and 42. The original plan for UN collective security by the drafters of the UN Charter expected that all significant power during the decision-making phases as well as in their implementation process should totally focus on the SC, whenever any forcible measures would be required.<sup>7</sup>

The reality since the establishment of the UN, however, is remarkably different from the expectation by the drafters of the UN Charter because of the essentially

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<sup>3</sup> On the elaborate consideration of this concept, see Sorel, J.-M., “L’élargissement de la notion de menace contre la paix” in SFDI (ed.), *Le Chapitre VII de la Charte des Nations Unies*, Paris: Éditions A. Pedone, 1995, at 3–57; Österdahl, I., *Threat to the Peace: The Interpretation by the Security Council of Article 39 of the UN Charter*, Uppsala: Iustus Förlag, 1998; and Schäfer, A., *Der Begriff der “Bedrohung des Friedens” in Artikel 39 der Charta der Vereinten Nationen: Die Praxis des Sicherheitsrates*, Frankfurt am Main: Peter Lang, 2006.

<sup>4</sup> Schrijver, N.J., “The future of the Charter of the United Nations”, 10 *Max Planck UNYB* 9–10 (2006).

<sup>5</sup> Wellens, K., “The UN Security Council and new threats to the peace: back to the future”, 8 *Journal of Conflict and Security Law* 53 (2003).

<sup>6</sup> For the expanded powers of the SC after the Cold War, see de Wet, E., *The Chapter VII Powers of the United Nations Security Council*, Oxford: Hart Publishing, 2004; and Manusama, K., *The United Nations Security Council in the Post-Cold War Era: Applying the Principle of Legality*, Leiden: Martinus Nijhoff Publishers, 2006.

<sup>7</sup> Blokker, N., “The Security Council and the use of force – on recent practice” in Blokker, N. and Schrijver, N. (eds.), *The Security Council and the Use of Force: Theory and Reality – A Need for Change?*, Leiden: Martinus Nijhoff Publishers, 2005, at 7–8.

decentralized structure of the international community. During the Cold War, conflicts between East and West fairly reflected debates within the SC and there were few agreements that involved Chapter VII situations in the decision-making process. After the end of the Cold War, it became more likely for Member States to gradually grow in accord with the existence of some values in international law. International law can involve much more in human dimensions, for example, the protection of human rights, the promotion of democracy and the rule of law, etc. Unfortunately, difficulties have still remained in the application of relevant rules to concrete cases such as in military and non-military enforcement actions that are likely to restrict some of the fundamental rights of States.<sup>8</sup>

With respect to the use of force under Chapter VII, due to the impossibility of genuine application of the related provisions, such as Article 43 under which no agreement has been concluded so far, it is a contrivance that the SC can act under Article 42 through the process of “organic growth”.<sup>9</sup> In actual practice, there is also the case of a leading country of the Member States that is authorized to use force under Chapter VII and permitted to maintain the command and control of their forces in the course of their operations. This is sometimes called a “Multinational Force” but not identifiable as such, and yet, is empowered to carry out the collective will of the SC on behalf of the UN. This is the reality of how the UN collective security concept is implemented in the military sphere.<sup>10</sup> Decentralized actions may be legalized and legitimized by the SC through “authorization” which has been installed through its practice of *ultra legem*.<sup>11</sup>

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<sup>8</sup> In the recent debates in the Security Council, the Myanmar case shows such difficulty. A draft resolution by the United States and the United Kingdom (UN Doc. S/2007/14) was rejected by the two vetoes. UN Doc. S/PV5619, 12 January 2007.

<sup>9</sup> Franck, T.M. and Patel, F., “UN police action in lieu of war: ‘The old order changeth’”, 85 *AJIL* 66 (1991). See also Schachter, O., “United Nations law in the Gulf conflict”, 85 *AJIL* 464 (1991).

<sup>10</sup> Franck, T.M., *Recourse to Force: State Action Against Threats and Armed Attacks*, Cambridge: Cambridge University Press, 2002, at 24–31. For comprehensive research on Security Council authorizations to the Member States, see Sarooshi, D., *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers*, Oxford: Clarendon Press, 1999.

<sup>11</sup> Weckel, P., “L’usage déraisonnable de la force”, 107 *RGDIP* 379 (2003). In order for the military action by a Multinational Force to be seen as a UN operation, three requirements should be met: the existence of a resolution authorizing the use of force, clear specification of the extent, nature and objectives of the military action through the current and subsequent resolutions, and regular submission of a report to the SC by the force commander on the military action being taken. There remain several weak controls over military activities on the ground, that are in the hands of the SC, and that it uses to place military enforcement actions through a Multinational Force within the framework of the UN collective security. See White, N.D. and Ülgen, Ö., “The Security Council and the decentralized military option: constitutionality and function”, 44 *NILR* 386–387 (1997). For the features of the post Gulf War authorizations, see also Lobel, J. and Ratner, M., “Bypassing the Security Council: ambiguous authorizations to use force, cease-fires and the Iraqi inspection regime”, 93 *AJIL* 141–144 (1999).

The actual UN collective security system has thus included two directions as reflected by the structural characteristics of the international community: a centralized one and a decentralized one. As the need to achieve a common value and to keep a feeling of solidarity among members in the international community is increasingly being recognized, this more centralized mechanism may work well within the UN system. Provided, however, that States confronted with situations in which they feel obliged to give priority to their own interests over the interests of the international community, even if ideally each could be mutually complementary, do not succumb to the temptation of adopting decentralized unilateral measures inside and outside the UN system.<sup>12</sup>

### **Augmentation of the unilateral acts by States**

On the international level, States normally try to maintain a free hand, particularly when it concerns their own security. As long as unilateral acts by States are in accordance with the UN Charter and meet the requirements to be observed in it, relatively few serious problems will occur. However, some recent cases demonstrate instances in which States tried to ease some of the legal requirements for the unilateral use of force deliberately. There seemed to be even efforts to remove them, substantially by ignoring such requirements, or by attempting to produce some new exceptions to the non-use-of-force principle instead.

The reaction by some States to international terrorism may fall under the former category. After the 11 September attacks by Al-Qaeda, in an attempt to crush its main camps and capture the persons responsible for these horrifying events, the United States and the United Kingdom started their military activities in Afghanistan, whose government was alleged to have provided support to the terrorist group, as a function of their right to self-defence.<sup>13</sup> The idea of pre-emptive action claimed by President George W. Bush in the National Security Strategy in September 2002 is an extension of this conduct.<sup>14</sup>

Arguably, these practices are questionable as regards their legality, because there continues to be controversy regarding the definition of terrorist attacks as armed attacks capable of activating the right of self-defence in accordance with inter-

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<sup>12</sup> Quigley, pointing out some problematic aspects of the authorization technique, concludes that “[I]f the Security Council is to maintain its integrity as an institution, its members must work to reassert Council prerogatives. Unless this is done, there will be little viability in the concept of collective enforcement of the peace”. Quigley, J., “The ‘privatization’ of Security Council enforcement action: a threat to multilateralism”, 17 *Michigan JIL* 283 (1996).

<sup>13</sup> UN Doc. S/2001/946 (United States); and UN Doc. S/2001/947 (United Kingdom).

<sup>14</sup> For the National Security Strategy of the United States of America, see 41 *ILM*, 1478–1479 (2002). See also, Gray, C., *International Law and the Use of Force*, 2nd ed., Oxford: Oxford University Press, 2004, at 176–179.

national jurisprudence.<sup>15</sup> Although the question of its legality does not have to be dealt with here, it must be pointed out that once such unilateral actions recur, these would likely be placed almost outside the control of the SC. This means that the non-use of force principle might be eroded, and that the UN centralized mechanism of regulation for the use of force could be undermined.

The latter category is still less centralized. There are many doctrines that have strongly argued that some exceptions should be regarded as immune to the non-use-of-force principle, besides military enforcement measures under Chapter VII and the right to self-defence. Typical examples are the protection of nationals abroad, armed reprisals to enforce human rights etc., and especially humanitarian intervention,<sup>16</sup> as in the case of Kosovo. The bombing of Yugoslavia by NATO and its subsequent justification as a humanitarian intervention would obviously signify as a deviation from the UN collective security system.<sup>17</sup> It is certain that these kinds of unilateral acts by States are fundamentally based on and gradually aggravate the decentralized structure of international community. Ultimately, they might severely impair the intrinsically centralized-oriented nature of UN collective security.<sup>18</sup>

The UN collective security system, thus, currently hangs on a precarious balance between the need for strengthening the centralized functions performed mainly by the SC, on the one hand, and the enduring demand for deviation from the UN centralized system through the decentralized performance in the use of force by States, on the other. It should be stressed, however, that the collective security system itself includes elements of solidarity among States in the international community and that this regime accordingly obliges States to act in the interest and defence of a common value: the preservation of peace.<sup>19</sup> What implication can then be derived from actions undertaken “as if” Chapter VII were in force? We will see it in taking

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<sup>15</sup> With regard to the recent jurisprudence of the ICJ on the use of force, see Gray, C., “The use and abuse of the International Court of Justice: cases concerning the use of force after Nicaragua”, 14 *EJIL* 867–905 (2003). Wandscher, C., *Internationaler Terrorismus und Selbstverteidigungsrecht*, Berlin: Duncker & Humblot, 2006 gives comprehensive prospects on the relationship between terrorism and the right to self-defence. On the historical work for defining terrorism in international law, see Saul, B., “Attempts to define ‘terrorism’ in international law”, 52 *NILR* 57–83 (2005).

<sup>16</sup> For these rules as the exceptions of the non-use of force principle other than self-defence, see Gazzini, T., *The Changing Rules on the Use of Force in International Law*, Manchester: Manchester University Press, 2005, at 163–179.

<sup>17</sup> For a comprehensive review on the Kosovo crisis, e.g. Tomuschat, C. (ed.), *Kosovo and the International Community*, Leiden: Kluwer Law International, 2002; and Corten, O. and Delcourt, B. (eds.), *Droit, légitimation et politique extérieure: L’Europe et la guerre du Kosovo*, Brussels: Edition Bruylant, 2000.

<sup>18</sup> Kolb, R., *Le droit relative au maintien de la paix internationale: Evolution historique, valeurs fondatrices et tendances actuelles*, Paris: Éditions A Pedone, 2005, at 53.

<sup>19</sup> Wolfrum, R., “Solidarity amongst States: an emerging structural principle of international law” in Dupuy, P.-M., Fassbender, B., Shaw, M.N. and Sommermann, K.-P. (eds.), *Völkerrecht als Weltordnung: Common Values in International Law: Festschrift für Christian Tomuschat*, Kehl: N.P. Engel Verlag, 2006, at 1092–1093.

two examples in the next chapter, which seemingly blur the distinction between Chapter VII and non Chapter VII of the UN Charter.

## POSSIBLE ACTIVITIES BETWEEN CHAPTER VII AND NON-CHAPTER-VII RESOLUTIONS

### Use of force under the past authorization by Chapter VII resolutions

#### *The “Operation Iraqi Freedom” and Security Council resolution 1441*

The United States and its allies invaded Iraq in the course of a military action called Operation Iraqi Freedom in March 2003, after Iraq refused to fully comply with several relevant resolutions, including SC Resolution 1441, dated 8 November 2002. The legality of their military action against Iraq was argued in and around the SC at that time, but as the following will clearly show, Resolution 1441 on its own cannot legally justify the use of force by the Coalition.<sup>20</sup>

In terms of the language, Resolution 1441 does not include authorization for the use of force, despite reference to “*Acting* under Chapter VII”, and specific mention among others, of Resolutions 678 and 687 in its preamble. In most cases in which the use of force is authorized by the SC, it normally makes use of the term, “all necessary means/measures” to fill certain objects precisely defined in each resolution.<sup>21</sup> Regrettably, Resolution 1441 has no such terms, nor any similar ones. The words “final opportunity” found in operative paragraph 2 of that resolution cannot be interpreted as endorsement of any unilateral action by the Member States because the SC set up “an enhanced inspection regime” to consider the situation referred to in this paragraph and is responsible for determining whether or not Iraq faces “serious consequences as a result of its continued violations of its obligations” (operative paragraph 13).<sup>22</sup> Thus, Resolution 1441 in itself provides no legal basis for any military action.

This interpretation is confirmed by the intentions of most Member States in the SC. The majority of them objected to any resolution that would authorize certain Member States for unilateral action, and so insisted that no automatic resort to force

<sup>20</sup> UN Doc. S/RES/1441 (2002), 8 November 2002. On the background of its adoption, in particular after 11 September 2001, see Malone, D.M., *The International Struggle over Iraq: Politics in the UN Security Council 1980–2005*, Oxford: Oxford University Press, 2006, at 186–195.

<sup>21</sup> Blokker, N.M., “Is the authorization authorized? Powers and practice of the UN Security Council to authorize the use of force by ‘coalitions of the able and willing’”, 11 *EJIL* 541–568 (2000); and Sicilianos, L.-A., “L’*autorisation* par le Conseil de sécurité de recourir à la force: une tentative d’évaluation”, 106 *RGDIP* 5–50 (2002).

<sup>22</sup> Corten, O., “Opération Iraqi Freedom: peut-on admettre l’argument de ‘l’*autorisation implicite*’ de Conseil de sécurité?”, 36 *RBDI* 211–212 (2003); and Nguyen-Rounault, F., “L’*intervention armée* en Irak et son occupation au regard du droit international”, 107 *RGDIP* 843–849 (2003).

clause should be included within it. While the United States and the United Kingdom demanded that the combination of “material breach” and “serious consequence” in Resolution 1441 should be interpreted as authorizing the use of armed force, the rest of the SC Members did not accept this argument. The representative of Ireland, for example, maintained that the purpose of that resolution was to achieve disarmament of Iraq through inspections and not to establish the legal basis for the use of force. This was reflected by the ideas of “a two-stage approach”, which was supported by most States in the SC.<sup>23</sup> In fact, the United States was unable to persuade them otherwise and conceded, as its representative accepted at the meeting in which Resolution 1441 was adopted, that the resolution contained neither “hidden triggers” nor “automaticity” with respect to the use of force. The United Kingdom also admitted that the SC should bear its own responsibility in this case.<sup>24</sup> Thus, Resolution 1441 in itself was not considered to permit any exception to the ban on the use of force by the SC at the time of its adoption.<sup>25</sup> This was further signified by the fact that after the adoption of Resolution 1441, the United States and the United Kingdom sought out a fresh resolution authorizing them to use military force just before the beginning of “Operation Iraqi Freedom”.<sup>26</sup>

*“Revival” of the previous authorization by the SC*

The United States and the United Kingdom, forced to respond to the ongoing events, and unable to rely upon *ex post facto* authorization,<sup>27</sup> had to consider another possibility, that is to say, the existing relevant Security Council resolutions, especially the combination of Resolutions 678, 687 and 1441. The two governments, having acquired limited evidence of the weapons of mass destruction (WMD) in Iraq, and feeling the need to use force for eliminating that threat to peace, unsuccessfully attempted to persuade the SC to adopt a new resolution authorizing the use of

<sup>23</sup> UN Doc. S/PV.4644, 8 November 2002, at 7 (Ireland). See also *ibid.*, at 5 (France); at 6 (Mexico); at 8 (Russia); at 9 (Bulgaria); at 10 (Syria); and at 12 (China).

<sup>24</sup> For these statements of the representatives in the Security Council meeting, see *ibid.*, at 3 (the United States); and at 4–5 (the United Kingdom). See also Corten, O., *Le retour des guerres préventives: le droit international menacé*, Brussels: Éditions Labor, 2003, at 33–34.

<sup>25</sup> Hofmann, R., “International law and the use of military force against Iraq”, 45 *GYIL* 21–28 (2002).

<sup>26</sup> On this process, see, White, N.D., “Self-defence, Security Council authority and Iraq” in Burchill, R., White, N. D. and Morris, J. (eds.), *International Conflict and Security Law: Essays in Memory of Hilaire MacCoubrey*, Cambridge: Cambridge University Press, 2005, at 246–248.

<sup>27</sup> For the *ex post facto* authorization, see Österdahl, I., “Preach what you practice: the Security Council and the legalisation *ex post facto* of the unilateral use of force”, 74 *Nordic JIL* 231–260 (2005). *Contra*. see Kohen, M.G., “The use of force by the United States after the end of the Cold War, and its impact on international law” in Byers, M. and Nolte, G. (eds.), *United States Hegemony and the Foundations of International Law*, Cambridge: Cambridge University Press, 2003, at 217, where the author argues that the theory of *ex post facto* authorization contradicts the rationale of the collective security system.

force before their invasion of Iraq in March 2003.<sup>28</sup> When they realized that the efforts to obtain a second resolution for legitimizing their coming military operations had failed in the SC, they instead argued that besides the right to self-defence,<sup>29</sup> the combined and existing Security Council resolutions legally permitted them to use force against Iraq because it posed the threat to peace with its WMD. According to this so-called “combination” doctrine, pursuant to Resolution 678 authorizing Member States to use all necessary means to uphold and implement Resolution 660 and all subsequent relevant resolutions, the Member States could use force to enforce the cease-fire and to restore international peace and security, and Resolution 1441, which acknowledged Iraq’s material breaches of Resolution 687, triggered Resolution 678’s authorization to use force against Iraq.<sup>30</sup> In sum, the material breach of Resolution 687, which was found through the adoption of Resolution 1441, revived the authority to use force under Resolution 678. The United States and the United Kingdom then seemingly changed their interpretation of the relevant resolutions, and took the position that no new resolution would be required because Resolution 1441 (and Resolution 678) had already authorized the use of force.<sup>31</sup>

Their argument, however, faced severe criticisms from other Member States of the UN at the meeting of the SC just before the outbreak of war, and the majority then were opposed to resumption of the war against Iraq. The consensus was that upon consideration, Resolution 1441 did not authorize use of force explicitly or implicitly, and that the findings of the resolution could not revive the preceding authorization.<sup>32</sup> The condemning voices from the international community have not diminished but rather deepened during and after the war. Although some States,

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<sup>28</sup> White, N.D. and Myjer, E.P.J. “The use of force against Iraq”, 8 *Journal of Conflict and Security Law* 5–6 (2003).

<sup>29</sup> The relevancy of the self-defence to the “Operation Iraqi Freedom” is beyond this article. It is only added here that interestingly, the United States alone invoked the self-defence to justify its activities but the United Kingdom and another ally, Australia, did not. UN Doc. S/2003/350; UN Doc. S/2003/352. On this subject, see Taft IV, W.H. and Buchwald, T.F., “Preemption, Iraq, and international law”, 97 *AJIL* 557–563 (2003); Greenwood, C., “International law and pre-emptive use of force: Afghanistan, Al-Qaida, and Iraq”, 4 *San Diego ILJ* 7–37 (2003); and Bothe, M., “Terrorism and the legality of pre-emptive force”, 14 *EJIL* 227–240 (2003).

<sup>30</sup> Hoo, J., “International law and the war in Iraq”, 97 *AJIL* 567 (2003). See also Lietzau, W.K., “Old laws, new wars: jus ad bellum in an age of terrorism”, 8 *Max Planck UNYB* 427–428 (2004).

<sup>31</sup> The United Kingdom representative pleaded in a SC meeting after attacking Iraq that “[T]he use of force is authorized in the current circumstances under Security Council resolutions 678 (1990), 687 (1991) and 1441 (2002)”. UN Doc. S/PV.4726 (Resumption 1), 27 March 2003, at 23. The United States also explained that “Resolution 1441 (2002) explicitly found Iraq in continuing material breach. In view of Iraq’s additional material breaches, the basis for the existing ceasefire has been removed and the use of force is authorized under resolution 678 (1990)”, *ibid.*, at 25. See also, Corten, *loc. cit.*, n. 22, at 223–224.

<sup>32</sup> See UN Doc. S/PV.4709, 18 February 2003; UN Doc. S/PV.4709 (Resumption 1), 19 February 2003; UN Doc. S/PV.4714, 7 March 2003; UN Doc. S/PV.4717, 11 March 2003; and UN Doc. S/PV.4717 (Resumption 1), 12 March 2003.

including Japan, have stood with the United States and the United Kingdom,<sup>33</sup> it must be emphasized that the terms of Resolution 1441, the attitudes of the Member States at the meetings of the SC, and the subsequent practice by the States after its adoption reveal that “Operation Iraqi Freedom” has not been authorized under Chapter VII by the SC.<sup>34</sup>

Thus, the United States and the United Kingdom invaded Iraq in March 2003 without any explicit or implicit authorization from the SC, although they sought to obtain it in advance. As a result, they had to undertake their military operations without the support and sanction of Chapter VII. However, what needs to be highlighted here is that the invasion of Iraq was considered contrary to the spirit of UN collective security by the majority of the SC, and the United States and the United Kingdom also tried to disguise their activities with a Chapter VII authorization of the use of force through the combination doctrine. Plainly speaking, these countries conducted the war in 2003, while lacking accordance with any Chapter VII resolution, and simultaneously tried to justify their activities under a Chapter VII authorization.

### **Binding effect of a non-Chapter-VII resolution?**

#### *The adoption of Security Council Resolution 1695 on North Korea*

Another example of the seeming blur in the differentiation between Chapter VII and non Chapter VII resolutions is SC Resolution 1695 regarding the launch of missiles by North Korea in July 2006.<sup>35</sup>

North Korea has given rise to and increased tension around the East Asian region since the early 1990s, by initially not observing the various non-proliferation obligations under the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) and then declaring its withdrawal from the NPT regime. The missile incident, which was followed by the exercise of the nuclear test by North Korea in October 2006, should be considered in this context.<sup>36</sup>

<sup>33</sup> UN Doc. S/PV.4726, 26 March 2003, at 39 (Japan). *See also ibid.*, at 14 (Kuwait), 25 (Poland), 27 (Australia), and 35 (Republic of Korea).

<sup>34</sup> Especially, Russia and China criticized the military operation by the United States and the United Kingdom as a violation of international law. UN Doc. S/PV.4726 (Resumption 1), at 26 (Russian Federation), and 28 (China). *See also* Åkermark, S.S., “Storms, foxes, and nebulous legal arguments: twelve years of force against Iraq, 1991–2003”, 54 *ICLQ* 223–226 (2004).

<sup>35</sup> UN Doc.S/RES/1695 (2006), 15 July, 2006. *See* Crook, J.R. (ed.), “United States supports UN sanctions, vigorous enforcement following North Korean missile and nuclear tests”, 101 *AJIL* 216–217 (2007).

<sup>36</sup> On the outline of the nuclear crisis in North Korea, *see* Andemicael, B., “Nuclear verification in North Korea and Iran” in Lee, R.S. (ed.), *Swords into Plowshares: Building Peace through the United Nations*, Leiden: Martinus Nijhoff Publishers, 2006, at 129–131; and Rozman, G., “The North Korean nuclear crisis and US strategy in Northern Asia”, 47 *Asian Survey* 601–621 (2007).

Immediately after the supposed launches of missiles by North Korea on 5 July 2006, the Japanese government protested strongly against them and tried to impose sanctions in consultation with other States objecting to them as well. On the very same day, a draft resolution on North Korea was ready and submitted to the UN Security Council by Japan and the United States. Reportedly, this draft, determining that “these launches constitute a threat to international peace and security”, and referring to “*Acting* under Chapter VII”, decided that “North Korea shall immediately cease the development, testing, deployment and proliferation of ballistic missiles”, and that “Member States shall prevent the transfer of some materials that could contribute to North Korea’s missiles”.<sup>37</sup> It is quite clear from these words that the Japanese and the United States governments intended to have the SC adopt the Chapter VII resolution with a binding force towards all Members States, including North Korea.

Although fully supported by the United States,<sup>38</sup> the Japanese draft resolution was fiercely criticized as much too tough against North Korea by China and Russia during informal meetings of the SC. They contended that such a harsh resolution could stiffen North Korean resolve and aggravate the situation in the Korean Peninsula so that the Six-Party Talks might be unsuccessful. Especially China, the President of the talks, took great pains to prevent problems with the talks by objecting to any attempts to adopt a Chapter VII resolution, which would alienate North Korea. Instead, China, with Russia, put forward its own milder draft as a Presidential Statement that subsequently became a draft resolution without reference to Chapter VII.<sup>39</sup> The negotiation almost came to a deadlock, but finally, the United Kingdom and France jointly proposed a compromise, which was acceptable to both sides. Adoption of the resolution was necessary, not only because Japan quickly sought it in response to the missile launches by North Korea in order to demonstrate political pressure by the SC, but also because China and Russia felt the adoption of a resolution would be the inevitable response to such hostile acts. On 15 July, the SC unanimously adopted Resolution 1695, in which “*Acting* under Chapter VII” is not referred.<sup>40</sup> However, the interpretation of this Resolution, particularly in its legal effect, was not in perfect accord among the Member States of the SC.

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<sup>37</sup> For the information on this draft from Fox News, [http://www.foxnews.com/printer\\_friendly\\_story/0,3566,202213,00.html](http://www.foxnews.com/printer_friendly_story/0,3566,202213,00.html) (visited on 20 July 2006).

<sup>38</sup> It is said, however, that the Bush Administration overall has been averse to stronger sanctions on North Korea by virtue of being wary of provoking Chinese opposition and of jeopardizing any prospects for the restart of the Six-Party Talks. See Hughes, C.W., “The political economy of Japanese sanctions towards North Korea: domestic coalitions and international systemic pressures”, 79 *Pacific Affairs* 481 (2006).

<sup>39</sup> “US, allies seek punitive action against N. Korea”, *The Washington Post*, 7 July 2006, A01; and “At UN, China and Russia offer a new measure on North Korea”, *The New York Times*, 13 July 2006, at 8.

<sup>40</sup> It is only after making sure that Chapter VII of the UN Charter is not invoked when China joined in this resolution. See Cho, I.D. and Woo, M.J.-E., “North Korea in 2006: the year of living dangerously”, 47 *Asian Survey* 70 (2007).

*The content of SC Resolution 1695 and its legal effect*

Resolution 1695 includes a condemnation against the ballistic missile launches by North Korea, demands on it for the suspension of all activities related to its ballistic missile programme, calls for the re-establishment of its pre-existing commitments to a moratorium on missile launching and an immediate return to the Six-Party Talks without precondition. This Resolution also requires all Member States of the United Nations, in accordance with their national legal authorities and legislation and consistent with international law, to exercise vigilance and prevent missile and missile-related materials, technology, etc. from being transferred to North Korea's missile or WMD programme. Given these contents, Resolution 1695 seemingly could impose sanctions on North Korea with the binding force of all Member States, although it never actually refers to "Acting under Chapter VII", and never makes the determination that a threat to international peace and security might exist. The only reference found is in its preamble, in the quite similar phrases: "Affirming that such launches jeopardize peace, stability and security in the region and beyond" and "Acting under its special responsibility for the maintenance of international peace and security".<sup>41</sup>

In fact, Japan read a legally binding force into this resolution owing to Article 25 of the UN Charter, even if it does not mention Chapter VII, as the Japanese representative stated in the SC meeting just after its adoption:

Through the resolution, the Council has . . . agreed on a set of binding measures that both the Democratic People's Republic of Korea and Member States are obliged to comply with in order to deal appropriately with the situation created by the Democratic People's Republic of Korea.<sup>42</sup>

Thus, Japan exerted an effect through inclusion of the aforementioned terms, which are very similar to the ones usually used in a Chapter VII resolution.<sup>43</sup> The United States also maintained that the Council's action is clear, firm and unanimous in adopting this resolution.<sup>44</sup>

By contrast, China and Russia did not expressly state that this resolution was mandatory to all Member States. It can be supposed from their attitudes during the negotiation process that these countries have consistently refused the legally binding

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<sup>41</sup> UN Doc. S/RES/1695 (2006), pre.para. 12 and 13.

<sup>42</sup> UN Doc. S/PV.5490, 15 July 2006, at 2.

<sup>43</sup> "UN Council, in weakened resolution, demands end to North Korean missile program", *The New York Times*, 16 July 2006, at 8.

<sup>44</sup> UN Doc. S/PV.5490, at 6. "Security Council rebukes N. Korea: nations agree to demand end of missile program", *The Washington Post*, 16 July 2006, A13, says that the United States and Japan overcame Chinese opposition by agreeing to include language offered by France and Britain that only implicitly referred to Chapter VII. The French representative also says that the resolution is perfectly clear and contains provisions to which all parties must adhere, UN Doc. S/PV.5490, at 7.

effect of any non-Chapter-VII resolution, and thus were unconcerned by this compromised non Chapter VII resolution.<sup>45</sup>

However, is it impossible for a non Chapter VII resolution to be legally binding because of Article 25 of the UN Charter? In its Advisory Opinion in the *Namibia* case in 1971, the International Court of Justice stated on this point that Article 25 was not limited in its application to Chapter VII because it was not situated in Chapter VII and that without it Articles 48 and 49 would secure a binding effect for resolutions adopted under its auspices.<sup>46</sup> Admittedly, most international lawyers also support this view.<sup>47</sup> As for the scope and the legal basis of the binding effect of the decisions under Article 25, they are still controversial. In practice, there is a great deal of confusion because of the artifice in the approach taken by Western countries that only Chapter VII resolutions are binding.<sup>48</sup>

In this case, some international lawyers argue that the relevant paragraphs in Resolution 1695 may have binding force even if Chapter VII is not referred to.<sup>49</sup> Reconsidering such issues with respect to the precise scope of this Article, however, is beyond this work. Rather, what should be noted here is that in order to ascertain whether a resolution includes a binding decision, the intention of the SC with regard to it should be taken into account. Only if there has been agreement among the

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<sup>45</sup> *The New York Times*, *loc. cit.*, n. 43, at 8.

<sup>46</sup> *Legal Consequences for the States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Rep. 1971, at 52–53, paras. 113–114. Judge Sir Gerald Fitzmaurice, on the contrary, criticizes this position taken by the Court in his dissenting opinion, saying that “[S]ince, in consequence, the question whether any given resolution of the Security Council is binding or merely recommendatory in effect, must be a matter for objective determination in each individual case, it follows that the Council cannot, merely by *invoking* Article 25 . . . impart obligatory character to a resolution which would not otherwise possess it according to the terms of the chapter or article of the Charter on the basis of which the Council is, or must be deemed to be, acting” [emphasis in original]. Dissenting Opinion of Judge Sir Gerald Fitzmaurice, *ibid.*, at 293–294, para. 114. See Suy, E. and Angelet, N., “Article 25” in Cot, J.-P., Pellet, A. and Forteau, M. (eds.), *La Charte des Nations Unies: Commentaire article par article*, 3rd ed., Paris: Economica, 2005, at 478.

<sup>47</sup> Delbrück, J., “Article 25” in Simma (ed.), *The Charter of the United Nations: A Commentary*, 2nd ed., Vol. I., Oxford: Oxford University Press, 2002, at 457–458. See also Higgins, R., “The advisory opinion on Namibia: which UN resolutions are binding under Article 25 of the Charter?”, 21 *ICLQ* 270–286 (1972).

<sup>48</sup> White, N.D., *Keeping the Peace: The United Nations and the Maintenance of International Peace and Security*, 2nd ed., Manchester: Manchester University Press, 1997, at 63; and Frowein, J.A., “Collective enforcement of international obligations”, 47 *ZaöRV* 69–70 (1987). Also, Klabbers, though presuming that “[the SC] can also take binding decisions outside the Chapter VII context”, confesses that “we do not really know the basis for the Namibia opinion, and thus we cannot tell with certainty that, in 1971, the Court held a non-chapter-VII decision to be binding”. Klabbers, J., *An Introduction to International Institutional Law*, Cambridge: Cambridge University Press, 2002, at 222–223.

<sup>49</sup> Kirgis, F.L., “North Korea’s missile firings”, *ASIL Insight*, vol. 10, issue 18, 24 July 2006; and Nakatani, K., “Kita-Chosen misairu hassya [North Korea’s missile launches]”, *Jurist*, No. 1321 (2006), at 48–49.

Member States of the SC, therefore, a Chapter VII resolution must have a binding effect. An article by the Japanese foreign minister showed that, at least in this case, the Japanese government identified Resolution 1695 with a Chapter VII resolution through the use of some “robust” verbs: demand, require, etc., which are usually employed in the latter, and accordingly found the resolution binding the Member States even if it lacked explicit reference to Chapter VII.<sup>50</sup>

Resolution 1695 definitely makes no reference to Chapter VII but this is because China and Russia strongly resisted its reference because of possible issues with the binding force. For their part, on the other hand, Japan and the United States were satisfied since they interpreted this resolution as “Acting under Chapter VII”. This revealed that both sides consider it extremely important whether or not the term “Chapter VII” is inserted into the resolution. It also indicated that they recognized and agreed that a Chapter VII resolution had a binding force that included all Member States. This means that there is still a solemn threshold between Chapter VII and non Chapter VII with respect to a binding effect of a resolution, at least in the SC.<sup>51</sup>

## STATES TAKING CHAPTER VII SERIOUSLY

### Reasons for covering up non Chapter VII

#### *Political and legal call for Chapter VII in the use of force*

The non Chapter VII actions, which seek the effects of Chapter VII, are intrinsically ambiguous. States, which have unsuccessfully sought adoption of a Chapter VII resolution, pretend to act “as if” under Chapter VII. Then, those States entertain two contradictory expectations: to use any means at their disposal, on the one hand, and to have their actions accepted as legal and legitimate by the international community, on the other. When needed, they could invoke a Chapter VII resolution, with the expectation that it might serve as a kind of bridge between these contradictory preferences.

As for actions involving the use of force, the reason for States seeking a Chapter VII resolution is relatively simple and clear. When the situation does not permit acting States to invoke the right to self-defence, they look for an authorization by the

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<sup>50</sup> Asou, T., “Nihon gaiko, shiren to tassei no 11 nichikan [The Japanese diplomacy: 11 days of trials and achievements]”, *Chuo Koron* (monthly magazine), 143 (September 2006).

<sup>51</sup> On the SC’s legislative powers, Dicke insists that it is based on Articles 24 and 25 and on Chapter VII of the UN Charter, but also that it is limited to its primary responsibility for the maintenance of international peace and security. Dicke, K., “National interest vs. the interest of the international community – a critical review of recent Security Council practice” in Delbrück, J. (ed.), *New Trends in International Lawmaking – International ‘Legislation’ in the Public Interest*, Berlin: Duncker & Humblot, 1997, at 164. It should be noted that discussion here focuses on the maintenance of international peace and security. For a comprehensive review of the SC’s legislative power, see, Denis, C., *Le pouvoir normative du Conseil de sécurité des Nations Unies: Portée et limites*, Brussels: Editions Bruylant, 2004.

SC under Chapter VII. Otherwise, they would deliberately be violating existing rules on the use of force with the intention of changing them.<sup>52</sup> Those States which intend to use force may also want to engage the SC because even their seemingly controversial conduct might be legalized under Chapter VII. The economy of this behaviour is derived from the possibility that what they are doing may be sanctioned by the SC and therefore legitimized by the UN, from a political point of view.<sup>53</sup>

The Iraq war of 2003 is not the only instance in which States endeavoured to acquire a Chapter VII resolution directly authorizing them to use force as if they had been permitted to by the SC in advance. In the 1998 Iraq crisis, for example, the United States and the United Kingdom also wanted to have an authorizing resolution adopted, but the SC only provided Resolution 1154, which, according to most Member States, did not automatically authorize any State to use force against Iraq in its non-compliance with the disarmament provisions of Resolution 687. As in the attack on Iraq to enforce the no-fly zone in the same month, these two countries claimed to justify their conduct through reference to a series of relevant resolutions, among which Resolution 678 has been regarded as occupying the most prominent position on the use of force in the Iraq crises.<sup>54</sup> Their interpretations of those resolutions, especially the “revival” of the authorization effect of Resolution 678, did not necessarily demand them to acquire a new authorization resolution to use force, but they realized it was desirable politically to confirm the legitimacy of their actions. Against these arguments, most States have never accepted any authorization of the use of force in non-Chapter-VII resolutions, even when there is an allegedly implicit authorization.<sup>55</sup> As a result, whether States are for the use of force or against it, they

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<sup>52</sup> Byers, M., “Preemptive self-defense: hegemony, equality and strategies of legal changes”, 11 *Journal of Political Philosophy* 189 (2003).

<sup>53</sup> This need of legitimacy from the UN should be stressed definitely in the *ex post facto* authorization. See Österdahl, *loc. cit.*, n. 27, at 254–255. As a practical point of view as well, Paulus, A., “The war against Iraq and the future of international law: hegemony or pluralism?”, 25 *Michigan JIL* 732 (2004), who is right in saying that “the use of force without the clear and unequivocal support of international law and institutions is costly in terms of so-called political capital, . . . [T]hus, the legitimacy bestowed on military action by international institutions is everything but negligible”.

<sup>54</sup> For the justifications, especially by the United States government, see Murphy, S.D. (ed.), “Contemporary practice of the United States relating to international law”, 93 *AJIL* 471–479 (1999). See also Wedgwood, R., “The enforcement of Security Council resolution 687: the threat of force against Iraq’s weapons of mass destruction”, 92 *AJIL* 724–728 (1998). Similar arguments appeared when the Security Council adopted Resolution 1137 in November 1997. See Kirgis, F.L., “The legal background on the use of force to induce Iraq to comply with Security Council resolutions”, *ASIL Insights*, November 1997; and Williamson, E.D., “Comment on: The legal background on the use of force to induce Iraq to comply with Security Council resolutions”, *ASIL Insights*, March 1998.

<sup>55</sup> On the comments against the “revival” of Resolution 678, see Denis, C., “La résolution 678 (1990) peut-elle légitimer les actions armées menées contre l’Iraq postérieurement à l’adoption de la résolution 687 (1991)?”, 31 *RBDI* 485–525 (1998). See also White, N.D. and Cryer, R., “Unilateral enforcement of resolution 687: a threat too far?”, 29 *California Western ILJ* 269–280 (1999).

are always conscious of the boundary between Chapter VII and non-Chapter-VII contents in a resolution, from a political perspective on the one hand, and from a legal perspective on the other.

For its part, the UN also has some advantages in authorizing Member States to take enforcement measures under Chapter VII. The SC is the only plausible source of legitimization for the collective use of force.<sup>56</sup> Such an endorsement may induce Member States to become fully aware that their actions should fit into the framework of UN collective security, and may lead to the activation of the SC. This also allows the UN to explore further opportunities to exercise effective measures and so improve its legitimacy in the field of international peace and security. This presents an ideal response towards criticism against UN inaction such as occurred during the crisis in Rwanda.<sup>57</sup> The more effective the measures adopted and implemented by the UN through a multilateral force or a regional organization force are, the more established its legitimacy becomes under Chapter VII. Apart from the inner elements of the SC,<sup>58</sup> however, it is to be noted that going too far in this direction would undermine the spirit and intention of both the UN as an institution and the collective security system itself.

#### *Grasp of the special meaning of Chapter VII in Security Council lawmaking*

Concerning the subject of the binding force under Article 25, legitimacy through the SC could work equally well for States seeking a Chapter VII resolution. As already mentioned, Japan and the United States sought the strength of a Security Council decision and obstinately persisted in reference to Chapter VII in a resolution on the North Korea missile launches, despite one or more paragraphs in a non-Chapter-VII resolution possibly holding binding force depending on the terms used. As a foundation for the binding force of a Security Council resolution, these two countries did not choose only the general effects of a decision under Article 25, which the ICJ has recognized in the *Namibia* case. They instead relied on both Article 25 and Chapter VII in accordance with the practice of the permanent Member States of the SC that a Security Council decision with binding force must be adopted only under Chapter

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<sup>56</sup> Brunnée, J. and Troope, S.J., “The use of force: international law after Iraq”, 53 *ICLQ* 805 (2004).

<sup>57</sup> Gray, C., “A crisis of legitimacy for the UN collective security system?”, 56 *ICLQ* 169–170 (2007). For a general view on the legitimacy of the Security Council in the context of Chapter VII, see Sato, T., “The legitimacy of Security Council activities under Chapter VII of the UN Charter since the end of the Cold War” in Coicaud, J.-M. and Heiskanen, V. (eds.), *The Legitimacy of International Organizations*, Tokyo: UNU Press, 2001, at 309–352.

<sup>58</sup> The question to be asked at this point is whether the Security Council has such proper legitimacy that Member States could place trust and confidence in the Security Council. They are likely to avoid the Security Council and to implement what they want to do if they cannot find any confidence in the quality and objectivity of its decision making. See *A More Secure World: Our Shared Responsibility, Report of the Secretary-General's High-level Panel on Threats, Challenges and Change*, New York: United Nations, 2004, paras. 197 and 204–209.

VII. The rest of the Member States also stood in agreement that only a Chapter VII resolution has the power to bind all UN Member States signifying that these countries, at least the main Members in the SC, take Chapter VII seriously. In so doing, they imbued Chapter VII with a specific and special meaning in its power to affect Security Council resolutions. In short, the SC Members have agreed to the legitimacy of Chapter VII in the lawmaking process in general and beyond the scope of its application in the North Korea missile resolution. They have agreed to be cautious in determining the legitimacy of their own activities and to keep to those strictly derived from Chapter VII.<sup>59</sup>

Slightly different from the use of force authorizations,<sup>60</sup> the above-mentioned process of the adoption of Resolution 1695 seems to reveal that the SC Members have unanimously understood that it is the SC who should be making mandatory decisions in its lawmaking. And it can be also pointed out that they shared the same idea that the legal basis should be required for such a decision only under Chapter VII. In this sense, admittedly, the fact that Japan and the United States sought a Chapter VII resolution may reflect their keen desire for legalization through application of the UN Charter rules as well as legitimacy via SC resolution. In the Iraqi crisis, the United States and the United Kingdom finally asked for political legitimacy from the SC only because they had allegedly obtained the legal basis for the use of force against Iraq through the “revival” effect of Resolution 687. By contrast, in the North Korea missile crisis, Japan and the United States had to utilize Chapter VII in proving the legality of their activities as well as in persuading other Members to confirm their alleged legitimacy. There was also the acknowledgement by these

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<sup>59</sup> Admittedly, the discussions in the SC just before adopting Resolution 1540 on the non-proliferation of the WMD, through which the SC is said to exercise its legislative power, could give a different interpretation. Besides the concern about the exercise of legislative functions by the SC or the authorization of unilateral use of force by some States by recourse to Chapter VII, some States express the view that there is no need for the reference to Chapter VII in the draft resolution since Article 25 provides that all decisions by the SC shall be accepted and carried out by the Member States. UN Doc. S/PV.4950, 22 April 2004, at 4 (Brazil), and 5 (Algeria). On the contrary, some other States support the binding force under Chapter VII as the political importance of this resolution in the maintenance of international peace and security. *Ibid.*, at 8–9 (France), 12 (the United Kingdom), and 21 (New Zealand). The United States maintains that the draft resolution is placed under Chapter VII because “the Council is acting under that Chapter and levying binding requirements” (*ibid.*, at 17). Japan also says that “[I]n adopting a binding Security Council resolution under Chapter VII of the United Nations Charter, the Security Council assumes a lawmaking function” (*ibid.*, at 28). For the effect of Resolution 1540 and the SC’s legislative power, see Lavalley, R., “A novel, if awkward, exercise in international lawmaking: Security Council resolution 1540 (2004)”, 51 *NILR* 411–437 (2004); Sur, S., “La Résolution 1540 du Conseil de sécurité (28 avril 2004): entre la prolifération des armes de destruction massive, le terrorisme et les acteurs non étatiques”, 108 *RGDIP* 855–882 (2004); and Joyner, D.H., “Non-proliferation law and the United Nations system: resolution 1540 and the limits of the power of the Security Council”, 20 *Leiden JIL* 489–518 (2007).

<sup>60</sup> Franck, T.M., “What happens now? the United Nations after Iraq”, 97 *AJIL* 616 (2003), where he argues that the Iraqi crisis was not primarily about what to do but, rather, who decides.

two and other Members as well, that a mandatory decision without Chapter VII might not stand up to the competence of the SC in the field of international peace and security.

### The effects of acting “as if” under Chapter VII

#### *From centralized to decentralized?*

The SC may legitimize and put otherwise unilateral acts by Member States under the framework of UN collective security, and may also work to strengthen its institutional functions. This is appropriate, especially in the use of force, only to the extent that the SC can exercise proper control over those acts. In the meantime, States, in particular dominant States, are likely to secure consent from the UN, in order to prevent the UN from exercising effective control over their own activities. They also make use of the UN and its existing rules, and even try to create new rules, as a means of realizing their own interests, while rejecting legal constraints on themselves unless those restrictions suit their interests. Even if this scheme appears simplistic, dominant States may undoubtedly always oscillate between the so-called instrumentalization of and withdrawal from international law.<sup>61</sup> A major problem here is that unilateral acts constitute a deviation from the UN collective security system and the power of the SC has eroded through them. The result is an almost unlimited margin of action available to powerful States. Actually, some scholars have tried to justify the unilateral action by the United States and its allies on the grounds of the SC’s inaction.<sup>62</sup>

Compared with it, actions engaged in “as if” under Chapter VII, *prima facie*, do not seriously impair the collective security system. This is because the States acting “as if” under Chapter VII seem to carry out their activities within the realm of that system and seem to maintain legality and legitimacy via decisions by the SC. In effect, it is argued that “the case for intervening in Iraq to enforce Council resolutions comes from within the existing normative and institutional framework”.<sup>63</sup>

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<sup>61</sup> Krisch, N., “International law in times of hegemony: unequal power and the shaping of the international order”, 16 *EJIL* 369–408 (2005).

<sup>62</sup> E.g. Glennon, M.J., “The UN Security Council in a unipolar world”, 44 *Va. JIL* 91–112 (2003); and Wedgwood, R., “Unilateral action in the UN system”, 11 *EJIL* 349–359 (2000).

<sup>63</sup> Johnstone, I., “US–UN relations after Iraq: the end of the world (order) as we know it?”, 15 *EJIL* 831 (2004). Dinstein, after saying that “[T]he text of Resolution 1441 does not prescribe that, prior to recourse to force, the Coalition must return to the Security Council for a second (confirmatory) resolution”, concludes that “I consequently do not regard the 2003 hostilities in Iraq as a diminution of the powers of the Security Council . . . from start to finish the Security Council played an important political part—in Resolutions 660, 678, 687 and finally in Resolution 1441— . . .”. Dinstein, Y., “Sovereignty, the Security Council and the use of force”, in Bothe, M., O’Connell, M. E. and Ronzitti, N. (eds.), *Redefining Sovereignty: The Use of Force After the Cold War*, Ardsley: Transnational Publishers, Inc., 2005, at 118–119.

According to this argument, for the SC as well, such a situation would be more desirable since the SC could effectively keep those States within the framework of the collective security system that otherwise would depart from it.<sup>64</sup>

However, responses by most Security Council Members towards these kinds of actions, as mentioned above, would give a different impression. They have rejected any act that would obscure the differentiation between Chapter VII and non-Chapter-VII resolutions, and have also maintained that no legal effects of Chapter VII, including the authorization of the use of force, should be conferred to such actions. Putting things differently, they have neither found any Chapter VII effect in these actions nor recognized them as UN collective measures on behalf of the international community to realize its values.

In fact, one of the essential aspects of unilateral actions would be their deviation or avoidance of possible SC control over them, which might by nature represent decentralization.<sup>65</sup> Both cases discussed in this article undeniably would appear to represent decentralization sufficiently to deserve the criticism. It is not wrong, therefore, to assert that these actions “as if” under Chapter VII may, to a large extent, undermine the spirit and institution of the UN collective security system. Only the SC can rule out the unlawfulness of the breach of one of the most fundamental principles in international law and can also authorize the use of force within the framework of the collective enforceable actions. It is also only the SC and not the individual States that can impose binding decisions on all the UN Member States, which is critical in the implementation and enforcement of UN mandatory measures. From this perspective, actions “as if” under Chapter VII would seem to harm the core of the UN collective security system and to foment preference for a decentralized system in place of the collective one.

Should proponents of these actions unsuccessfully seek a Chapter VII resolution to give the appearance of acting within the framework of the UN collective security system, while having full awareness of the importance and distinction of Chapter VII, the end result may be the same. That is, despite intentions that may hypothetically lie in the effective implementation of the UN collective measures and an understanding of the international community and its values, their conduct may still threaten to undermine the developing centralized system for the international community and contribute in creating an international system of hegemony instead.<sup>66</sup>

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<sup>64</sup> Similar rhetoric can be seen in the *ex post facto* authorization doctrine. See Österdahl, *loc. cit.*, n. 27, at 234–237.

<sup>65</sup> For the negative impacts of such unilateral actions on the UN collective security system, see Krisch, N., “Unilateral enforcement of the collective will: Kosovo, Iraq, and the Security Council”, 3 *Max Planck UNYB* 100–102 (1999). On harmful aspects of unilateralism, see Dupuy, P.-M., “The place and role of unilateralism in contemporary international law”, 11 *EJIL* 20 (2000).

<sup>66</sup> For a very brief consideration on the United States’ hegemonic position in the current international system and its influences on international law, see Vagts, D.F., “Hegemonic international law”, 95 *AJIL* 843–848 (2003).

*Future impacts of dissembling resolution as compromise*

States which claim to have achieved legitimacy through a Chapter VII resolution and encounter vigorous objection may have to consider interpretation through a non-Chapter-VII resolution so they can proceed “as if” under Chapter VII. By contrast, others can keep their line of reasoning that Chapter VII should be excluded, and, despite objections to interpretations by the opposite side, does not prevent the SC from adopting a resolution without any reference to Chapter VII. In this sense, the adoption of a non Chapter VII resolution as the outcome of a confounding process is equal to the result of a compromise between competing interests among the SC. However, when resolutions produced in this context prove themselves to fall short of the legal requirements set by Charter rules regarding use of force or of a binding resolution, their effectiveness may be questionable.

On the legal effects of the terminological similarity between a Chapter VII and a non-Chapter-VII resolution, Resolution 1701 calling upon the strength of UNIFIL, which was adopted unanimously on 11 August 2006 after the Israel armed forces invaded the Lebanese territories against Hezbollah’s attacks initiated in July 2006, proved interesting and full of implications.<sup>67</sup>

In this resolution, the SC determines that the situation in Lebanon constitutes a threat to international peace and security, and “authorizes UNIFIL to take all necessary action”, to ensure that its area of operations is not utilized for hostile activities, to resist forcible obstruction of performance of its duties, and “to protect United Nations personnel, facilities and equipment, ensure the security and freedom of movement of United Nations personnel, humanitarian workers and, without prejudice to the responsibility of the government of Lebanon, to protect civilians under imminent threat of physical violence”.<sup>68</sup> It, however, contains no SC reference to Chapter VII in it. Very similar sentence structure can be found in other resolutions authorizing some recent “robust” peacekeeping forces to use force under Chapter VII,<sup>69</sup> but Resolution 1701 avoids any explicit reference to Chapter VII,

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<sup>67</sup> On the attacks by Israel as the background of adopting this resolution, see *Letter dated 7 August 2006 from the Secretary-General addressed to the President of the Security Council*, UN Doc. S/2006/626. See also Cannizzaro, E. “Entités non-Etatiques et régime international de l’emploi de la force. Une étude sur le cas de la réaction israélienne au Liban”, 111 *RGDIP* 333–354 (2007). For an excellent inquiry into the recent activities of UNIFIL, involving the use of force, see Murphy, R., “United Nations peacekeeping in Lebanon and Somalia, and the use of force”, 8 *Journal of Conflict and Security Law* 71–99 (2003). See also Coleman, K.P., *International Organizations and Peace Enforcement: The Politics of International Legitimacy*, Cambridge: Cambridge University Press, 2007, at 314–325.

<sup>68</sup> UN Doc. S/RES/1701 (2006), 11 August 2006, pre. para. 11 and op. para. 12.

<sup>69</sup> “Robust” rules of engagement of peacekeeping force is referred to in the Brahimi Report (UN Doc. A/55/305-S/2000/809, para. 55), but what are mentioned here as “robust” peacekeeping forces are the ones which are combined with Chapter VII, and seen mainly in Africa, especially since the end of the twentieth century, like UNAMSIL, UNMIL, UNOCI, MONUC and UNMIS. On this issue, see Zacklin, R., “The use of force in peacekeeping operations” in Blokker and Schrijver (eds.), *op.cit.*, n. 7, at 91–106.

despite the fact that Israel and the United States insisted on the deployment of the most robust international force under Chapter VII authority to stabilize the situation in southern Lebanon.<sup>70</sup> The result is that UNIFIL was not authorized to use force under Chapter VII, although it fulfilled the same mandate as carried out by the “robust” peacekeeping forces.<sup>71</sup> This case demonstrates that language similar to that used in a Chapter VII resolution does not necessarily carry the same effect in a non-Chapter-VII resolution in which it is used. It is the intention of the SC Members that may be crucial in determining the effects.

As Judge Rosalyn Higgins rightly pointed out in 1963, “[i]t has come to be accepted almost as a matter of principle that the authority to decide upon disputed questions of the interpretation of the Charter belongs to the organ charged with their application”.<sup>72</sup> And on the premise that the will of the international community is expressed by the SC in the field of international peace and security, it is for the SC to decide, on behalf of the international community, what steps should be taken, not for the individual States.<sup>73</sup>

So, if the SC Members should agree that a new action should be and continue to be supported in place of an older one in performing its activities on international peace and security, there would be increasing possibility for establishment of a new rule, either by changing the interpretation of relevant norms or through a legal act within the framework of the UN Charter. A binding decision may provide a good example of this point. The current prevailing view among the SC Members, especially by five permanent members, that a legally binding effect should only be conferred by a Chapter VII resolution might be a driving force for confirming their interpretation or even for creating a new normative rule. It cannot be denied that a rule saying that binding effects should be restricted to Chapter VII resolutions might be introduced in the near future, depending on the subsequent practice of the SC that has had to face criticism due to its paucity of supporting doctrines as well as from the inappropriateness of its past behaviour.<sup>74</sup> In this respect, Resolution 1685 fell short of a mandatory effect due to lack of reference to Chapter VII, and

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<sup>70</sup> Nasu, H., “The responsibility to react? Lessons from the Security Council’s response to the Southern Lebanon crisis of 2006”, 14 *International Peacekeeping* 347 (2007).

<sup>71</sup> The French representative clearly declared just before the adoption of Resolution 1701 that “the mandate that the Security Council is giving UNIFIL is not one that imposes peace”, and the Qatar representative also plainly stated that the mandate of UNIFIL “will continue to be subject to the provisions of Chapter VI of the Charter”. See UN Doc. S/PV.5511, 11 August 2006, at 8 (France); and at 8–9 (Qatar).

<sup>72</sup> These words are in the context of a domestic matter problem, but are also true of the use of force, or the lawmaking questions. Higgins, R., *The Development of International Law through the Political Organs of the United Nations*, Oxford: Oxford University Press, 1963, at 66.

<sup>73</sup> Lowe, V., “The Iraqi crisis: what now?”, 52 *ICLQ* 868–869 (2003). But see also Corten, O., “La participation du Conseil de sécurité à l’élaboration, à la cristallisation ou à la consolidation de règles coutumières”, 37 *RBDI* 562 (2004).

<sup>74</sup> Jaqué, J.-P., “L’avis de la Cour internationale de justice du 21 juin 1971”, 76 *RGDIP* 1089–1092 (1972).

nevertheless, may open a way for the creation of a new rule against the advisory opinion of the ICJ in 1971.

As for the rules on the use of force within the UN collective security system, to the contrary, there is little or no probability of reshaping them through the recent SC practice. Actions “as if” under Chapter VII, implicit or revival authorization of the use of force, would undermine and even abrogate the spirit of that system if they were to be regarded as under “true” authorization. The result would be to transform originally unilateral acts of individual States into the disguised collective measures of the UN but without its control over them. A series of SC resolutions after the Gulf War have confirmed that this conversion should be illegitimate and may be illegal as it may bring the danger of a creeping erosion of the centralized collective security system. The general will of the SC through its legal acts can be established here in drawing a strict line between an act under Chapter VII and one with no reference to it. This does not mean that the possibility of creating and changing rules of customary international law by greater unilateral acts “as if” under Chapter VII in the near future should be excluded. To realize it, however, the appearance of a consistent interpretation of the relevant resolutions and treaties among the SC must be awaited,<sup>75</sup> and at present, the SC has found a significantly rigid threshold between Chapter VII and non Chapter VII, where there seems to be no room for a disguised Chapter VII action.

## CONCLUDING REMARKS

Actions “as if” under Chapter VII might be legalized and legitimized through attempted “revival” of a core authorization resolution (the Iraqi War in 2003), or the implicit or implied authorization (the North Korea missile launch events in 2006) by its creators. These justifications, however, have been fiercely challenged and criticized for eroding the UN collective security system by both other States and many scholars. From the perspective of the fundamental principles in international law, namely, the non-use-of-force principle, and the mandatory effect of the SC decisions as the nub of the UN collective security system, these assessments must be considered as correct. It is to be noted that those actions may bring to the surface the inclusive antagonism in that system: decentralized unilateralism by individual States and centralized collective measures by the international community, and may also lead the system to be undermined.<sup>76</sup>

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<sup>75</sup> Byers, M., “The shifting foundations of international law: a decade of forceful measures against Iraq”, 13 *EJIL* 40–41 (2002). On the recent controversial issue of interpretation of the SC resolutions, see Wood, M.C., “The Interpretation of Security Council resolutions”, 2 *Max Planck UNYB* 73–95 (1998); and Papastavridis, E., “Interpretation of Security Council resolutions under Chapter VII in the aftermath of the Iraqi crisis”, 56 *ICLQ* 83–118 (2007).

<sup>76</sup> Franck, T.M., “Is collective security through the UN still feasible?”, 9 *The Finnish YIL* 38 (2000).

The traditional arguments, which may promote unilateral action by individual States, would carry a veil of an institutional dimension for UN collective security.<sup>77</sup> This is also the case when actions “as if” under Chapter VII should be claimed. Thus, it should be careful and prudent that such actions be legalized and legitimized within the UN collective security system, because the UN Member States have strongly identified Chapter VII as different from other parts of the UN Charter and as having a distinctive effect on concrete actions. In practice, the SC has also accordingly attached great weight to the rigid distinction between Chapter VII and non-Chapter-VII resolutions.

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<sup>77</sup> Sicilianos, L.-A., “Après l’Irak: Vers une redefinition des pouvoirs du Conseil de sécurité?” in Banneilier, K., Corten, O., Christakis, T. and Klein, P. (eds.), *L’intervention en Irak et le droit international*, Paris: Édition A. Pedone, 2004, at 65.



# THE ROLE OF IMO RESOLUTIONS IN OCEAN LAW AND POLICY IN THE ASIA-PACIFIC

Mary George\*

## ABSTRACT

Resolutions of the International Maritime Organization (IMO) have a unique role to play in the national ocean law and policy framework of States in the Asia-Pacific region, being quasi-legal non-binding norms with a technical content quite incomparable to the soft law found in general recommendations, guidelines, codes of conduct, principles, standards, norms, best practices or model laws. These resolutions are purpose driven, being passed for improving the safety and security of navigation and for the prevention, reduction and control of marine pollution. As an international inter-governmental organization with a membership of 167 Member States, in content the resolutions blur the thin line between convincing evidence and legal argument grounded in treaty, custom or general principles of law recognized by civilized nations. To some extent, this paper follows the trail blazed by Professor Dinah Shelton and to that extent alone bases its findings upon the research conclusions as stated in her book, *The Role of Non-Binding Norms in the International Legal System*. In ocean law, the relationship between the 1982 Law of the Sea Convention (1982 LOSC) that constantly refers to the Generally Accepted International Rules and Standards (GAIRAS) and the IMO has been determined. According to the IMO, many of these GAIRAS rules and standards refer to IMO Conventions and Resolutions. Professor Shelton is of the view that the requirement in the 1982 LOSC to give effect to “generally accepted standards” increases the likelihood of compliance with non-binding standards set for marine pollution by the IMO.<sup>1</sup>

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<sup>1</sup> Shelton, D. (ed.), *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System*, Oxford: Oxford University Press, 2000, at 536 and 537. The original name of “Inter-Governmental Maritime Consultative Organization (IMCO)” was changed to IMO by IMO Assembly resolutions A.358(IX) and A.371 (X) adopted in 1975 and 1977 respectively. For the Convention on IMCO, see 53 *AJIL* at 516 (1959).

Although this aspect is not elaborated upon here, it is perhaps through this route that disputes regarding IMO resolutions may be filed in the Registry of the ICJ. The implications of this discussion for other IGO resolutions are not considered here.

## INTRODUCTION

The IMO resolutions<sup>2</sup> have a critical role to play in the formulation of national ocean law and policy instruments of States in the Asia-Pacific region whereby recommendations on technical global maritime rules and standards, not included in IMO treaties,<sup>3</sup> may be implemented in national legislation followed by institutional capacity-building. It is through the effective mechanism of government departments that there can be effective exercise of maritime safety administration. In implementing its technical cooperation programme, the IMO's key principle is that the ownership of the development and implementation process rests with the recipient countries themselves. This is followed by the integration of IMO's regulatory priorities into government programme-building process and promotion of partnerships with governments, the industry and international development aid agencies and other development aid programmes in the maritime sector. The IMO assesses the effectiveness of any given assistance in accordance with paragraph 6 of Resolution A.873(20). Resolution A.901(21) adopted on 25 November 1999 focuses, *inter alia*, on the achievement of sustainable development and effective implementation of the Integrated Technical Cooperation Programme and assistance to developing countries (ITCP). The resolution urges Member States to take that linkage into account in the preparation and delivery of their national development plans. Resolution A.909 (22) was adopted on 29 November 2001 and covers policy making in IMO – setting the organization's policies and objectives.<sup>4</sup> In this Resolution, the Assembly endorses the need for openness and transparency within the IMO and to ensure that all States represented are provided with an opportunity to contribute constructively to any policy preparation and evaluation and all member governments are encouraged to submit policy documents to the Council for consideration. The Resolution also calls upon the Council to ensure its implementation and to report to the Assembly as appropriate.

Resolution A.777 (18) on Work Methods and Organization of Work in Committees and their Subsidiary Bodies adopted on 4 November 1993 calls upon member

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<sup>2</sup> Some areas of concern for the IMO are Ship and Port Interface, the Prevention of Air Pollution from Ships, the International Convention on Standards of Training, Certification and Watch-keeping, the International Safety Management Code, Passenger Ship Safety, the International Ship and Port Facility Security Code, Port State Control, problem of places of refuge for disabled vessels, and new regulations for bulk carrier safety, and marine pollution.

<sup>3</sup> See LEG/MIMSC.5 at 2 and 5 where it is stated at 5 that “. . . national legislation implementing IMO recommendations can be applied with binding effect to foreign ships”.

<sup>4</sup> [http://www.imo.org/About/mainframe.asp?topic\\_id=1333](http://www.imo.org/About/mainframe.asp?topic_id=1333) (visited in November 2007).

governments to bring this resolution to the attention of their representatives who attend meetings of the organization and to advise them to observe agreed guidelines on work methods and organization of work. The objective is to promote a safety culture and environmental conscience, to avoid excessive regulation and intensify governmental efforts at controlling security of ships and ports, to combat crimes at sea and to control maritime terrorism and illicit drug trafficking, to check illegal migration by sea and stowaway cases, thereby ensuring the wide and effective implementation of the revised conventions on standards, training, certification and watchkeeping, the international safety management code, and the conventions on marine pollution.

Arguments as to whether United Nations General Assembly (UNGA) resolutions are law or not also apply to IMO Resolutions. When analyzing IMO resolutions, much of the argument that centres around UNGA resolutions<sup>5</sup> applies here because these resolutions seem law-creating in behaviour<sup>6</sup> and policy when governments adopt them into their municipal law and policy framework. These States have to succeed in justifying their behaviour internationally, in the type and theory of punishment they adopt for an infringement of their laws, in the regard they pay to

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<sup>5</sup> See, for instance, Resolution 22 C (1) of the General Assembly of the United Nations, 13 February 1946. Privileges and Immunities of the International Court of Justice: 1. *The General Assembly*, with a view to ensuring that the International Court of Justice shall enjoy the privileges, immunities and facilities necessary for the exercise of its functions and the fulfilment of its purposes, in the country of its seat and elsewhere, invites the members of the Court at their first session to consider this question and to inform the Secretary-General of their recommendations. 2. *The General Assembly* decides that the question of the privileges and immunities of the Court shall be considered as soon as possible after the receipt of the recommendations of the Court. 3. *The General Assembly* recommends that, until further action has been taken, the rules which have been applied to the Permanent Court of International Justice should be observed by Members in relation to the International Court of Justice.

See also Resolution 90(I) of the General Assembly of the United Nations, 11 December 1946; Privileges and Immunities of Members of the International Court of Justice, The Registry, Assessors, and Agents and Counsel of the Parties and of Witnesses And Experts – By a resolution adopted on 13 February 1946, the General Assembly, with a view to ensuring that the International Court of Justice should enjoy the privileges, immunities and facilities necessary for the exercise of its functions and the fulfilment of its purposes, in the country of its seat and elsewhere, invited the Court at its first session to consider this question and to inform the Secretary-General of its recommendations. The Court has accordingly examined the problem in its various aspects during its first session, held at The Hague from 3 April to 6 May 1946, and has transmitted to the General Assembly its conclusions. The General Assembly considered the recommendations of the Court during the second part of its first session, and the report of the Sixth Committee.

<sup>6</sup> See Letter from the President of the International Court of Justice to the Minister for Foreign Affairs of The Netherlands, 26 June 1946; Letter from the Minister for Foreign Affairs of The Netherlands to the President of the International Court of Justice, 26 June 1946; and Letter from the Minister for Foreign Affairs of The Netherlands to the President of the International Court of Justice, 26 February 1971, see <http://www.icj-cij.org> (visited on 21 October 2007).

the domestic and international factors that they consider important, in enumerating the international legal norms through which they seek to justify their behaviour and in their relationship to the societal formations for which they have undertaken such laws and policy.<sup>7</sup> Questions raised by Professor Onuma shape the arguments: “Furthermore, we could also contribute to the study of international law as a normative science by seeking to answer the question of how we can promote compliance with international law by exploring the following issues: (1) Which international legal norms do we utilize? (2) Which government behaviour are we seeking to regulate? (3) What kind of law-realizing mechanism are we trying to use? (4) What kind of interpretative and legislative techniques are we going to employ?”<sup>8</sup> The international norms that are utilized to regulate the flag State and government behaviour under consideration are the standards and normative content of the technical IMO resolutions and their application by coastal States to all flag States in the maritime zones under their enforcement jurisdiction such as in the territorial seas and in straits used for international navigation. The law-realizing mechanism and the interpretative and legislative techniques used here centre around: (1) the quasi-legal character of the resolutions under discussion; (2) the precautionary principle at the IMO; (3) the philosophy of criminal sanctions for violations of these resolutions; (4) the theory of compliance; (5) their evidentiary character; and (6) Professor Shelton’s arguments.

#### STANDARDS AND NORMATIVE CONTENT OF IMO RESOLUTIONS AND THEIR APPLICATION TO ALL FLAG STATES

The IMO resolutions are adopted by the Assembly, the Council, the Maritime Safety Committee (MSC), the Marine Environment Protection Committee (MEPC) and the Committee on the London Convention (LC). The IMO Assembly has passed over 945 resolutions to date. Generally, the IMO resolutions are of two types, those which have formative influence on treaties or which mature into treaties and their amendments and those, considered in this paper, which though not law-creating yet contain the potential to develop into rules. For instance, Assembly Resolution A.5(1) 1959 adopted the Status of the Convention on International Maritime Consultative Organization (IMCO), the precursor to the IMO, and A.945(23) 2003 adopted the 1991 Amendments to the Convention on the International Maritime Organization (Institutionalization of the Facilitation Committee). The IMO Council adopted Resolution A. 316 (ES.V) of 1974 on Wider Representation in the Council to include the Asian States who are new actors in IMO’s work, for it was not easy even for non-Asian States such as Panama (in the Americas) and Liberia (in Africa) to effectively

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<sup>7</sup> Onuma, Y., “International law in and with international politics: the functions of international law in international society”, 14 *EJIL* 105–139 (2003), at 138.

<sup>8</sup> *Ibid.*, at 138 and 139.

occupy a position within the forerunner of the IMO, referred to as the Inter-Governmental Maritime Consultative Organization (IMCO).<sup>9</sup>

The Maritime Safety Committee (MSC) through MSC.1 (XLV) 1981 adopted the 1981 amendments to the International Convention for the Safety of Life at Sea, 1974 and by MSC 227(82) 2006 adopted the amendments to the Protocol of 1988 relating to the International Convention for the Safety of Life at Sea 1974. The LC Committee has adopted Resolution LP.1(1) 2006 on the amendment to include CO<sub>2</sub> sequestration in sub-seabed geological formations in Annex 1 to the London Protocol.

### IMO resolutions in straits used for international navigation

The Maritime Safety Committee at its 79th session discussed the matter of the proposed pilotage system in the Torres Strait Particularly Sensitive Sea Area whereby the existing associated protective measure of a system of pilotage within the Great Barrier Reef would be extended to include the Torres Strait.<sup>10</sup> It is significant

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<sup>9</sup> See the *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization Case*, ICJ Rep. 1960, at 160, 195 where the Court interpreted the term “largest ship-owning nations” in the IMCO Constitution, according to the natural and ordinary meaning of the words. The question before the Court was as follows: “Is the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, which was elected on 15 January 1959, constituted in accordance with the Convention for the Establishment of the Organization?” The Court by nine votes to five gave a negative answer to the question.

<sup>10</sup> The background to this issue is as follows: MEPC Resolution 45(30) deals with the current system of pilotage within the Great Barrier Reef. Australia’s new proposed resolution recommended that governments “recognize the need for effective protection of the Great Barrier Reef and Torres Strait region and inform ships flying their flag that they should act in accordance with Australia’s system of pilotage for merchant ships 70m in length and over or oil tankers, chemical tankers and gas carriers, irrespective of size when navigating:

- (a) the inner route of the Great Barrier Reef between the northern extreme of Cape York Peninsula . . . and . . . in Hydrographers Passage;
- (b) the Torres Strait and Great North East Channel between Booby Island . . . and Bramble Cay . . .”.

See IMO Document, Maritime Safety Committee, 79th session, Agenda Item 23, MSC 79/23, 15 December 2004. It is to be noted that IMO Assembly Resolution A.710(17) adopted in November 1991, introduced a regime of recommended pilotage in the Torres Strait, replacing IMO Resolution A.619(15) adopted in November 1987. IMO Resolution A.710(17) “recommends that all ships of 70 m in length and over and all loaded oil tankers, chemical tankers or liquefied gas carriers, irrespective of size, use the pilotage services licensed under Australian Commonwealth, State or Territory law, when navigating the Torres Strait and the Great North East Channel between Booby Island . . . and Bramble Cay. . . . The proposed extension of the existing compulsory pilotage areas would have the same geographic application as this resolution. Compliance with the existing recommended pilotage regime is declining and Resolution A.710(17) no longer

to note that the Sub-Committee on Safety of Navigation in its Report to the Maritime Safety Committee “noted the opinion of a number of delegations that there was no clear legal basis to adopt a compulsory pilotage regime in international straits”.<sup>11</sup> Of course the view submitted by Australia and Papua New Guinea was that this was consistent with international law and implementable under the 1982 LOSC and IMO instruments and procedures.<sup>12</sup> While the reasons advanced by both States are valid, the text of Part III, 1982 LOSC as currently worded does not give the desired legal imprimatur to impose any action that would hamper transit passage. The issue here is not the IMO resolution but the nature of transit passage in straits used for international navigation which cannot be suspended or hampered. Any IMO resolution that has the effect of hampering or suspending transit passage *per se* is null and void. In the Legal Committee of the IMO, various arguments were advanced for and against the motion. One important suggestion was that “a new regulation in SOLAS Chapter V could be adopted concerning pilotage. Moreover, the new regulation should also be supported by the development of new guidelines and criteria for adoption of pilotage schemes”.<sup>13</sup> Despite that, the Committee was unable to resolve the issue.<sup>14</sup>

Australia issued Marine Orders Part 54, Issue 4 (Order No. 10 of 2006) on Coastal Pilotage repealing Marine Order Part 54, Issue 3 to give effect to IMO Resolution MEPC 133 (53) on Designation of the Torres Strait as an extension of the Great Barrier Reef Particularly Sensitive Sea Area. In Notice to Mariners 1267 for Australia Aus376 [1152/2006] it states that the Torres Strait Compulsory Pilotage Area consists of:

Area A bounded in the south by latitude 10 41’S, in the north by Australia’s EEZ, and longitudes 141 50’E to 142 05’E.

Area B bounded in the south by latitude 10 41’S, in the north by Australia’s EEZ, and longitudes 142 05’E to 143 24’E. All vessels of 70 metres or greater . . . all loaded oil tankers, chemical tankers and liquefied gas carriers when transiting through Area A with a draught of 8 metres or more must carry a pilot. The same vessels (irrespective

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provides an acceptable level of protection for the Torres Strait. Data from shipping in the Torres Strait in 1995 and 2001 shows compliance has dropped from 70% to 32% for vessels on eastbound voyages and 55% to 38.5% for west bound voyages. This amounts to over 500 unpiloted transits per year and is increasing rapidly. As a consequence, the risk of an accident is unacceptably high. Australia and Papua New Guinea therefore consider that resolution A.710(17) has proven to be inadequate to protect the Torres Strait.” See IMO Document, Legal Committee, 89th session, LEG 89/15, 24 August 2004, at paras. 4, 5 and 6.

<sup>11</sup> See IMO Document, Sub-Committee on Safety of Navigation, 50th session, Agenda item 19, and NAV 50/19, 28 July 2004. An extract of the Report of the Ships’ Working Group at para. 15.

<sup>12</sup> See IMO Document, Legal Committee, 89th session, Agenda item 15, LEG89/15, 24 August 2004.

<sup>13</sup> See *ibid.*, Agenda item 16, LEG89/16, 4 November 2004, at para. 2347.

<sup>14</sup> *Ibid.*, Agenda item 15, LEG89/15, at para. 241.

of draught) when transiting through Area B must carry a pilot. Defence forces vessels are exempt.

Provision 8 to the Explanatory Notes to Marine Orders Part 54, Issue 4 (Order No. 10 of 2006) states as follows:

... the duties of a pilotage provider include(ing) the timely supply of information prior to providing a pilot for a transit of Torres Strait. The provision also specifies the conditions for the issuing of a Document of Compliance and the associated validity periods. Provision 8.1.1 is a penal provision which prohibits a person from acting as a pilotage provider unless the person is the holder of a valid Document of Compliance. Provision 8.2 is a penal provision that requires a pilotage provider to operate in accordance with the Queensland Coastal Pilotage Safety Management Code.<sup>15</sup>

This is an example of an IMO resolution operating within the national law framework of a coastal State. As the Torres Strait is a strait used for international navigation under the 1982 LOSC, transit passage of foreign flags can neither be suspended nor hampered and this is the case even when the marine environment is at stake. Further, the domestic laws of any strait State that adopt an IMO resolution cannot impose criminal sanctions upon foreign flags that refuse to comply with the impugned domestic law. This is because the transit passage regime of straits used for international navigation in Part III of the 1982 LOSC does not permit such criminal enforcement jurisdiction by the strait State unlike the regime of the territorial seas where such action is permitted expressly. Flag States in the Torres Strait have a duty to comply with the resolution found in municipal law *suo moto*, and where they have failed to do so through deliberate voluntary non-compliance, the matter has to be referred to the diplomatic mission of the flag State whereby restitution in integrum may be offered by the flag States to the coastal State. If the dispute is submitted to the Australian courts based on the locus, the courts in Australia may examine the feasibility of applying, *mutatis mutandis*, the doctrine of the most significant relationship, a concept borrowed from the law of contracts in conflict of laws situations, as was expounded by the High Court of Hong Kong in *Bank of India v. Gobindram Naraindas Sadhwani and Others*,<sup>16</sup> to the case of an impugned IMO resolution. The better solution might be to read both propositions of law together to mutually reinforce each other.

Other IMO Resolutions that encourage the use of pilots on board ships in certain areas are as follows:

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<sup>15</sup> In a private discussion with Professor James Crawford, Lauterpacht Centre for International Law, University of Cambridge, I was advised that penal provisions are no longer attached for non-compliance with this provision, 1 November 2007.

<sup>16</sup> See August, R., *Public International Law, Text, Cases and Readings*, New Jersey: Prentice Hall, 1995, at 488; Carter, B.E., Trimble, P.R. and Bradley, C.A., *International Law*, New York: Aspen Publishers, 2003, at 448.

- Resolution A.480(IX) (adopted in 1975) recommends the use of qualified deep-sea pilots in the Baltic and Resolution A.620(15) (adopted 1987) recommends that ships with a draught of 13 metres or more should use the pilotage services established by Coastal States in the entrances to the Baltic Sea;
- A.486(XII) (adopted 1981) recommends the use of deep-sea pilots in the North Sea, English Channel and Skagerrak;
- A.579(14) (adopted 1985) recommends that certain oil tankers, all chemical carriers and gas carriers and ships carrying radioactive material using the Sound (which separates Sweden and Denmark) should use pilotage services;
- A.668(16) (adopted 1989) recommends the use of pilotage services in the Euro-Channel and IJ-Channel (in the Netherlands); and
- A.827(19) (adopted 1995) on *Ships' Routeing* includes in Annex 2 *Rules and Recommendations on Navigation through the Strait of Istanbul, the Strait of Canakkale and the Marmara Sea* the recommendation that: "Masters of vessels passing through the Straits are strongly recommended to avail themselves of the services of a qualified pilot in order to comply with the requirements of safe navigation."<sup>17</sup>

Greater corroborative evidence of the technical content of IMO resolutions may also be found in the MEPC Resolutions, which include:

- MEPC 46(30) on measures to control potential adverse impacts associated with the use of tributyl tin compounds in antifouling paints;
- MEPC 50(31) international guidelines for preventing the introduction of unwanted aquatic organisms and pathogens from ships' ballast water and sediment discharge;<sup>18</sup> and
- MEPC 67(37) guidelines on incorporation of the precautionary approach in the context of specific IMO activities.

There are many IMO marine pollution treaties now where there once were IMO resolutions such as The International Convention on the Control of Harmful Anti-Fouling Systems 2001 and The International Convention for the Control and Management of Ships' Ballast Water and Sediments 2004.

The MEPC Resolutions target prevention of pollution by liquid substances in bulk,<sup>19</sup> prevention of pollution by harmful substances in packaged

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<sup>17</sup> The present discussion does not cover the customary international law status of pilotage for which there seems to be ample basis.

<sup>18</sup> This has become a treaty now, International Convention for the Control and Management of Ships' Ballast water and Sediments 2004.

<sup>19</sup> Prevention of pollution (noxious liquid substances in bulk)

MEPC 32(27) 1989. Amendments to the International Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk (IBC Codes);

MEPC 33(27) 1989. Amendments to the International Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk (BCH Code);

form,<sup>20</sup> prevention of pollution by sewage,<sup>21</sup> prevention of pollution by garbage,<sup>22</sup>

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MEPC. 34(27) 1989. Amendments to the annex of the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973 (Appendices II and III of Annex II of MARPOL 73/78);

MEPC 40(29) 1990. Amendments to the International Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk (IBC Code) (Harmonised system of survey and certification);

MEPC 41 (29) 1990. Amendments to the Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk (BCH Code) (Harmonised system of survey and certification);

MEPC 57(33) 1992. Amendments to the annex of the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973 (Designation of the Antarctic area as a special area and lists of liquid substances in Annex II);

MEPC 62(35) 1994. Amendments to the standards for procedures and arrangements for the discharge of noxious liquid substances – Amends MEPC 18(22);

MEPC 109 (49) 2003. Tripartite agreements;

MEPC 119 (52) 2004. 2004 Amendments to the International Code for the Construction and Equipment of Ships carrying Dangerous Chemicals in Bulk (IBC Code);

MEPC 137(53) 2005. Amendments to the guidelines for the development of shipboard marine pollution emergency plans for oil and/or noxious liquid substances (Resolution MEPC 85(44) – Amends Resolution MEPC 85(44);

MEPC 158 (55) 2006. Amendments to the guidelines for the transport and handling of limited amounts of hazardous and noxious liquid substances in bulk on off-shore support vessels (Resolution A.673(16) – Amends A.673(16);

MEPC 160(55) 2006. Implications of the revised Annex II to MARPOL 73/78 for the reference in article 1.5(a)(ii) of the HNS Convention to “Noxious Liquid Substances carried in Bulk”.

<sup>20</sup> Prevention of pollution (harmful substances in packaged form)

MEPC 35(27) 1989. Implementation of Annex III of MARPOL 73/78;

MEPC 58(33) 1992. Amendments to the annex of the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973 (Revised Annex III);

MEPC 156(55) 2006. Amendments to the Annex of the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973 (Revised Annex III of MARPOL 73/78);

MEPC 157(55) 2006. Recommendation on standards for the rate of discharge of untreated sewage from ships;

MEPC 159(55) 2006. Revised guidelines on implementation of effluent standards and performance tests for sewage treatment plants – Supersedes MEPC 2(VI).

<sup>21</sup> Prevention of pollution (sewage)

MEPC 38(29) 1990. Application of the provisions of Annex IV of the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto, on the discharge of sewage in the Baltic Sea area, MEPC 143(54) 2006. Amendments to the Annex of the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973 (Addition of Regulation 13 to Annex IV of MARPOL 73/78).

<sup>22</sup> Prevention of pollution (garbage)

MEPC 9(17) 1982. Application of the provisions of Annex V of MARPOL 73/78 on the discharge of garbage in the Baltic Sea area;

reception of waste facilities from ships',<sup>23</sup> prevention of pollution of the sea by oil,<sup>24</sup> control of ships and discharges,<sup>25</sup> contravention of conventions and penalties,<sup>26</sup>

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MEPC 31(26) 1988. Establishment of the date of application of the provisions of regulation 5 of Annex V of the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto, on the discharge of garbage in the Baltic Sea area;

MEPC 36(28) 1989. Amendments to the annex of the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973 (Amendments to Annex V of MARPOL 73/78);

MEPC 37(28) 1989. Establishment of the date of the provisions of regulation 5 of Annex V of the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto, on the discharge of garbage in the North Sea area;

MEPC 42(30) 1990. Amendments to the annex of the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973 (Designation of Antarctic area as a special area under Annex V of MARPOL 73/78);

MEPC 43(30) 1990. Prevention of pollution by garbage in the Mediterranean;

MEPC 48(31) 1991. Amendments to the annex of the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973 (Designation of the Wider Caribbean area as a special area under Annex V of MARPOL 73/78);

MEPC 71(38) 1996. Guidelines for the development of garbage management plans;

MEPC 92(45) 2000. Amendments to the Revised guidelines for the implementation of Annex V of MARPOL 73/78 (Resolution MEPC 59(33)) – Amends MEPC 59(33).

<sup>23</sup> Reception facilities for wastes from ships

MEPC 83(44) 2000. Guidelines for ensuring the adequacy of port waste reception facilities.

Implementation of conventions

MEPC 87(44) 2000. Use of Spanish under IMO conventions relating to pollution prevention.

<sup>24</sup> Prevention of pollution (oil)

MEPC 1(II) 1974. Establishment of the list of substances to be annexed to the Protocol relating to Intervention on the High Seas in Cases of Marine Pollution by Substances Other than Oil, MEPC 17(22) 1985. Implementation of Annex II of MARPOL 73/78, MEPC 53(32) 1992. Development of the capacity of ship scrapping for the smooth implementation of the amendments to Annex I of MARPOL 73/78;

MEPC 64(36) 1994. Guidelines for approval of alternative structural or operational arrangements as called for in regulation 13G (7) of Annex I of MARPOL 73/78;

MEPC 88(44) 2000. Implementation of Annex IV of MARPOL 73/78;

MEPC 92(45) 2000. Amendments to the Revised guidelines for the implementation of Annex C of MARPOL 73/78 (Resolution MEPC 59(33)) – Amends MEPC 59(33).

<sup>25</sup> Control of ships and discharges

MEPC 51(32)1992. Amendments to the Annex of the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973 (Discharge criteria of Annex I of MARPOL 73/78).

MEPC 107(49) 2003. Revised guidelines and specification for pollution prevention equipment for machinery space bilges of ships (Amends MEPC 60(33) on Guidelines and specifications for pollution equipment for machinery space bilges of ships).

<sup>26</sup> Contravention of conventions and penalties; MEPC 61(34) 1993. Visibility limits of oil discharges of Annex I of MARPOL 73/78.

reporting of incidents involving harmful substances,<sup>27</sup> combating of spillages<sup>28</sup> and prevention of air pollution from ships.<sup>29</sup>

It is self-evident that the content of these resolutions needs to be implemented for the safe and secure navigation of ships and for sound environmental protection and preservation of the marine environment. It might be argued that the preponderance of IMO resolutions will diminish when their content makes its way into treaties. Until then, their value will not diminish to negligible proportions. Coastal States do have an option to adopt the IMO Resolution or ratify the treaty. Both are valid and the IMO Resolution has a legal validity even though its contents are now found in a treaty. These Resolutions will always be binding upon coastal States that decide to adopt them into their municipal laws without ratifying the corresponding treaty. It remains to be seen whether flag States have a culture of conforming to IMO Resolutions in domestic law.

Where there are new areas untouched by treaties, or by judicial decisions or the writings of jurists, the role of IMO resolutions as a dynamic source of fresh rules of international law of the sea cannot be ignored. These resolutions may over time amount to either custom or its less legal form, usage. While breach of a custom may be punished, breach of a usage does not attract the punishment of law. The consummation of a usage as custom involves two processes that must be satisfied, namely, the material or State practice and the psychological aspects of the customary rule often referred to as the *opinio juris sive necessitatis*.

## PHILOSOPHY OF CRIMINAL SANCTIONS

The kind of punishment that should be meted out to foreign flags that violate domestic laws encapsulating IMO resolutions without encouraging recidivism is not expressly covered by the 1982 LOSC. However, this may be implied as the 1982 LOSC comes quite close to the idea of penal sanctions in the protection of the marine environment, where Article 211 endeavours to harmonize policy among

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<sup>27</sup> Reporting of incidents involving harmful substances: MEPC 138(53) 2005. Amendments to the general principles for ship reporting systems and ship reporting requirements, including guidelines for reporting incidents involving dangerous goods, harmful substances and/or marine pollutants (Resolution A.851(20)).

<sup>28</sup> Combating of spillages: MEPC 12(18) 1983. Regional arrangements for combating major incidents of marine pollution. MEPC 54(32) 1992. Guidelines for the development of shipboard oil pollution emergency plans.

<sup>29</sup> Prevention of air pollution from ships: MEPC 96(47) 2002. Guidelines for the sampling of fuel oil for determination of compliance with Annex VI of MARPOL 73/78.

MEPC 130(53) 2005. Guidelines for on-board exhaust GAS-SO<sub>x</sub> cleaning systems.

MEPC 132(53) 2005. Amendments to the Annex of the Protocol of 1997 to amend the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (Amendments to MARPOL Annex VI and the NO<sub>x</sub> Technical Code).

States on pollution from vessels and Article 217 has a generic provision that “penalties provided for by the laws and regulations of States for vessels flying their flag shall be adequate in severity to discourage violations wherever they occur”; and again in Articles 228 and 230 which deal with the issue of marine pollution beyond the territorial sea of the coastal State, and in its territorial sea “except in the case of a wilful and serious act of pollution in the territorial sea” and the issue of double jeopardy and the imposition of monetary penalties and the observance of the rights of the accused.

There needs to be a balance between ocean law and policy and philosophy such that a suitable form of punishment can be meted out for non-compliance by the impugned foreign flag. It would be possible to consider the IMO resolutions that are incorporated into domestic ocean law and policy framework of States as quasi-legal in structure. In a quasi-legal framework, punitive elements of law have no place. For example, in domestic criminal law, rapists express “their rage” and predatory paedophiles “replay their old scripts”. What message then is the foreign flag sending to the coastal State when they express non-compliance with coastal State rules? As the act of flag States is volitional, how should the coastal State react? In a legal regime, punitive maritime criminal law might remove the source of non-compliance once the reasons for non-compliance are made known and general defences are woven into the statute. Unlike domestic criminal law where medical models may be advanced to explain why rape takes place, in maritime and ocean-related law this may not be a solution. In an actual dispute between the States parties with regard to the implementation of an IMO resolution, the courts should be guided by the “most significant relationship” doctrine. This doctrine States that courts should apply the law of the State that has the closest and most real connection with the dispute. There is no punitive element here but restitution in integrum may prove to be more realistic given the purpose-driven test of implementing the IMO resolution in the first place.

The IMO Resolutions lay down international standards for international shipping and for control of marine pollution. The question of whether IMO resolutions are binding or not depends upon two factors: consent of the coastal State and legal nature of the resolution. Where a State adopts or consents to a resolution and its treaty, it is said to be binding upon that State. Examining the legal nature of an IMO Resolution, being in name a resolution, *ipso facto*, compels it to be regarded as non-binding. However, examining the contents of the resolutions associated with treaties, it seems that a very strong case may be made out for them to be considered as binding norms. Those resolutions not engaged with a treaty may be considered as non-binding norms.

As non-binding norms do not attract penal sanctions, they are said to be of a quasi-legal character. The *Oxford Dictionary* offers the following meaning of the term “quasi”: “seemingly: apparently but not really; being partly or almost independent.” In other words, if these rules are adopted into municipal law, they cannot be of a punitive character. By comparison, “quasi in rem jurisdiction applies when a court is determining the ownership rights of specific persons in specific property. The defendant must be present in the forum State, but the property does

not have to be. In such cases, the plaintiff's remedy is limited to acquiring the defendant's interests in the specific property – no money damages are allowed." Here, too, it is noteworthy that monetary damages are not awarded.<sup>30</sup>

The IMO standards are and may be adopted to suit local needs and conditions. However, the IMO standards are technical and unlike the other so-called soft law standards which are adopted by many international bodies such as the ILO. These standards are of value as they represent an interim, preparatory step towards the final or eventual development of international law. They have a very strong persuasive effect and many standards move from voluntary to mandatory hard law when States pass them into legislation. So, a regime of rules is adopted for behaviour. This also means that new actors have entered the area of international law. The balance between hard law and soft law can achieve many objectives in an ocean law and policy framework.

The practice of technical committees in adopting the standards encapsulated in IMO resolutions for enhancing safety of navigation is particularly interesting. An example of a practical application of the IMO resolutions is seen in the IEC Technical Committee 80 established in 1980, which has issued several thematic brochures on Maritime Navigation and Radiocommunication Equipment where reference is made to the IMO Performance Standards where applicable. In this way, they have given effect to IMO Resolution A.823(19) in Automatic Radar Plotting Aids, MSC.64(67) Annex 4 in Automatic Tracking Aids, MSC.64(67) Annex 4 in Electronic Plotting Aids and A.817 (19) amended by MSC.86(70) Annex 4 in Electronic Chart Display and Systems, MSC.64(67) Annex 1 in Integrated Bridge Systems, and MSC.86(70) Annex 3 in Integrated Navigation Systems to name a few. As the contribution of technical committees towards lawmaking and *opinio juris* has not been explored so far, it is quite clear that this is fast becoming an area of practical importance and cannot remain in the shadows for long. This is also because, in 1999, the IMO's Assembly adopted Resolution A.900(21) on Objectives of the Organization in the 2000s,<sup>31</sup> the first of which is to continue the proactive policy of the 1990s to enhance safety of navigation and to control marine pollution of the seas and oceans. To do so, Formal Safety Assessment should be used whereby the emphasis was shifted on to people and there had to be effective uniform implementation of existing IMO standards and regulations. Among others, the Resolution highlights the worldwide implementation of the standards and regulations adopted by the organization.<sup>32</sup> This is an example of the worldwide application of IMO standards and norms.

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<sup>30</sup> August, R., n. 16, at 473.

<sup>31</sup> [http://www.imo.org/includes/blastDataOnly.asp/data\\_id%3D14472/900.pdf](http://www.imo.org/includes/blastDataOnly.asp/data_id%3D14472/900.pdf) (visited on 1 December 2006).

<sup>32</sup> [http://www.imo.org/includes/blastDataOnly.asp/data\\_id%3D14472/900.pdf](http://www.imo.org/includes/blastDataOnly.asp/data_id%3D14472/900.pdf) (visited on 1 December 2006).

## QUASI-LEGAL CHARACTER

It could be argued that IMO resolutions are technical norms that create expectations of behaviour in States for they are drafted by developed and developing maritime nations. Given the international context in which they are adopted, and the fact that the subject matter of the norm has received universal recognition, it may be argued that they have the pull of an international treaty even though they are not of such kind. They are more than political or moral commitments. Legally binding obligations are chosen very carefully by States and where IMO resolutions are related to IMO treaties, they help in shaping consensus on the obligations. To begin with, these resolutions have an international character and acquire a national or regional trait eventually. Treaties have a place in municipal laws and resolutions ought to have a place in the policy setting of the municipal law. They are quasi-legal because they are technical, specific and vital for domestic implementation and compliance as they deal with safe and secure shipping and prevention of marine pollution. They are special norms that set standards of behaviour in scientific and legal domains. This is particularly so as the IMO has factored the highly regarded precautionary principle into its work. These resolutions are the Recommendations, Standards and Measures such as the Resolutions of the Marine Environment Protection Committee (MEPC).<sup>33</sup>

Where coastal States have adopted IMO resolutions into their municipal law to promote safe and secure navigation and for protection and preservation of their marine environment, all flag States should after examination of the facts as a whole, *suo moto*, abide by these rules in foreign maritime zones even if they have voted against the impugned resolution. These resolutions could play an important role in national ocean law and policy framework in the Asia-Pacific region, when adopted by the region or a portion thereof. They may be interpreted as an evidentiary source of law under Article 38 of the Statute of the ICJ and not as a formal source as resolutions are not mentioned therein unless their normative content amounts to a custom having acquired sufficient State practice and *opinio juris sive necessitatis* or represents *jus cogens* or is tantamount to an *erga omnes* right or obligation or is a general principle of law recognized by civilized nations. For purposes of due diligence performance requirements of coastal States, municipal legislation should incorporate or transform these rules for application in their territorial seas or in straits used for international navigation subject to the caveat that in straits, the right of transit passage of ships and aircraft may not be compromised. Just as treaties

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<sup>33</sup> There are other IMO resolutions on a wide array of subjects such as the Resolutions that refer to the MEPC, namely A.297 (VIII) on the Establishment of a Marine Environment Protection Committee and A.346 (IX) on Approval of the Reports of the Marine Environment Protection Committee. See also [http://www.imo.org/InfoResource/mainframe.asp?topic\\_id=435](http://www.imo.org/InfoResource/mainframe.asp?topic_id=435) (visited on 1 December 2007). For a recent paper that discussed issues relating to IMO Assembly Resolution A.981(24) on recycling of ships, see Dr Mikelis, Nikos, "Developments and issues on recycling of ships" presented at the East Asian Seas Congress, Haikou City, Hainan Province, PR China, 12–16 December 2006.

become binding upon States that ratify them, IMO resolutions become binding upon States that adopt them.

Schachter's arguments, that deny the General Assembly the authority to adopt resolutions that purport to assert legal norms without recourse to treaty provisions but nevertheless are declaratory of the law either in general terms or in a particular case, may be drawn upon in the context of IMO resolutions that are not related or connected to a treaty/amendment. Resolutions of the IMO and those of the UNGA are rather different. The IMO is the central global forum set up under the ECOSOC of the UN for the international community, with the competence to discuss and adopt the necessary legal and scientific infrastructure for safe, secure and efficient navigation and control of marine pollution. The IMO has become a major instrument of States for articulating their national interests and seeking general support for them. The conception of [Assembly] resolutions as expressions of international law and as expressions of common interests and the "general will" of the international community has been a natural consequence. It also has naturally followed that in many cases the effort is made to transform the "general will" thus expressed into law. One obvious way of accomplishing that transformation is to use a resolution as a basis of a treaty by the [Assembly] itself or by a diplomatic conference convened by it. The treaties are then open for adherence by Member States and other States. A considerable number of such treaties have been concluded following a formative stage in which a resolution was adopted. This two-stage process presents no problems under the UN Charter or classical international law. States are, of course, free to adhere to such treaties or not as they choose in keeping with their constitutional procedures. There is no legal uncertainty in that process. "... Legal uncertainty has, however, been created when the General Assembly adopted resolutions which purported to assert legal norms without recourse to the treaty process. Such resolutions 'declared the law' either in general terms or as applied to a particular case. Neither in form nor intent were they recommendatory."<sup>34</sup> Schachter questions the legally binding nature of these resolutions when the GA had no constitutional authority to adopt the mandatory decisions. Here again it is submitted that the GA resolutions are different from the IMO resolutions. The IMO possesses the constitutional mandate to adopt the IMO resolutions. They are authoritative and so should be binding upon the States that accept them whether unanimously or almost unanimously. So long as the resolution is not *ultra vires* the constitutional mandate of the IMO, it may be considered binding upon States parties that accept it according to their constitutional provisions. Though worded as a Guideline or Recommendation, it is nevertheless a declaration which expresses the *opinio juris communis* of States participating in that resolution. As States are required to vote responsibly at all times but perhaps do not, instead of categorizing these IMO resolutions as binding, they are instead referred to here as quasi-legal non-binding norms. In this

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<sup>34</sup> See Schachter, O., "International law in theory and practice" in Carter, Trimble and Bradley, *op. cit.*, n. 16, at 129.

way they are in between two polar categories: “binding” and “hortatory”. To qualify as a binding customary rule, the elements of State practice and *opinio juris sive necessitatis* must be fulfilled, even though some commentators are satisfied with only the *opinio juris*. The credibility of States in the adoption of an IMO resolution may be differentiated from their performance at the UNGA. The language of IMO resolutions also assists us in this matter for unlike UNGA resolutions, they do not couch “principles” as law or use equivocal language to this end. If voting on a UNGA resolution commits the State to it or expresses the stance of the State on that issue, the adoption of an IMO resolution by that State empowers the State to use the rule in a national ocean law and policy instrument which may be changed periodically or from time to time.

The use of IMO resolutions may enable a State to assess the legal, scientific and financial requirements for the implementation of that resolution in future. Just as Schachter categorized these UNGA norms as evidentiary in character, so too in the present case they are regarded as “evidentiary” in nature. Schachter adds: “We would assess the degree and character of support received in the United Nations and the relation if any of the asserted rule to an underlying Charter or customary law principle . . . [It] would be pertinent to determine whether State practice both before and after the adoption of the resolution varies so significantly from the norm asserted as to deprive it of validity as custom or agreed interpretation. This determination – namely, whether inconsistent practice should vitiate an asserted principle – may involve drawing distinctions among norms based on value judgments of their significance . . . They require justification grounded in values accepted by the community of States as reflected in their authoritative statements and collective declarations.”<sup>35</sup>

When accepted as evidence, they are also subject to rebuttals. For non-concurring States, they are not binding at law unless they are dealing with safe and secure navigation in a Particularly Sensitive Sea such as a strait used for international navigation where the coastal strait State cannot suspend or hamper transit passage. Flag States in such seas have to agree either on a bilateral or multilateral basis with the strait State that they in turn will not jeopardize the marine environment and voluntarily agree to the implementation of the IMO resolution. In the context of UNGA resolutions declaring apartheid illegal, Schachter said: “On the other hand, if a resolution is persuasive evidence of an existing obligation, then a dissenting State may be considered bound by that obligation.”<sup>36</sup> This may be true for the IMO resolutions too.

When drafting any policy for the lawful government of a nation, one should have explicit prioritization of the list of projects to be accomplished so that there is a start and a finish to that policy for the period under review. One should be able to spot the problem areas, the technical criteria and economic cost factors, and costs benefit

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<sup>35</sup> Schachter, *loc. cit.*, n. 34, at 131 and 132.

<sup>36</sup> *Ibid.*, at 132.

analysis based on the best information available. Issues relating to economics and law are inseparable. Questions on hard to compare alternatives such as what do we tackle and how, what laws are appropriate and “in place”, what has been the investment of the federal and State government and the non-governmental organizations in the projects identified so far are equally pressing on the mind of the policy drafter. Likewise, questions relating to institutional rigidities such as the number of institutions involved, clash of their institutional priorities and the role of international agencies also come to mind. Following from this, it is also incumbent on the government to examine political issues, election manifesto promises to the people and address issues such as “who benefits” and “has the project increased the welfare in the country”. Furthermore, the government has to undertake several steps to end “conflicts”, resource depletion, check malnutrition, prevent communicable diseases among species, improve upon the income of the coastal populations and islanders and alleviate their suffering from hunger. The government of a State would have to take cognizance of its international treaty obligations but before it adopts a piecemeal approach to treaty ratification, quasi-legal non-binding norms can play an effective role by giving the government a feel for the nature of the rights and obligations. Focusing on the international plane, the government has to examine the international norms and inventorize its international obligations, for example on sustainable development.

To improve sustainable development, the IMO focuses on the improvement of the safety of merchant and fishing fleets, efficiency of maritime activities, increased global trade, improved balance of payments and enhanced marine tourism, cleaner waters and coasts, environment protection through integrated, greater access to protein through improved fisheries catches and coastal zone management. It also endorsed the promotion of sustainable livelihoods and poverty eradication, employment for seafarers in the global shipping and fisheries industries, consequent beneficial impact and increased foreign exchange earnings, and at the local level, especially in coastal/fishing communities.

#### PRECAUTIONARY PRINCIPLE

Resolution MEPC.67(37) adopted on 15 September 1995 notes that General Assembly resolution 47/191 requests the United Nations Specialized Agencies to report on steps taken to strengthen and adjust their activities in line with Agenda 21. The Resolution acknowledges that the Marine Environment Protection Committee is IMO’s focal point for UNCED follow-up actions, and in November 1994 approved a report to the Commission on Sustainable Development in fulfilment of UNGA Resolution 47/191. The above MEPC resolution also endorses that Principle 15 of the Rio Declaration calls for the application of the Precautionary Approach and in pursuance to that adopts the guidelines on incorporation of the Precautionary Approach in the context of specific IMO activities, on an interim basis until further experience with their application has been gained. It requests all relevant IMO bodies to review the guidelines and provide comments to the Committee with a

view to their eventual submission to the Assembly for adoption as a guidance for all relevant IMO activities.

“The Precautionary approach as set out in Principle 15 of the Rio Declaration states: In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”

“In Chapter 17 of Agenda 21, it states further:

17.21 A precautionary and anticipatory rather than a reactive approach is necessary to prevent the degradation of the marine environment.”

Resolution MEPC67.(37) and 37/22/Add.1 in section 2 provide that the precautionary approach has been incorporated into the work of IMO. In section 4 the decision-making and management processes are listed. To incorporate the precautionary approach, the organization should ensure that anticipation and prevention of environmental problems arising from any regulatory activities of IMO and striving for continual improvement in all facets of those activities are incorporated into its work. It is also vital that solutions to problems and consideration of new and existing policies, programmes, guidelines and regulations are developed in accordance with the precautionary approach. Likewise, it states that where action is necessary and options may involve uncertainty, all options are evaluated consistent with the precautionary approach. This is driven home in Resolution MEPC.50(31), MEPC 31/21 at Annex 16 on ballast water and sediment guidelines in section 9 on Future Considerations where it is provided that “It must be made clear, however, that there is a lack of research knowledge and practical experience on the cost, safety, effectiveness, and environmental acceptability of these possible approaches. Any proposed chemical or biocidal treatments should be environmentally safe and in compliance with international conventions. Authorities carrying out or commissioning research studies into these or other relevant areas are encouraged to work cooperatively and provide information on the results to the Organization.”<sup>37</sup>

## THEORY OF COMPLIANCE

In the Torres Strait, the IMO Resolution tried to solve a safety of navigation issue to protect and preserve the marine eco-system of the Strait. To implement an international obligation domestically, what is the most effective technique to maximize flag State compliance with the resolution? The term “compliance” has often been used in a fluid manner to include terms such as implementation, effectiveness or even

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<sup>37</sup> The IMO has not adopted any resolution on tsunamis. For IMO’s response to this disaster, see [http://www.imo.org/Newsroom/mainframe.asp?topic\\_id=1018&doc\\_id=4603](http://www.imo.org/Newsroom/mainframe.asp?topic_id=1018&doc_id=4603) (visited on 2 July 2005).

enforcement. These processes require international political and legal cooperation. Domestic laws make the link between an international obligation and the national legal system. Compliance in relation to a resolution would mean how far that State has complied with the resolution. Implementation and compliance with an IMO resolution would increase its effectiveness.

Enforcement just as in other international environmental treaties would mean in the present context the methods available to force States to implement and comply with the obligations of the resolution. Effectiveness is the effect of the resolution as a whole when wholly complied with by States. In other words, was the resolution able to achieve the envisaged goal? What was the enthusiasm of States during the negotiations of the resolution and what was the international public opinion on this resolution? Extrapolating from the primary rule system of international environmental law, it is argued that the IMO Resolution only requires a clear and specific, albeit, a minimal behavioural change in flag ship individuals such as the captain and crew when asked to take on compulsory pilotage. As Australia neither lacks the resources nor the technological abilities to undertake this pilotage for foreign flags, foreign flags have very little reason for non-compliance. All weaknesses relating to compliance by third States should be taken into account during the drafting of the IMO Resolution. The primary rule system has been explained as follows:

The primary rule system is the actual contents of the treaty that is agreed upon by the parties. This primary rule system defines the behaviour that is required by the specific treaty, or in other words, the duties imposed upon the participatory States under the specific treaty. The primary rules are directly related to the activity that the environmental accord is supposed to regulate. A first important aspect of the design of the primary rule system relates to whether it requires any behavioural change, what the costs of this change will be, and by whom this behavioural change is required. It is easier to achieve compliance if the degree of behavioural change and the costs of this change are low.<sup>38</sup>

Where the international rules do not show a differentiation of the obligations, local laws may adopt a “managerial type of approach” and where instead of penal provisions, the local laws may perhaps take into account the differing capacities and prevent non-compliance in the local laws by adopting bilateral or multilateral agreements on such compulsory pilotage. Other essential aspects of compliance are accuracy of information on the environmental risks, transparency of implementation and third-party compliance monitoring. States transform their local laws “from an enforcement to a managerial approach to compliance”.<sup>39</sup> Incapacity on the part of the foreign flags to comply with compulsory pilotage may be documented and publicized.

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<sup>38</sup> Faure, M. and Lefevre, J., “Compliance with international environmental agreements, the global environment: institutions, law and policy” in Carter, Trimble and Bradley, *op. cit.*, n. 16, at 932.

<sup>39</sup> *Ibid.*

## EVIDENTIARY CHARACTER

Article 38(1) of the Statute of the International Court of Justice (ICJ) does not refer to the Resolutions of the UN or of its specialized agencies such as the IMO. It is trite law that UNSC Resolutions when validly adopted and passed are binding upon the States mentioned therein, as part of the mandate of the UN. The General Assembly of the United Nations has the mandate under Article 10 of the UN Charter to discuss any appropriate matter and make non-binding recommendations to its members unless the Security Council has dealt with the matter under Article 12. The issue then arises as to the status of the UNGA Resolutions. The arguments have been varied: Sloan has argued that each resolution must be weighed according to its own merits; that budgetary decisions under Article 17 of the Charter are binding upon the members and that non-binding legal resolutions carry an obligation of cooperation and good faith.<sup>40</sup> Professor Ian Brownlie wrote that Resolutions of the UNGA are not binding in general on Member States, but when they are concerned with general norms of international law, then acceptance by a majority vote constitutes evidence of the opinions of governments in the widest forum for the expression of such opinions: “Even when they are framed as general principles, resolutions of this kind provide a basis for the progressive development of the law and the speedy consolidation of customary rules. In general, each individual resolution must be assessed in the light of all the circumstances and also by reference to other evidence of the opinions of States on the point in issue.”<sup>41</sup>

Commentators are divided in their opinion about the effect of GA resolutions. Some are of the view that the position taken at and resolutions adopted by the UNGA particularly in the field of human rights are binding and may be evidence of customary international law. This legitimacy has been questioned by some authors such as Oscar Schachter, discussed above. A UNGA resolution is only binding where it contains a rule of customary international law. According to the orthodox view, the elements of customary international law are the *corpus* of the law and the *animus* of States that accompany it (State practice and *opinio juris*). By *corpus* is meant the material or objective element which consists of a usage – *consuetudo* embodying a rule of conduct. The *animus* is the conviction on the part of States that the rule is legally binding. Such a conviction has to be an acceptance, a recognition of or an acquiescence in the binding character of the rule in question. In other words, it has

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<sup>40</sup> Sloan, “General Assembly resolutions revisited”, 58 *BYIL* 93 (1987).

<sup>41</sup> Brownlie, I., *Principles of Public International Law*, 5th ed., Oxford: Oxford University Press, 2002, at 14 and 15. Examples of important “lawmaking” resolutions are the Resolution which affirmed “the principles of international law recognized by the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal; the Resolution on Prohibition of the Use of Nuclear Weapons for War Purposes; the Declaration on the Granting of Independence to Colonial Countries and Peoples; the Declaration on Permanent Sovereignty over Natural Resources and the Declaration of Legal Principles Governing Activities of States in the Exploration and Use of Outer Space”. See Brownlie, *ibid.*, at 14 and 15.

to amount to a rule of the general law binding on all, which the Statute of the ICJ speaks of as “international custom, as being evidence of a general practice accepted as law”.<sup>42</sup> This view finds expression in Article 38(1) of the Statute of the ICJ which states that the Court applies international custom as being evidence of a general practice accepted as law. For example, the decisions in the *S.S. Lotus* case,<sup>43</sup> the *Asylum* case<sup>44</sup> and *Right of Passage* case<sup>45</sup> stress the importance of the subjective element of *opinio juris*. If the international community of nations wishes to give a binding legal effect to its resolutions, then there has to exist the requisite *Opinio Generalis Juris Generalis* among members of the United Nations. Until then it remains merely recommendatory with a potential binding force (*in posse*).<sup>46</sup> While there is no minimum time limit imposed for the formation of a customary rule (*North Sea Continental Shelf Cases* 1969), the universal acceptance of the rule in question by States is important (*Fisheries Jurisdiction Case* 1973). A State’s voting pattern at the UNGA is significant for it shows one aspect of State practice, but unless it is accompanied by the necessary *opinio juris* it has no legally binding value (*Nicaragua Case* 1986 and *North Sea Continental Shelf Cases* 1969) and it falls within the body of “soft law”. The ICJ has accepted the possibility of a resolution being part of customary international law (*North Sea Continental Shelf Cases* and *Nicaragua Case*). The question is whether all UNGA Resolutions should be considered binding or only some of them depending upon their content, given the political nature of the GA.

The Memorandum of the United Nations Office of Legal Affairs on the Use of the Terms “Declaration and Recommendation” states that a declaration in international law is a formal and solemn instrument, such as a Declaration of Human Rights. A Recommendation is less formal. Other than this strict legal distinction there is no difference between the two. Both are adopted by a UN organ, and as such, though not binding upon Member States like a treaty is, there is an expectation that the Member States will abide by it. An expectation may eventually be justified by State practice and a declaration could become custom.<sup>47</sup> However, based on the intention of the parties, a Declaration could be equivalent to a treaty if intended by the parties to be legally binding.

Article 18 of the United Nations Charter states that a resolution of the General Assembly requires a two-thirds majority on important matters. Where a resolution has two-thirds majority it is of political significance.

Cheng is of the view that customary international law applicable *erga omnes* needs only one single constitutive element which is the *opinio juris* of States, and if a new *opinio juris* should grow overnight, he questions whether it should then give rise

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<sup>42</sup> Cheng, B., *Studies in International Space Law*, Oxford: Clarendon Press, 1997, at 138.

<sup>43</sup> (*France v. Turkey*), *PCIJ Series A*. No. 10 (1927).

<sup>44</sup> (*Columbia v. Peru*), *ICJ Rep. 1950*, at 226.

<sup>45</sup> Preliminary Objections, *ICJ Rep. 1957*, at 125.

<sup>46</sup> Cheng, *op. cit.*, n. 42, at 142–143.

<sup>47</sup> E/CN.4/L.610 (2.4.62), at 1–2.

to instant customary international law. He further argues that usage or practice is still a normal element of the rule of customary international law, where instead of being a constitutive and indispensable element, it is only an evidence of that legal rule and of the *opinio juris*.<sup>48</sup>

Ago's view is that UNGA resolutions that have had a follow-up action carried through may minimize the difference between a resolution and an established source of international law.<sup>49</sup>

Professor Onuma wrote, in the context of the adoption of comprehensive standards of human rights, that "in order to carry out global human rights policies with the limited resources of our international society, *we must first establish human rights standards which are legitimate from international, transnational and intercivilizational perspectives*, and tackle human rights problems not on the basis of political considerations or sporadic concerns, but on priorities in terms of seriousness and urgency of the problem".<sup>50</sup> Though at an earlier point in the article, Professor Onuma did point out that: "From the viewpoint of international law, the multilateral human rights conventions are more important than the declarations or resolutions, because while the former formally binds contracting parties, the latter generally has only recommendatory force".<sup>51</sup> However, Professor Onuma did not altogether set aside the argument that declarations and resolutions may embody norms of general international law on human rights by his examination of such documentation further in the article.<sup>52</sup> Extrapolating from Professor Onuma's arguments, it is my submission that perhaps the IMO Resolutions may just pass the intercivilizational test in setting policy standards as developing and developed maritime States representative of Asia, Africa, Europe and many other regions bring to bear their experiences in the maritime sector and this fact should give it the necessary legitimacy towards an intercivilizational approach to maritime shipping and cleaner oceans.

### **Legal dispute and evidence before the international court**

As the question is whether an IMO resolution can create a rule of international law which in turn creates a binding obligation, a dispute between States Parties, assuming that there is no Article 53 situation, has to be brought under one of the categories of Article 36 of the Statute of the ICJ, set out below.

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<sup>48</sup> Cheng, *op. cit.*, n. 42, at 142–143.

<sup>49</sup> Ago, Shin-ichi, "Follow-up of United Nations resolutions", Extract from *Ho to Seiji – 21 Seiki Eno Taido* (Law and politics – Quickening toward the 21st Century), Vol. 1, November 1995, at 80 and 81.

<sup>50</sup> Onuma, Y., "Towards an intercivilisational approach to human rights: for universalisation of human rights through overcoming of a westcentric notion of human rights", 7 *Asian Yearbook of International Law*, at 73.

<sup>51</sup> Onuma, *loc. cit.*, n. 50, at 71.

<sup>52</sup> *Ibid.*, at 72 and 73.

Article 36

1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.
2. The States parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
  - a. the interpretation of a treaty;
  - b. any question of international law;
  - c. the existence of any fact which, if established, would constitute a breach of an international obligation;
  - d. the nature or extent of the reparation to be made for the breach of an international obligation.
3. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain States, or for a certain time.
4. Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court.
5. Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.
6. In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

If IMO Resolutions are the subject matter of a dispute before the ICJ, they may be brought under Article 36(2)(a) above under the provisions of the 1982 LOSC that refer to GAIRAS rules which have been ascertained by the IMO as a reference to its treaties and resolutions.<sup>53</sup> As they represent the subject matter of the dispute, then surely the Resolutions are not convincing evidence but legal argument. There can be a submission of additional evidence outside of the Rules of the Court, Articles 6, 29, 57, 58, 62, 63, 66, 70, 71, 72 and 79, based on the equality of the States Parties to the

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<sup>53</sup> It might be possible for IMO resolutions to fall under limbs (b) or (d) of Article 36 (2), provided the Resolutions directly referred to a question of international law or expressly contained a recognised international obligation under custom or jus cogens or is an erga omnes obligation or right. Situations such as the Torres Strait incident discussed above may come under limb (c). This might prove to be a source of contention.

dispute. In the *Nicaragua Case (Merits)*<sup>54</sup> in paragraph 29, the ICJ held that for the purposes of deciding whether the claim was well-founded in law, the principle of *jura novit curia* signified that the Court was not solely dependent upon the argument of the parties before it with respect to the applicable law. Sufficient evidence must be brought to the Court to show that the dispute is not politically inspired but legally based and sufficient evidence has to be adduced for the legal case. This would also be the case where the coastal State has enacted budgetary legislation for specific provisions for funds to be used in this regard. From the above, it may be inferred that a dispute under an IMO Resolution will fall within Article 36(2)(a) of the Statute of the ICJ for it to be considered a justiciable dispute with the relevant evidence and legal argument. It is also trite law that Article 38 of the Statute of the ICJ does not refer to IMO Resolutions as a source of law unless the Resolution has crystallized as a rule of custom or has become a rule of treaty, whether regional or global. Under this Article, IMO Resolutions can play the role of convincing evidence before the Court. Following through, the next question is whether there has to be some measure of consistency between Articles 36 and 38 to stem the dichotomy that arises where an IMO Resolution is the subject matter of a dispute under Article 36 as shown above but not a source of law but remains evidentiary in character under Article 38.

Article 297(1) of the 1982 LOSC provides for compulsory dispute settlement procedures concerning the interpretation or application of the provisions of the LOSC by a coastal State in the exercise of its sovereign rights or jurisdiction. Paragraph (c) of this Article provides that this provision is applicable where a “coastal State has acted in contravention of specified international rules and standards for the protection and preservation of the marine environment which are applicable to the coastal State and which have been established by this Convention or through a competent international organization . . .”. Where States Parties choose the ICJ under Article 287(1)(b) of the 1982 LOSC for compulsory dispute settlement, Article 288(1) confers jurisdiction on the court “over any dispute concerning the interpretation or application of this Convention . . .” or under paragraph 2 “over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention . . .”. While the IMO Resolutions could fall under Article 288(1) as they are part of the GAIRAS, it is less certain whether they amount to an “international agreement” under paragraph 2. For this determination, as discussed above, recourse must be had to the legitimacy of the resolution, intention of States Parties to the resolution, and whether the text was adopted by consensus. Article 223 requires States which institute proceedings for a violation of “Section 5: International Rules and National Legislation to Prevent, Reduce and Control Pollution of the Marine Environment” to take measures to facilitate the proceedings such as the hearing of witnesses and the admission of evidence.

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<sup>54</sup> *Nicaragua v. United States (Merits)*, ICJ Rep. 1986 on-line, <http://www.icj-cij.org> (visited on 20 October 2007).

## PROFESSOR SHELTON'S ARGUMENTS ON NON-BINDING NORMS

Professor Shelton distinguished between four categories of instruments based on whether the form was binding or non-binding and whether the content was binding or non-binding. This served as a basis for categorizing instruments and for clarifying hypotheses related to compliance.

The distinction drawn based on the form of the instrument and the instrument's purpose is an essential parameter in framing our understanding of compliance . . . The results from the case studies on compliance with soft law indicate that the answer is mixed: in some cases the binding instrument evokes much greater compliance, in others there may be little difference, and in still others a non-binding legal instrument may evoke better compliance than would a binding one. In general, the same factors are at play and the pathways through which compliance takes place are the same. Where domestic institutions for enforcing law, such as the judiciary, are not available, or in the absence of domestic legislation or a customary international law rule, the various international and national incentives and pressures to comply may often be less. Moreover, it is less likely that the institutions often associated with agreements will be created for soft law instruments.<sup>55</sup>

The first hypothesis of the study was that the context in which soft law developed would affect compliance with the norm . . . the circumstances that led to the negotiation of a non-binding obligation affected its compliance. *The requirement in the UN Convention on the Law of the Sea to give effect to "generally accepted standards" increases the likelihood of compliance with the non-binding standards set for marine pollution by the IMO*<sup>56</sup> (emphasis added).

Generally, the research confirmed that the consensus about the norm positively affected compliance. For example, the case on drift net fishing and land mines, and the shared common norm of protecting the Antarctic, confirm this.

The second hypothesis was that where it was costly to comply with soft law, either because of economic costs or the lack of technical, administrative, or other capacity, compliance was less likely . . . Capacity of the actor and the lack of proper infrastructure to comply also affected compliance. So, third States' assistance may be required to spur compliance. Institutional mechanisms for monitoring and supervising compliance with soft law obligations are crucial.

Professor Shelton also identified six factors that influence non-binding norms as set out below, of which three are important for the present discussion:

- (1) The force of the Continuing Relationship among Participants factor.
- (2) The Reputation factor.

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<sup>55</sup> Shelton, *loc. cit.*, n. 1, at 535 and 536.

<sup>56</sup> *Ibid.*, at 536 and 537.

- (3) Consensus on the Underlying Norm factor.
- (4) Maximizing Welfare and Increasing Efficiency.
- (5) The threat of legal enforcement.
- (6) The Institutional Setting.<sup>57</sup>

The force of the Continuing Relationship among Participants factor is important for non-binding instruments are generally designed to influence the behaviour of States and other actors for numerous years or indefinitely. States must engage with each other constantly in the international system. In this sense, they are engaged in an ongoing business relationship. However, the theory suggests that for non-binding instruments, States may need to be engaged in a somewhat tighter relationship, either one focused on the issues that are the subject of the agreement or otherwise linked together closely in their disparate dealings. . . . Pressures from civil society may be brought to bear to elicit compliance with the instruments. . . . Compliance with non-binding instruments would enhance a State's reputation, since a State would be known to comply even if it had not assumed a binding obligation. The source for developing the norms must be viewed as legitimate by the international community. A consensus on the norm tends to give legitimacy to the norm. Perceived legitimacy in turn fosters compliance.<sup>58</sup>

*It is submitted that when we extrapolate from Professor Shelton's arguments, we find that the IMO resolutions, in terms of form and content, as far as purpose and compliance are concerned, may well be binding resolutions. The resolutions should evoke better compliance as they are capable of responding to the demands of technology. They are pointers to States to the way forward and have no sanctions attached to them. They reflect the available best practices of the international community and could prove to be a clear statement of the goals that States must aspire to achieve in an ocean policy. In particular, where domestic legal systems lack the full spectrum of ocean-related and maritime legislation and institutions for enforcing such laws, IMO Resolutions serve as good policy indicators. Likewise, where rules of customary international law are of unclear applicability in a domestic legal system, then again IMO Resolutions on such matters may prove to be invaluable when they are included in a national ocean policy.*

However, if IMO resolutions were considered quasi legislative in character and were a part of a national oceans policy, then States could still apply the benefit of the

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<sup>57</sup> *Ibid.*, at 535–545. For informal social norms, research indicates that the institutional setting affects compliance. *E.g.* Antarctica Treaty Consultative Parties within the context of the Antarctic Treaty (Shelton, *loc. cit.*, at 545). According to Kellman, the recommendations come in where the treaties leave off. There is substantial compliance with them, because of the institutional setting and the link to the treaties. NGOs and global civil society play important roles in fostering compliance with international soft law. They can provide important input into relevant institutions and put pressure on governments and other actors to comply. They are part of the institutional context (Shelton, *ibid.*, at 546).

<sup>58</sup> *Ibid.*, at 540–543.

treaties as IMO resolutions will encapsulate the essence of a treaty. States that find it difficult to adopt the basket of conventions approach in their legislation may find it useful to adopt the “basket of Resolutions” approach.

It is submitted that when we apply Professor Shelton’s second hypothesis to the IMO Resolutions we find that they have been adopted with the active and continuous participation of all States, developing and developed, with an interest in the subject matter. The meetings are continuous and the subject matter of the agenda requires States to engage in a continuous dialogue. The norm-creating culture of the IMO thus becomes legitimate in the eyes of the international community.<sup>59</sup>

## CONCLUSIONS

The Oceans Commission is of the view that numerous global instruments lead to uncertainties at the national level. However, they point out that more rules are needed in the following inadequately developed areas of ocean law as follows:

- current international agreements are required to reflect the “precautionary principle”;
- specified standards and recommended applications are required to be drawn up to reinforce global and regional framework agreements.<sup>60</sup>

From the above discussion, it is quite apparent that IMO Resolutions contain international standards and recommendations that may be adopted by States. Many of these resolutions are a precursor to the IMO Conventions that deal with issues relating to the prevention, reduction and control of marine pollution and protection of the marine environment, effective implementation of Port State Control, the implementation of the London Convention, the Protocol to the London Convention, all issues relating to Maritime Safety of Navigation and the actual adoption of conventions. These resolutions have played a tremendous role in shaping the past, present and future conventions concluded by the IMO. Even though they are tantamount to a rule of law, unfortunately the principles of public international law as found in Article 38 of the Statute of the ICJ do not explicitly recognize a category entitled “Resolutions of UN/IMO” as a source of law. As the 1982 LOSC is virtually dependent upon the IMO as an international inter-governmental organization and the IMO Conventions for effective implementation of its provisions, including GAIRAS referred to above, it does make a case out for these resolutions to have some legal standing. The IMO resolutions may be considered the power in a national oceans law and policy framework.

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<sup>59</sup> *Ibid.*, at 543.

<sup>60</sup> See The International World Commission on the Oceans, *The Ocean Our Future: The Report of the Independent World Commission on the Oceans*, Cambridge: Cambridge University Press, 1998, at 149.

Pre-treaty resolutions which contain the nucleus of a valid rule for safe and secure shipping and protection of the marine environment ought to have a quasi-legal effect. It is also possible that over time some of the provisions of the non-binding norms may, besides slipping into customary international law, have ripened into *erga omnes* obligations and rights or even represent *jus cogens*, peremptory norms of general international law.<sup>61</sup> However, there may be a possibility that IMO resolutions may represent the *opinio juris generalis juris* or *opinio juris communis* as they are adopted at the IMO and subsequently find their way into national oceans policies and domestic laws of States.

As coastal States, strait States, port States, archipelagic States and flag States are all dependent upon the IMO conventions, protocols, regulations and codes for their safety and security, this ought to confer greater legal validity upon the IMO resolutions: as legal rules. Where the 1982 LOSC is insufficient for the new millennium, the IMO resolutions may fill in the gaps. As a specialized agency of the UN that has been entrusted with the core duty of protecting the seas and oceans, shipping and the fight against maritime terrorism, the IMO has proved itself beyond doubt, especially in the recent adoption of the 2005 SUA Protocols.

Up to a point, the paper relied on the findings of Professor Shelton whose conclusions are that non-binding norms only become international law when they emerge in customary international law or are incorporated into a treaty. However, this paper argued that the IMO resolutions which are heavy in technical content may be considered as quasi-legal in character and have a role to play in a national oceans law and policy framework of States in the Asia-Pacific region. Reluctantly, it is conceded that these are not treaties and only to that extent are said to be non-binding norms. However, all treaties and resolutions are binding upon those who accept them. On the domestic level, however, non-binding international instruments often become a source of law even before they are obligatory on the international level. States employ non-binding instruments for the following reasons:

- (1) When they do not desire legally binding commitments.
- (2) When they are related to a treaty in some manner.
- (3) Where they precede the treaty, they help in shaping consensus.
- (4) Where a prior treaty refers to them, they may acquire legal validity.

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<sup>61</sup> A good example of the binding nature of legally non-binding norms is found in driftnet fishing. The chapter on Driftnet Fishing authored by Donald Rothwell in Professor Shelton's book demonstrates that there is great compliance with the non-binding UNGA 1991 resolution that calls upon all States to implement fully a global moratorium on all large scale pelagic driftnet fishing by the end of 1992. To ensure that this happened, the UN set up a mechanism whereby the UN Sec-Gen reported to the UNGA on the resolution's implementation. The UN FAO and the UNEP monitored the status of high sea driftnet fishing while States, NGOs and international organizations with fishing interests and the scientific community provided information on such fishing. Shelton, *op. cit.*, n. 1, at 538.

- (5) Subject matter is very important to determine if the resolution is binding or non-binding.<sup>62</sup>
- (6) The content of the norm, the process by which it was adopted, the international context, and especially the institutional follow-up, institutional monitoring, and supervisory mechanism are all important. The compliance pull attributable to law is missing. There is no longer any need to couch obligations in legal terms, as there is a large measure of compliance with the non-binding obligations. They have a place in the modern legal system.<sup>63</sup>

Professor Shelton has stated that non-binding norms are heavy in normative content and are relevant for compliance, enforcement, implementation, monitoring, supervision and effectiveness. There is a freedom of action in upholding these non-binding norms, which generally are a prelude to the treaties themselves.

It is submitted that by adopting the normative content of IMO resolutions into a national oceans law and policy framework, we adopt the minimum/maximum standards and best practices based on a precautionary approach. It is also submitted that the IMO resolutions, like some of the UNGA resolutions, provide the necessary policy infrastructure upon which to build a national oceans law and policy framework which a State can revise and carry through each year without calling for legislative amendments. This is because a policy statement needs to set standards and address the “best practices” on the subject matter with the least red tape. To draft an oceans law and policy paper means to draft a paper that is capable of amendment without involving legal bureaucracy and which is up to date and in consonance with the latest thinking on the subject, which mirrors the developments at the IMO, one of the many relevant organizations. Even if States are unable to implement the conventions due to their technical difficulties, States may aspire to a higher level of conduct by adopting the relevant IMO resolutions as part and parcel of their policy.

It is also submitted that IMO resolutions may be prophylactic in nature, for like the treaties, they could assist in preventing disputes by ensuring that shipping is safe, secure and efficient on clean and secure oceans. When States meet and greet in the name of IMO meetings<sup>64</sup> and resolutions are adopted, there is a great deal of consensus building and indirect settlement of ocean law disputes. If these quasi-legal obligations create rights and duties for States, then at least they are self-adopted. It is

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<sup>62</sup> See human rights where soft law usually preceded hard law in the past, helping to build consensus on the norms. See human rights courts in regional systems only. In arms control, there are more international instruments than regional ones. There are also soft and hard laws existing together; sometimes soft law acts as a precursor or subsequent gap-filler in the environmental field. Soft law follows these agreements and acts to fill in the gaps, bringing in the non-State actors, or allowing solutions when there are scientific uncertainties.

<sup>63</sup> Shelton, *op. cit.*, n. 1 at 554.

<sup>64</sup> See List of IMO Meetings by acronym and dates at [http://www.imo.org/includes/blastDataOnly.asp/date\\_id%3D17589/ListofIMOMeetingsbyacronymmandates.doc](http://www.imo.org/includes/blastDataOnly.asp/date_id%3D17589/ListofIMOMeetingsbyacronymmandates.doc) (visited on 5 March 2007).

the intention of States Parties and the text of the instruments that they consent to that ought to matter. It is probable that there will be implications for third States if the resolutions were to amount to custom under a regional practice unless the persistent objector rule applies. Finally, if IMO resolutions are regarded as legally binding or quasi-legal, then it is a breakthrough not only in Public International Law but also for the Law of the Sea. It is also suggested that perhaps the IMO resolutions will also pass the intercivilizational test laid down by Professor Onuma. This will then mean that the dawn of a new thought process has emerged: an intercivilizational approach to ocean law and governance in the context of the IMO resolutions.

# LEGAL MATERIALS



# STATE PRACTICE OF ASIAN COUNTRIES IN THE FIELD OF INTERNATIONAL LAW\*

## PEOPLE'S REPUBLIC OF CHINA<sup>1</sup>

### JUDICIAL DECISIONS

#### *Dispute over International Air Passenger Transport Contract*

ABDUL WAHEED V. CHINA EASTERN AIRLINES CORP. LTD

**1st Instance Court: People's Court of Pudong New Area, Shanghai Municipality, 21 December 2005**

**2nd Instance Court: No. 1 Intermediate People's Court of Shanghai Municipality, 24 February 2006**

#### **Facts**

On 29 December 2004, the plaintiff bought a discounted air ticket (non-refundable and non-endorsable) issued by Cathay Pacific (CP). The air ticket set forth the arrangement of the journey as follows: China Eastern (CE) Airlines MU 703 from Shanghai to Hong Kong at 11.00 am on 31 December 2004; then CP Airlines from Hong Kong to Karachi at 16.00 pm on the same day. The clauses on the back of the air ticket provided that the contract shall comply with the liability rules and restrictions specified in the Warsaw Convention.

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\* Edited by B.S. Chimni. The responsibility for the content of the contributions is that of the national contributor to the State Practice section. The original footnote form has been retained in each contribution. The year for which the State Practice has been collated is 2006 (and in some cases for part of 2007). However, in many instances State practice for previous years has been included. This editorial decision, as in the past, was taken for two reasons – first, in many instances the record of State practice is available in later years only; second, in the belief that readers may find this State practice useful.

<sup>1</sup> Contributed by Yun ZHAO, Associate Professor, University of Hong Kong.

Because of snow on 30 December 2004, Pudong Airport had to close its service for one hour from 22.00 to 23.00. As a result, 104 flights were delayed that day. On the next day, 43 flights were cancelled and 142 flights were delayed. The MU 703 flight was also delayed for 3 hours and 22 minutes due to bad weather, and the plaintiff was not able to catch the connecting flight to Karachi after arriving at Hong Kong Airport.

When the plaintiff and his family realized that they would miss the connecting flight to Karachi due to the later arrival of flight MU 703 in Hong Kong, they asked CE Airlines' service counter about how to deal with the matter. The CE employee asked the plaintiff to fill in a "Registration Form on Endurance" and said they would help resolve the problem later. After the plaintiff's arrival in Hong Kong, CE's employee offered two solutions to the plaintiff: either to wait for another three days at Hong Kong Airport for the next CP flight to Karachi at the plaintiff's own expense, or to buy air tickets from another air company and fly to Karachi at the price of around HK\$25,000. The plaintiff and his family refused to accept either of the two solutions. With the intervention of Hong Kong Airport employees, the plaintiff bought the air tickets and luggage tickets of Emirates Airline and took its flight to Karachi via Dubai. The plaintiff paid HK\$4,721 in air fares and HK\$759 in luggage fares, totalling HK\$5,480.

### **State practice and implementation**

The plaintiff was a Pakistani citizen. The place of departure and destination of the original air ticket was Shanghai, China and Karachi, Pakistan, respectively. Article 142(1) of the General Principles of Civil Law of the People's Republic of China (PRC) provides that "the application of law in civil relations with foreigners shall be governed by the provisions in this Chapter". Article 142(2) further states that "if any international treaty concluded or acceded to by the People's Republic of China contains any provision different from those in the civil laws of the People's Republic of China, the provisions of the international treaty shall prevail, unless the provisions are the ones on which the People's Republic of China has announced reservations". Both China and Pakistan are contracting parties of the 1955 Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw in 1929 (hereinafter referred to as the 1955 Hague Protocol) and the 1961 Convention Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier (hereinafter referred to as the Guadalajara Convention). The two international conventions are applicable in the present case. Article 28(1) of the 1955 Hague Protocol provides that "an action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the Court having jurisdiction where the carrier is ordinarily resident, or has his principal place of business, or has an establishment by which the contract has been made or before the Court having jurisdiction at the place of destination". Accordingly, Pudong Court had the jurisdiction to hear the dispute.

Article 7 of the Guadalajara Convention provides that “in relation to the carriage performed by the actual carrier, an action for damages may be brought, at the option of the plaintiff, against that carrier or the contracting carrier, or against both together or separately. If the action is brought against only one of those carriers, that carrier shall have the right to require the other carrier to join in the proceedings, the procedures and effects being governed by the law of the court that accepted the case”. As the air ticket held by the plaintiff was issued by CP, the international air passenger transport contractual relationship was established between the plaintiff and CP, with the latter being the contractual carrier. There was no direct international air passenger transport contractual relationship between CE and the plaintiff. CE was only an actual carrier to perform the transport task for the part of the travel from Shanghai to Hong Kong. According to the Guadalajara Convention, the plaintiff is entitled to bring the lawsuit against CP or CE or both as defendants. In the present case, the plaintiff chose to bring the lawsuit against CE only, although CE had the right to require CP to take part in the proceedings. Since the plaintiff claimed only for damages for the flight delay that occurred in the journey from Shanghai to Hong Kong with CE as the actual carrier, CP did not have to be added as a party in the present proceedings.

Article 19 of the 1955 Hague Protocol provides that “the carrier is liable for damage occasioned by delay in the carriage by air of passengers, luggage or goods”. Article 20(1) further provides that “the carrier is not liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures”. The MU 703 flight on 31 December 2004 was delayed due to *force majeure* (bad weather). CE did not need to bear liability for the delay, provided it proved that it had taken all necessary measures to avoid damages occurring because of the delay to the passengers. In this instance the plaintiff had foreseen the result of the delay and had asked CE employees many times for their assistance. CE should have known that the CP connecting flight from Hong Kong to Karachi was every three days and that it was inconvenient for the plaintiff and his family (including one infant) to wait long at a transfer airport. Accordingly, CE was under an obligation to inform the plaintiff of possible disadvantageous circumstances during the transfer and persuade the plaintiff to take a flight on another day. However, CE failed to do so; instead, CE asked the plaintiff to fill in a form on Endurance and told him that it would help to resolve the matter. As such, the plaintiff’s reliance on CE to make appropriate arrangements was reasonable. In normal circumstances, CE should have endorsed the plaintiff’s air tickets to another airline so as to help them fly to Karachi as soon as possible. However, CE proposed two other solutions, which put the plaintiff in a dilemma. Accordingly, CE did not take all necessary measures to avoid the losses that passengers incurred and thus was not exempt from liabilities. CE was therefore liable for compensating the plaintiff’s loss for buying the air tickets at Hong Kong airport.

In the appeal stage, Shanghai No. 1 Intermediate Court confirmed the decision made by the Court of the First Instance. Further comments were made in the judgment. First, once a flight is delayed, the passengers are entitled to get the most

detailed information at the earliest time so as to make the most rational decision. The air company is obliged to make an announcement timely of information on flight delay and provide the passengers with other available journey information when so requested. Second, an air ticket is the *prima facie* voucher proving the existence of the international air passenger transport contract. Once a passenger has paid the full amount of the ticket fare, the air company shall provide the complete transport services. The air company may only cancel some services for a discounted air ticket. A discounted air ticket with the condition of “non-refundable, non-endorsable” merely restricted the passenger from returning or endorsing the ticket due to his/her own reason; such a condition did not deprive the passenger of the right to fly to the place of destination on time. In the present case, with CE failing to fulfil its obligation, the plaintiff had no choice but to buy other tickets. Had CE clearly informed the plaintiff of the unfavourable consequences of flying to Hong Kong, the plaintiff would have avoided the losses. Accordingly, Shanghai No. 1 Intermediate Court decided on 24 February 2006 that the appeal by CE be rejected and that the judgment of the first instance be sustained.

## INDIA<sup>2</sup>

### JUDICIAL DECISIONS

*Definition of “good” extendable to intangible property for the purpose of levying of sales tax – Nature of software program – Incorporation of the concept of “transaction value” into Indian law pursuant to GATT/WTO obligations*

#### TATA CONSULTANCY SERVICES V. STATE OF ANDHRA PRADESH

**Supreme Court of India, 5 November 2004  
(2005) 1 Supreme Court Cases 308**

The appellants, *inter alia*, were the providers of computer consultancy services. As part of their business they prepared and loaded on customers’ computers custom-made software which was termed “uncanned software”. They also sold computer software packages off the shelf which were termed “canned software”. While the appellants were the licensees with permission to sub-license these canned software packages to others, the ownership of the canned software packages remained with those companies or persons who had developed these software packages. The canned software programs were programs like Oracle, Lotus and others. Sales tax

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<sup>2</sup> Contributed by V.G. Hegde, Associate Professor, School of International Studies, Jawaharlal Nehru University, New Delhi.

was imposed on the sales of these canned software packages under the Andhra Pradesh General Sales Act, 1957 holding that these packages were “goods”.

The appellants challenged imposition of sales tax on these canned software packages, arguing that the term “goods” under the Act referred to and meant only tangible movable property. Computer software, according to them, could not be regarded as tangible movable property. A software program, appellants pointed out, was essentially a series of commands issued to the hardware of the computer that enabled the computer to perform in a particular manner. For this purpose, a software program was reduced to a physical form by recording it on a magnetic media such as floppy drives, CDs or hard drives. Appellants further argued that in cases of software the consumer would not get any final product but simply a set of commands which would enable his computer to function. Considering the inherent characteristic and nature of the software, appellants contended that it could not fall within the definition of the term “goods”.

Noting the contentions of the appellants, the Court, *inter alia*, observed that:

the term “goods”, for the purposes of sales tax, cannot be given a narrow meaning. It has been held that properties which are capable of being abstracted, consumed and used and/or transmitted, transferred, delivered, stored or possessed, etc. are “goods” for the purposes of sales tax . . . The test is whether the item concerned is capable of abstraction, consumption and use and whether it can be transmitted, transferred, delivered, stored, possessed, etc. Admittedly in the case of software, both canned and uncanned, all of these are possible.

The Court referred to an earlier case decided by it in 2001 (*Associated Cement Companies Ltd v. Commissioner of Customs* (2001) 4 SCC 593) which dealt with the issue of applicability of customs duty on technical material supplied in the form of drawings, manuals and computer disk, etc. The other important question in this 2001 case related to the actual mode of valuation of customs duty on intangible property. The Court, in the present case agreed with the view expressed in the 2001 case “. . . the moment the information or advice is put on a media, whether paper or diskettes or any other thing, that what is supplied becomes a chattel”. The Court further noted that “it is clear that intellectual property when put on a media would be regarded as an article on the total value of which customs duty is payable”. In other words, “duty was payable on the transaction value determined therein and in determining the transaction value there has to be added to the price actually paid or payable”. The Court further noted the relevant paras of the 2001 case which, *inter alia*, stated: “It will be appropriate to note that the Customs Valuation Rules, 1988 are framed keeping in view the GATT protocol and the WTO agreement.<sup>3</sup> In fact our rules appear to be an exact copy of GATT and WTO. For the purpose of

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<sup>3</sup> The Court was referring to (a) Article VII of the General Agreement on Tariffs and Trade, 1947 and (b) WTO Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994.

valuation under the 1988 Rules the concept of 'transaction value' which was introduced was based on the aforesaid GATT protocol and WTO agreement. The shift from the concept of price of goods, as was classically understood, is clearly discernible in the new principles. Transaction value may be entirely different from the classic concept of price of goods. Full meaning has to be given to the rules and the transaction value may include many items which may not classically have been understood to be part of the sale price."

Taking into account the existing jurisprudence on the issue,<sup>4</sup> the Court stated:

In our view, the term "goods" as used in Article 366(12) of the Constitution and as defined in the said Act is very wide and includes all types of movable properties, whether those properties be tangible or intangible. We are in complete agreement with the observations made by this Court in *Associated Cement Companies Ltd.* A software program may consist of various commands which enable the computer to perform a designated task. The copyright in that program may remain with the originator of the program. But the moment copies are made and marketed, it becomes goods, which are susceptible to sales tax. Even intellectual property, once it is put on to a media, whether it be in the form of books or canvas (in case of painting) or computer discs or cassettes, and marketed would become "goods". We see no difference between a sale of a software program on a CD/floppy disc from a sale of music on a cassette/CD or a sale of a film on video cassette/CD. In all such cases, the intellectual property has been incorporated on a media for purposes of transfer. Sale is not just of the media which by itself has very little value. The software and the media cannot be split up. What the buyer purchases and pays for is not the disc or the CD. As in the case of paintings or books or music or films the buyer is purchasing the intellectual property and not the media *i.e.*, the paper or cassette or disc or CD. Thus a transaction/sale of computer software is clearly a sale of "goods" within the meaning of the term as defined in the said Act. The term "all materials, articles and commodities" includes both tangible and intangible /incorporeal property which is capable of abstraction, consumption and use and which can be transmitted, transferred, delivered, stored, possessed, etc. The software programs have all these attributes.<sup>5</sup>

The Court therefore held that the software program was a "good" and accordingly the appellant was liable to pay sales tax on the software marketed by it.

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<sup>4</sup> *CCE v. Acer India Ltd* (2004) 8 SCC 173. In this case the Supreme Court had considered in detail what a software program was. It had held that a computer and operative software are different marketable commodities.

<sup>5</sup> Article 366(12) of the Constitution defines "goods" as to include "all materials, commodities and articles". Article 366 defines various terms and expressions incorporated in the Constitution.

*International law as a guide to interpret domestic law – Appointment of a Police Officer as a member of the National Human Rights Commission – Scope of application of “Paris Principles” – Application and Interpretation of Human Rights*

PEOPLE’S UNION FOR CIVIL LIBERTIES V. UNION OF INDIA AND ANOTHER

**Supreme Court of India, 18 January 2005  
(2005) 2 Supreme Court Cases 436**

The question before the Supreme Court was whether a former member of the police force is eligible to become a member of the National Human Rights Commission (NHRC) as per section 3(2)(d) of the Protection of Human Rights Act, 1993 (1993 Act hereinafter). Section 3(2)(d) of the 1993 Act provides that persons having “knowledge of, or practical experience in, matters relating to human rights” should be appointed as members of the NHRC. The fundamental question was whether the appointment of a police officer would be consistent with the language of the section and the true intendment of the Act.<sup>6</sup>

The Court, while noting that the challenge was based on the fundamental issue and not on any allegations of a personal nature, referred to the Statement of Objects and Reasons in enacting the 1993 Act which, *inter alia*, stated that “the human rights embodied in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, adopted by the General Assembly of the United Nations on 16-12-1966 stand substantially protected by the Constitution of India”.<sup>7</sup> After considering the salient features of the Act, the Court went on to recount the developments at the international level that resulted in the creation of national human rights institutions, specifically the 1993 Act.<sup>8</sup> The

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<sup>6</sup> This was a Division Bench opinion delivered by Justice Y.K. Sabharwal and Justice D.M. Dharmadhikari. Both gave two separate opinions without concurring on the conclusions. Accordingly, in view of difference of opinion, the matter was referred to a larger bench (see the next case *People’s Union for Civil Liberties v. Union of India and Another* (2005) 5 Supreme Court Cases 363)).

<sup>7</sup> Quoting from the Protection of Human Rights Act, 1993, the Court noted two definitions – “Human Rights” mean the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India (s. 2(1)(d)). “International Covenants” mean the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights adopted by the General Assembly of the United Nations on 16-12-1966 (s. 2(1)(f)).

<sup>8</sup> The Court, *inter alia*, noted that “Articles 1, 55,56,62,68 and 76 of the UN Charter provide the basis for recognition, elaboration of the contents of the standards and the machinery for implementing the protection of human rights. The General Assembly of the United Nations on 10-9-1948 adopted a Universal Declaration of Human Rights. The International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights adopted by the General Assembly of the United Nations on 16-12-1966 form bedrock of international recognition of human rights.”

Court, referring to “Paris Principles”,<sup>9</sup> observed that “the composition of a national institution and the appointment of its members, whether by means of an election or otherwise, shall be established in accordance with procedures which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the protection and promotion of human rights . . .”<sup>10</sup>

The Court noted some of its earlier decisions in which “drawing aid from International Covenants, law enacted by the Indian parliament was construed and relief of protection of human rights was given”.<sup>11</sup> The Court, noting that many international treaties had influenced interpretation of Indian law in several ways, stated:

This Court has relied upon them for statutory interpretation, where the terms of any legislation are not clear or are reasonably capable of more than one meaning. In such cases, the courts have relied upon the meaning which is in consonance with the treaties, for there is a prima facie presumption that parliament did not intend to act in breach of international law, including State treaty obligations. It is also well accepted that in construing any provision in domestic legislation which is ambiguous, in the sense that it is capable of more than one meaning, the meaning which conforms most closely to the provisions of any international instrument is to be preferred, in the absence of any domestic law to the contrary.<sup>12</sup>

The Court, accordingly, held that the Paris Principles be taken into account while interpreting section 3(2)(d) of the 1993 enactment while proposing to appoint a police officer as a member of the NHRC and held the appointment null and void.<sup>13</sup>

Justice D.M. Dharmadhikari rendering a separate opinion referred to the

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<sup>9</sup> The “Paris Principles” were adopted in 1991 by the United Nations sponsored meetings of representatives of national institutions in Paris wherein a detailed set of principles on the status of national human rights institutions was developed, The Court also referred to six criteria to be met by national human rights institutions under the Paris Principles, namely (a) Independence guaranteed by the statute or Constitution; (b) Autonomy from the government; (c) Pluralism in membership; (d) Broad mandate based on human rights standards; (e) Adequate power of the State; and (f) Sufficient resources.

<sup>10</sup> The Court also outlined the categories of representative to be included such as (a) non-governmental organizations responsible for human rights . . . (b) trends in philosophical and religious thought; (c) universities and qualified experts; (d) parliament; (e) government departments (in advisory capacity).

<sup>11</sup> *Mackinnon Mackenzie and Co. Ltd v. Audrey D’ Costa* (1987) 2 SCC 469; *Sheela Barse v. Secy., Children’s Aid Society* (1987) 3 SCC 50; and *Vishaka v. State of Rajasthan* AIR 1997 SC 3011.

<sup>12</sup> This part of the judgment was delivered by Justice Y.K. Sabharwal.

<sup>13</sup> However, without affecting the validity of the decisions taken while the Respondent was a member of the Commission.

limitations placed on the applicability of “Paris Principles” as an interpretative tool to fill the gaps within domestic law.<sup>14</sup> He noted:

“Paris Principles” are at best merely in the nature of guidelines to be followed by covenanting countries who are parties to the resolutions taken in the international conferences on human rights. There is no obligation on acceptance of “Paris Principles”, to incorporate them word by word in statutory law. In the “Paris Principles”, a pluralistic composition of the Commission, under the Act, in respect of membership, Judges have a majority. A real pluralistic composition ought to include in its membership judges, human rights activists, scientists, academicians and even experienced police officers and social researchers . . . Merely because there are instances of human rights violations by some members of the police is no ground to exclude all police officers as a class from the membership of the Commission. The “Paris Principles” can at best be taken aid of to understand and interpret the provisions of the Act but not to substitute or supplement it.

*Legal Status of UN Resolutions and Human Rights Instruments – Binding Nature of Paris Principles – Domestic Implementation of treaties and covenants – Reference to Indian Case Law*

PEOPLE’S UNION FOR CIVIL LIBERTIES V. UNION OF INDIA AND ANOTHER

**Supreme Court of India, 29 April 2005  
(2005) 5 Supreme Court Cases 363**

The division bench case, as referred above, on account of disagreement between judges on the applicability and binding nature of Paris Principles vis-à-vis section 3(2)(d) of the Protection of Human Rights Act, 1993 was taken to a five-judge bench. The issue was whether a former police officer could be appointed as one of the members of the NHRC.

The Court, at the outset, noted that the provisions of the 1993 Act were in conformity with the Paris Principles and that neither the Paris Principles nor the UN Resolution prohibit a former civil servant or a police officer from becoming a member of the NHRC. The Court also observed that “once the Indian legislature enacts a law pursuant to an international convention then the legislative area in that field being covered it is the municipal law alone that prevails hence, the validity of the appointment of the second respondent can only be examined with reference to the provisions of the Act”. The Court, however, concluded that “. . . neither the Paris

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<sup>14</sup> Justice D.M. Dharmadhikari dissented on the issue of validity of appointment of Respondent and did not endorse the conclusions recorded by Justice Y.K. Sabharwal.

Principles nor the UN Resolution and much less does the Act either expressly or impliedly exclude the inclusion of a police officer in the Commission". The Court referring to the "well established canon of construction"<sup>15</sup> stated: "If we apply the said principle of law to the facts of the case, there being no exclusion in Section 3(2)(d) of the Act and the language being clear, we cannot by looking back into the Paris Principles or the UN Resolution interpret an exclusionary clause to keep police officers from being members of the Commission in spite of the Act not providing for the same." Referring to the judgment of Justice Sabharwal the Court noted:

17. In arriving at his decision Hon'ble Sabharwal. J has treated the Paris Principles and the UN General Assembly Resolution as covenants. Thereafter, he has applied the law applicable to international covenants and imported the obligations under the Paris Principles and the UN General Assembly Resolution as if they are binding as legal obligations on India even in the municipal context. While doing so he has relied upon the judgments of this Hon'ble Court in *Mackinnon Mackenzie & Co. Ltd. v. Audrey D' Costa*; *Sheela Barse v. Secy. Children's Aid Society*; *People's Union for Civil Liberties v. Union of India*; and *Vishaka v. State of Rajasthan*.

18. Having noted the above we would with respect like to point out that neither the Paris Principles nor the subsequent UN General Assembly Resolution can be exalted to the status of a covenant in international law. Therefore merely because India is a party to these documents does not cast any binding legal obligation on it. Further, all the above cases which Hon'ble Sabharwal. J has relied upon deal with the obligations of the Indian State pursuant to its being a party to a covenant/treaty or a convention and not merely a declaration in the international fora or a UN General Assembly Resolution.

The Court, accordingly, concluded that since the field in relation to the constitution of NHRC was covered by an Act of the Indian parliament, neither the Paris Principles nor the UN General Assembly Resolution could override the express provisions of the Act.

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<sup>15</sup> . . . that the court should read the section as it is and cannot rewrite it to suit its convenience; nor does any canon of construction permit the court to read the section in such a manner as to render it to some extent otiose . . ." in *A.R. Antulay v. Ramdas Srinivas Nayak* (1984) 2 SCC 500.

*Implementation and incorporation of Universal Declaration of Human Rights and the United Nations Standard Minimum Rules for the Protection of Juveniles – Scope and application of Indian Juvenile Justice enactments taking into account existing international legal norms*

PRATAP SINGH V. STATE OF JHARKHAND AND ANOTHER

**Supreme Court of India, 2 February 2005  
(2005) 3 Supreme Court Cases 551**

The issue before the Court was with regard to the mode of determining the age of the appellant who was charged under the provisions of the Indian Penal Code. The two specific issues were: (1) whether the date of occurrence would be the reckoning date for determining the age of the alleged offender as a juvenile offender or the date when he was produced in the court/competent authority; (2) whether the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter 2000 Act) would be applicable in the case of proceedings initiated and pending under the earlier Juvenile Justice Act of 1986 (hereinafter 1986 Act) when the Act of 2000 was enforced with effect from 1 April 2001. The Court also had to deal with its own two conflicting decisions given at two different times. In *Arnit Das v. State of Bihar* (2000) 5 SCC 488, a case decided in 2000, the Court had held the date of production before the Juvenile Court as the date relevant for deciding whether or not the appellant was juvenile for the purpose of trial. This decision, according to appellants, did not notice a decision of the Court in *Umesh Chandra v. State of Rajasthan* (1982) 2 SCC 202 which, *inter alia*, had held the date of occurrence of the offence as the deciding date for determination of the age of the juvenile.

After surveying the provisions of both the 1986 and 2000 enactments, the Court noted: “The Juvenile Justice Act in its present form has been enacted in discharge of the obligation of our country to follow the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985 also known as the Beijing Rules (the Rules).” After surveying the provisions of Beijing Rules, the Court observed:

The problem of juvenile justice is, no doubt, one of tragic human interest so much so in fact that it is not confined to this country alone but cuts across national boundaries. In 1966 at the Second United Nations Congress on the Prevention of Crime and Treatment of Offenders at London this issue was discussed and several therapeutic recommendations were adopted. To bring the operations of the juvenile justice system in the country in conformity with the UN Standard Minimum Rules for the Administration of Juvenile Justice, the Juvenile Justice Act came into existence in 1986. A review of the working of the then existing Acts both State and parliamentary would indicate that much greater attention was found necessary to be given to children who may be found in situations of social maladjustment, delinquency or neglect. The justice system as available for adults could not be considered suitable for being applied to juveniles. There is also need for larger involvement of informal system and

community-based welfare agencies in the care, protection, treatment, development and rehabilitation of such juveniles.

The Court pointed out that the provisions of the 1986 Act and the 2000 Act were required to be construed having regard to the Beijing Rules. Surveying and comparing the provisions of the 1986 and 2000 Act, the Court further pointed out that “the said Act has not only to be read in terms of the Rules but also the Universal Declaration of Human Rights and the United Nations Standard Minimum Rules for the Protection of Juveniles”. The Court further noted:

The Juvenile Justice Act specifically refers to international law. The relevant provisions of the Rules are incorporated therein. The international treaties, covenants and conventions although may not be a part of our municipal law, the same can be referred to and followed by the courts having regard to the fact that India is a party to the said treaties. A right to a speedy trial is not a new right. It is embedded in our Constitution in terms of Articles 14 and 21 thereof. The international treaties recognize the same. It is now trite that any violation of human rights would be looked down upon. Some provisions of the international law although may not be a part of our municipal law but the courts are not hesitant to in referring thereto so as to find new rights in the context of Constitution. Constitution of India and other ongoing statutes have been read consistently with the rules of international law. Constitution is a source of, and not an exercise of, legislative power. The principles of international law whenever applicable operate as a statutory implication but the legislature in the instant case held itself bound thereby and, thus, did not legislate in disregard of the constitutional provisions or the international law as also in the context of Article 20 and 21 of the Constitution. The law has to be understood, therefore, in accordance with the international law. Part III of our Constitution protects substantive as well as procedural rights. Implications which arise therefrom must effectively be protected by the judiciary. A contextual meaning to the statute is required to be assigned having regard to the constitutional as well as international law operating in the field.

The Court further noted that the “Constitution of India and the juvenile justice legislations must necessarily be understood in the context of present-day scenarios and having regard to the international treaties and conventions. Our Constitution takes note of the institutions of the world community which had been created . . .” Now, the Constitution speaks not only “to the people of India who made it and accepted it for their governance but also to the international community as the basic law of the Indian nation which is a member of that community”. Inevitably, “its meaning is influenced by the legal context in which it must operate”.

After considering the scope and application of 1986 and 2000 enactments, the Court held that the date of occurrence of the event should be taken as the relevant date for determining the age of a juvenile and not the date on which he was produced before the Juvenile Court. As regards the retrospective application of the 2000 Act for the events which occurred before its commencement the Court held that it would have limited application in the cases pending.

*Appointment of Arbitrators – Nature of Courts’ function in appointing Arbitrators – Difference between “administrative” and “judicial” function – Incorporation of the language of UNCITRAL Model Law on International Commercial Arbitration*

**SBP & CO V. PATEL ENGINEERING LTD AND ANOTHER**

**Supreme Court of India, 26 October 2005  
(2005) 8 Supreme Court Cases 618**

The Court in this case examined the role of the Chief Justice or his designate while appointing arbitrators as per section 11(6) of the Indian Arbitration and Conciliation Act, 1996 (hereinafter 1996 Act).<sup>16</sup> Hitherto the nature and function of the Chief Justice and his designate were held to be administrative in character.<sup>17</sup> Accordingly, the existing view was that the Chief Justice or his nominee performing the function under section 11(6) of the 1996 Act could not decide any contentious issue between the parties. The correctness of this view was questioned before the Court.

While surveying the provisions of the 1996 Act, the Court noted that the scheme and language of the enactment were based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration. It also noted that the General Assembly of the United Nations had recommended that all countries give due consideration to the Model Law so as to establish “a unified legal framework for a fair and efficient settlement of disputes arising in international commercial relations”. The Court further noted that while adapting the Model Law the 1996 Act had made some departures from it. The Court pointed out that Article 11 of the Model Law provided for the making of a request to “the court or other authority specified in Article 6 to take the necessary measure”. The words in Section 11 of the 1996 Act, the Court further pointed out, referred to “the Chief Justice or the person or institution designated by him”. According to the Court: “The fact that instead of the court, the powers are conferred on the Chief

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<sup>16</sup> Section 11 of the 1996 Act provided for the “Appointment of Arbitrators”. Section 11(6) provided that: “Where, under an appointment procedure agreed upon by the parties – (a) a party fails to act as required under that procedure; or (b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under the procedure; or a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means of securing appointment. This question of ‘administrative’ v. ‘judicial’ function of the Chief Justice was referred to seven judge bench of the Supreme Court in the *SBP & Co. v. Patel Engineering Ltd.* (2005) 6 SCC 288.”

<sup>17</sup> *Konkan Railway Corp. Ltd. v. Mehul Construction Co.* (2000) 7 SCC 201; *Konkan Railway Corp. Ltd. v. Rani Construction (P) Ltd* (2002) 2 SCC 388; *Ador Samia (P) Ltd v. Peekay Holding Ltd.* (1999) 8 SCC 572; and *Sundarm Finance Ltd v. NEPC India Ltd* (1999) 2 SCC 479.

Justice, has to be appreciated in the context of statute.” The Court, referring to its averment in an earlier case decided in 1993 – *Supreme Court Advocates on Record Association v. Union of India*<sup>18</sup> that the “expression ‘Chief Justice’ was used in the sense of collectivity of judges of the Supreme Court and the High Court respectively” – noted that “the departure from the UNCITRAL Model regarding the conferment of the power cannot be said to be conclusive or significant in the circumstances”. Referring to an earlier question that was dealt with in *Konkan Railway Corp. Ltd v. Mehul Construction Co.*<sup>19</sup> about the nature of order passed by the Chief Justice or his nominee in exercise of his power under section 11(6) of the 1996 Act, the Court stated:

After noticing the Statement of Objects and Reasons for the Act and after comparing the language of Section 11 of the Act and the corresponding article of the Model Law, it was stated that the Act has designated the Chief Justice of the High Court in case of domestic arbitration and the Chief Justice of India in cases of international commercial arbitration, to be authority to perform the function of appointment of an arbitrator, whereas under the Model Law, the said power was vested with the court. When the matter is placed before the Chief Justice or his nominee to bear in mind the legislative intent that the arbitral process should be set in motion without any delay whatsoever and all contentious issues left to be raised before the Arbitral Tribunal itself. It was further held that at that stage, it would not be appropriate for the Chief Justice or his nominee, to entertain any contention or decide the same between the parties. It was also held that in view of the conferment of power on the Arbitral Tribunal under Section 16 of the Act, the intention of the legislature and its anxiety to see that the arbitral process is set in motion at the earliest, it will be appropriate for the Chief Justice to appoint an arbitrator without wasting any time or without entertaining any contentious issue by a party objecting to the appointment of an arbitrator.<sup>20</sup>

The Court further observed:

It was noticed that in other countries where UNCITRAL Model was being followed, the court could decide such issues judicially and need not mechanically appoint an arbitrator. There were situations where preliminary issues would have to

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<sup>18</sup> (1993) 4 SCC 441.

<sup>19</sup> (2000) 7 SCC 201.

<sup>20</sup> *Ibid*; The Court quoted para. 4 from its 2000 decision on *Konkan Railway* which, *inter alia*, stated: “If it is held that an order under Section 11 (6) is a judicial or quasi-judicial order then the said order would be amenable to judicial intervention and any reluctant party may frustrate the entire purpose of the Act by adopting dilatory tactics in approaching a court of law even against an order of appointment of an arbitrator. Such an interpretation has to be avoided in order to achieve the basic objective for which the country has enacted the Act of 1996 adopting UNCITRAL Model.”

be decided by the court rather than by the arbitrator. If the order of the Chief Justice or his nominees were to be treated as an administrative one, it could be challenged before the Single Judge of the High Court, then before a Division Bench and then the Supreme Court under Article 136 of the Constitution, a result that would cause further delay in arbitral proceedings, something sought to be prevented by the Act.

The Court concluded that the proceedings before the Chief Justice, while entertaining an application under section 11(6) of the Act, were adjudicatory.<sup>21</sup> Accordingly, it held that the power exercised by the Chief Justice of the High Court or the Chief Justice of India under section 11(6) of the Act was not an administrative power but a judicial power.

*Meaning of Dumping – GATT/WTO interpretations on Agreement on Implementation of Article VI of GATT, 1994 – Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995*

#### S & S ENTERPRISE V. DESIGNATED AUTHORITY AND OTHERS

**Supreme Court of India, 22 February 2005  
(2005) 3 Supreme Court Cases 337**

The appellant imported lead acid batteries from Bangladesh during the period 1 February 2000 to 13 September 2001. The total number of batteries so imported was found to be less than 3% of the total imports of such batteries into India during that period. Designated Authority confirmed this after investigation pursuant to a complaint received to this effect under the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 (hereinafter the Rules). According to Rule 14(d), if the Designated Authority determines that the volume of the dumped imports actual or potential from a particular country accounts for less than 3% of the imports of

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<sup>21</sup> Justice C.K. Thakker while dissenting refers, *inter alia*, in para. 52 to the UNCITRAL Model Law stating “The United Nations Commission on International Trade Law (UNCITRAL) adopted a Model Law in 1985 on International Commercial Arbitration. The General Assembly of the United Nations recommended member-States to give due consideration to the Model Law to have uniformity in arbitration procedure which resulted in passing of the Arbitration and Conciliation Act, 1996. The Act is a complete code in itself and consolidates and amends the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards”. According to Justice Thakker, Statement of Objects and Reasons of the Act after considering the UNCITRAL Model “intended to minimize the supervisory role of the court in arbitral process”.

the like product, it shall terminate the investigation immediately. Nevertheless, the Designated Authority continued the investigation in respect of imports from Bangladesh on the finding that the value of imports made from Bangladesh was more than 6% which was more than the *de minimis* limit of 3% as provided under Rule 14(d). The Designated Authority published its final findings on 7 December 2001 and held that the anti-dumping duty was payable in respect of such import of batteries during the period under investigation. The Ministry of Finance accepted the recommendation and notified the anti-dumping duty payable by the appellant. The appellant preferred an appeal before the Customs, Excise and Gold (Control) Appellate Tribunal (CEGAT) which, *inter alia*, rejected the submission of the appellant that the volume of exports should have been computed on the basis of quantity rather than on the basis of price. It held that the word “volume” in the context of Rule 14 meant value. The appellant preferred an appeal before the Supreme Court.

The Court, holding the interpretation of Rule 14(d) by the Designated Authority and the Tribunal as incorrect and contrary to its language, stated:

The imposition of anti-dumping duty is under Section 9-A of the Customs Tariff Act, 1975 and the Rules and is the outcome of the General Agreement on Tariff and Trade (GATT) to which India is a party. The purpose behind the imposition of the duty is to curb unfair trade practices resorted to by exporters of a particular country of flooding the domestic markets with goods at rates which are lower than the rate at which the exporters normally sell the same or like goods in their own countries so as to cause or be likely to cause injury to the domestic market. The levy of anti-dumping duty is a method recognized by GATT which seeks to remedy the injury and at the same time balances the right of exporters from other countries to sell their products within the country with the interest of the domestic markets. Thus the factors to constitute “dumping” are (i) an import at prices which are lower than the normal value of the goods in the exporting country; (ii) the exports must be sufficient to cause injury to the domestic industry.

Referring to Article 5.8 of the Agreement on Implementation of Article VI of the GATT, 1994 the Court noted that “a negligible quantity of imports would not be sufficient to cause such injury”. The Court further observed:

The *de minimis* rule as far as the price is concerned is when the dumping margin or the difference between the export price of the article and its normal value is less than 2%. In other words the exporter is selling the goods in India at almost the same price that it does in its country. As far as quantity is concerned, if the export accounts for less than 3% of the total imports of the like article into India, it is treated as too trivial for the law and is ignored.

The Court, while noting the distinction between volume as meaning quantity on the one hand and price on the other, stated: “For example under Rule 11(2), the Designated Authority is required to determine the injury to the domestic industry

taking into account, *inter alia*, the *volume* of dumped imports and their effect on the *price* in the domestic market for like articles.”<sup>22</sup> The Court concluded:

Therefore, when Rule 14(d) says that the investigation must be terminated if the “volume” of the dumped imports is less than 3% of the imports of the like product, it must mean that the quantity of dumped imports must account for less than 3% of the total imports. To hold otherwise would mean that if the price is lower than 3%, irrespective of the quantity imported, the investigation would be dropped and it would, as submitted by the appellant, lead to the absurd situation that a small number of expensive imports would invite anti-dumping investigation but cheap imports flooding the domestic markets would not. In fact such a situation is exactly what the dumping rules have been framed to prevent.

The Court, while setting aside the anti-dumping duty imposed on the appellant, held that it was incumbent on the Designated Authority to have closed the investigation under Rule 14(d) once it came to the conclusion that the volume of dumped imports was less than 3% of the total imports.

*Environment and Development – Stockholm Declaration – Rio Declaration – Intergenerational Equity – Doctrine of Public Trust – State Responsibility and Environment*

#### INTELLECTUALS FORUM, TIRUPATHI V. STATE OF ANDHRA PRADESH AND OTHERS

**Supreme Court of India, 23 February 2006**  
**AIR 2006 Supreme Court 1350**

The present case related to preservation and restoration of two historically important tanks, namely, “*Avilala* and *Peruru*”, located on the precincts of *Tirupati*, a famous holy town in South India. Appellants challenged the decision of the government of Andhra Pradesh to alienate the tank bed lands in favour of some governmental agencies for valuable consideration. The High Court of Andhra Pradesh in September 2000 had dismissed the petition of appellants that challenged the alienation of these tank beds, finding no illegality or irregularity in the action of the respondents. Aggrieved by this decision, the appellants filed an appeal in the Supreme Court raising the issue as to whether urban development could be given

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<sup>22</sup> Rule 2(d) defines the term “like article” as “an article which is identical or alike in all respects to the article under investigation for being dumped in India or in the absence of such an article, another article which although not alike in all respects, has characteristics closely resembling those of the articles under investigation”.

primacy over and above the need to protect the environment and valuable fresh water resources. The Supreme Court, in order to examine this question from the technical and empirical standpoint, appointed a Committee of Experts. This Committee, *inter alia*, suggested various measures to revive the tanks by recharging the ground water level.

Referring to the doctrine of public trust as enunciated by it in an earlier decision,<sup>23</sup> the Court stated:

The responsibility of the State to protect the environment is now a well-accepted notion in all countries. It is this notion that, in international law, gave rise to the principle of “State responsibility” for pollution emanating within one’s own territories [Corfu Channel Case, ICJ Reports (1949) 4]. This responsibility is clearly enunciated in the United Nations Conference on the Human Environment, Stockholm 1972 (Stockholm Convention), to which India was a party . . . The respondents, however, have taken the plea that the actions taken by the government were in pursuance of urgent needs of development. The debate between the developmental and economic needs and that of the environment is an enduring one, since if environment is destroyed for any purpose without compelling developmental cause, it will most probably run foul of the executive and judicial safeguards . . . In response to this difficulty, policy makers and judicial bodies across the world have produced the concept of “sustainable development”. This concept, as defined in the 1987 Report of the World Commission on Environment and Development (Brundtland Report) defines it as “Development without compromising the ability of the future generations to meet their own needs” . . . Subsequently the Rio Declaration on Environment and Development, passed during the Earth Summit of 1992, to which also India is a party, adopted the notion of sustainable development.<sup>24</sup>

The Court held that the tank was a communal property and the State authorities are trustees to hold and manage such properties for the benefits of the community

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<sup>23</sup> In *M.C. Mehata v. Kamal Nath* 1997 (1) SCC 388, the Supreme Court of India referring to the doctrine of public trust, *inter alia*, stated: “The issues presented in this case illustrate the classic struggle between those members of the public who would preserve our rivers, forests, parks and open lands in their pristine purity and those charged with administrative responsibility, who under the pressures of the changing needs of an increasingly complex society find it necessary to encroach to some extent upon open lands, heretofore considered inviolate to change. The resolution of this conflict in any given case is for the legislature and not for the Courts . . . But, in the absence of any legislation, *the executive acting under the doctrine of public trust cannot abdicate the natural resource and convert them into private ownership or commercial use*” (emphasis added).

<sup>24</sup> The Supreme Court refers to its averments on this issue in earlier cases, such as *Essar Oil v. Halar Utkarsh Samiti*, 2004 (2) SCC 392; *Indian Council for Enviro-Legal Action v. Union of India*, 1996 (5) SCC 281; *M.C. Mehata v. Union of India (Taj Trapezium Case)*, 1997 (2) SCC 653; *State of Himachal Pradesh v. Ganesh Wood Products*, 1995 (3) SCC 363; and *Narmada Bachao Andolan v. Union of India*, 2002 (10) SCC 664.

and they cannot be allowed to commit any act or omission which will infringe the right of the Community and alienate the property to any person or body.

*Environmental aspects of Open Spaces and Open Lands – Need for Environmental Impact Assessment in Building Regulations – Sustainable Development and Concepts of International Environmental Law*

**BOMBAY DYEING & MFG. CO. LTD V. BOMBAY ENVIRONMENTAL ACTION GROUP AND OTHERS**

**Supreme Court of India, 7 March 2006  
AIR 2006 Supreme Court 1489**

The Bombay Environmental Action Group, a public charitable trust, questioned the validity of Development Control Regulation No. 58 (DCR 58) framed by the State of Maharashtra in terms of the Maharashtra Regional and Town Planning Act, 1966. DCR 58 was framed by the State of Maharashtra to deal with the situation arising out of closure and/or unavailability of various cotton textile mills occasioned, *inter alia*, by reason of a strike resorted by the workers thereof. The validity of DCR 58 was challenged before the Bombay High Court to “protect the interests of the residents of Mumbai and to improve the quality of life in the town of Mumbai . . . also for preventing further serious damage to the town planning and ecology so as to avoid an irretrievable breakdown of the city”. The main thrust of the writ petitioners was to ensure “open spaces” for the city and to provide the “crying need of space for public housing”. The Bombay High Court, *inter alia*, concluded that “the intent is to control the development and re-development by making comprehensive regulatory measures, the portions becoming vacant after demolition of existing built-up areas have to be included in the concept of ‘open lands’”. The February 2005 judgment of the Bombay High Court was challenged before the Supreme Court.

The Court examined in great detail the statutory scheme of DCR 58 and its constitutional validity and framed the following question: Would any synthesis between environmental aspects and building regulation vis-à-vis the scheme floated by the Board of Industrial and Financial Reconstruction in terms of the provisions of Sick Industries Companies (Special Provisions) Act, 1985 be possible? As regards the environmental issues the Court stated:

It is often felt that in the process of encouraging development the environment gets sidelined. However, with major threats to the environment, such as climate change, depletion of natural resources, the entrophication of water systems and biodiversity and global warming, the need to protect the environment has become a priority. At the same time, it is also necessary to promote development. The harmonization of the two needs has led to the concept of sustainable development, so much so that it has become most significant and focal point of environmental legislation and judicial

decisions relating to the same. Sustainable development, simply put, is a process in which development can be sustained over generations . . . Making the concept of sustainable development operational for public policies raises important challenges that involve complex synergies and trade offs.

The Court further noted that the Indian judiciary has time and again recognized “sustainable development” as being a fundamental concept of Indian law. It referred to its earlier decisions which elaborated core environmental legal principles based on emerging concepts from international environmental law such as “precautionary principle” and “polluter pays principle”.<sup>25</sup> It pointed out that “this Court, referring to Article 48-A and 51-A (g) of the Constitution of India, observed that the aforementioned principles are part of the constitutional law”. The Court also noted that “this Court negated the attempt on the part of the State for in situ regularization by way of change of policy”. The Court, while noting that in terms of Article 243-W of the Constitution of India the Municipalities have constitutional responsibilities of town planning,<sup>26</sup> stated that “. . . the government must have due regard in letter and spirit to aspects that have been mentioned in the earlier place including rights of individuals who are residents of the localities under consideration for in situ regularization by amendment of the Master Plan”.<sup>27</sup> The Court also noted: “While considering the environmental aspect, we must not forget that before constructions are allowed to be commenced and completed, the exercise for environmental impact assessment is mandatorily required to be done by the competent authority.” It accordingly suggested the creation of an expert body to examine this aspect.<sup>28</sup>

However, the Court upheld the legal validity of DCR 58, noting that it is not

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<sup>25</sup> *Vellore Citizens' Welfare Form v. Union of India and Others* (1996) 5 SCC 647; *Indian Council for Enviro-Legal Action v. Union of India* (1996) 5 SCC 281; *A.P. Pollution Control Board v. Prof. M.V.Nayudu and others* (1999) 2 SCC 718; and *Narmada Bachao Andolan v. Union of India and Others* (2000) 10 SCC 664.

<sup>26</sup> *M.C. Mehta v. Union of India and Others* (2004) 6 SCC 588.

<sup>27</sup> The Court while interpreting this aspect referred to some earlier cases – *Sushanta Tagore and Others v. Union of India* (2005) 3 SCC 16; *Indian Handicrafts Emporium and Others v. Union of India and Others* (2003) 7 SCC 589; *Virender Gaur and Others v. State of Haryana and Others* (1995) 2 SCC 577; and *Friends Colony Development Committee v. State of Orissa and Others* (2004) 8 SCC 733.

<sup>28</sup> The Court also framed the issue to be examined by this Expert Body when it stated: “The question has to be considered having regard to the fact that in stead and place of industries which would have otherwise a far larger environmental impact vis-à-vis the buildings which would be constructed would be used for residential or commercial purposes. The problem will have to be addressed from the point of view that as a part of the scheme framed by the State in making DCR 58, the money would be invested not only for the purpose of revival and/or rehabilitation of the sick or closed mills, the same would also give a boost to modernization/and/or shifting of mills and /or parts thereof from residential area to outside the town of Bombay . . . while doing the exercise of scrutiny as regard environmental impact assessment would be required to be gone into”.

“contrary to the principles governing environmental aspects including the principles of sustainable and planned development vis-à-vis Article 21 of the Constitution of India”.

*Preservation and Protection of Ecology – Calculation of Net Present Value (NPV) – Compensatory Afforestation Programme – Cost Analysis of Environment – Sustainable use of Biodiversity-*

T.N. GODAVARMAN THIRUMULPAD V. UNION OF INDIA AND OTHERS

**Supreme Court of India, 26 September 2005**  
**2005 Supreme Court Cases (SCC) 1**

This case dealt with the issue of conservation, preservation and protection of forests and its ecology.<sup>29</sup> The questions before the Court were: When forest land was used for non-forest purposes, what measures are required to be taken to compensate for loss of forest land and to compensate for the effect on the ecology? Whether before diversion of forest land for non-forest purposes and consequential loss of benefits accruing from the forest should the user agency of such land be required to compensate for the diversion? If so, should not the user agency be required to make payment of net present value (NPV) of such diverted land so as to utilize the amounts so received for getting back in the long run the benefits which are lost by such diversion? What guidelines should be issued for determining NPV?

The Court sought to examine these questions in the light of Forest (Conservation) Act, 1980, the Environment (Protection) Act, 1986 and other related enactments.

The Court noted that NPV is the present value (PV) of net cash flow from a project, discounted by the cost of capital. Further, that “. . . NPV is a method by

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<sup>29</sup> It should be noted that the Court issued directions with regard to preservation of forests in the first *T.N. Godavarman* case in 1997 (see (1997) 2 SCC 267). The genesis of this case dates back to 20 March 2000 when the Supreme Court of India decided to take suo *motu* action upon a statement by the government of India which was placed before it showing dismal degradation of forest land violating all existing legislations and norms relating to protection of environment, specifically violating compensatory afforestation programmes and utilizing an diverting funds generated for this purpose for other areas. See *T.N. Godavarman Thirumulpad v. Union of India* (2002) 10 SCC 646. The Court, accordingly, issued a direction in November 2001 to the Ministry of Environment and Forests to formulate a scheme providing that whenever any permission was granted for change of use of forest land for non-forest purposes and one of the condition for granting permission was to ensure that there would be compensatory afforestation. The Ministry submitted the scheme in March 2002. A Central Empowered Committee considered this scheme and suggested few improvements and these were accepted by the government. The government created, pursuant to this, the Compensatory Afforestation Fund Management Authority (CAMPA).

which future expenditures (costs) and benefit are levelised in order to account for the time value of money”. Applying this principle to forests and other environmental resources, the Court stressed that “forestry is a public project. It is important to bear in mind that a benefit received today is worth more than that received later. The benefit received today is in fact ‘cost incurred’ today. Time value of the cash inflow/outflow is important in investment appraisal . . . The object behind NPV is to levelise costs . . . A project like forestry has a long gestation period of 40–50 years. It goes through cost cycles each year depending upon inflation, rate of interest, internal rate of return etc . . . Under NPV, all costs are discounted to some reference date which we have taken as 2005 for illustration. The total cost reckoned at this reference date is the sum of present value or future value of costs discounted to the year 2005. Similarly, one can calculate the present value of the revenue from the expected benefits of forest regeneration.”

After examining varied facets of NPV, the Court applied it to environmental assets. It, *inter alia*, stated:

The current method of valuing public sector projects, like forestry, has become contentious as public sector undertakings agree for lower discount rate on account of long gestation period. However, the flaw with this argument is that the low rate of return is computed without including the intangible or environmental impact/benefits emanating from forests.

The Court further raised the question as to how one values the intangibles. It pointed out that “there are several methods, viz., opportunity cost, replacement cost, travel cost, contingent value method (CVM) and social benefit cost analysis (SBCA)”. It further noted that SBCA could be applied to the evaluation of environmental impacts of forestry projects. Here, the Court pointed out, one must appreciate that “the environmental outputs from forests appear as public goods for which there is no market”.<sup>30</sup> According to the Court, the value of these intangible environmental outputs would be difficult to quantify. The Court, however, noted that under SBCA, benefits from each of the above environmental outputs were identifiable. Further elaborating this aspect the Court noted:

Forest sustainability is an integral part of forest management and policy that also has a unique dominating feature and calls for forest owners and society to make a long-term (50 years or longer) commitment to manage forests for future generations. One of the viewpoints for sustaining forest is a naturally functioning forest ecosystem. This viewpoint takes the man and nature relationship to the point of endorsing, to the extent possible, the notion of letting the forest develop and process without

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<sup>30</sup> The Court classified these environmental outputs as – flood control benefits; water production; soil conservation; outdoor recreation; biodiversity and conservation; and habitat and air purification.

significant human intervention. A strong adoption of the naturalistic value system that whatever nature does is better than what humans do, this is almost the “nature dominates man” perspective. Parks and natural reserve creations; non-intervention in insect, disease and fire process; and reduction of human activities are typical policy situations. This viewpoint has been endorsed by the 1988 Forest Policy of the government of India.

The Court, while referring to several studies, outlined some of the criteria reflecting key elements of ecological, economic and social sustainability, such as conservation of biological diversity; maintenance of productive capacity of forest ecosystems; maintenance of forest ecosystem health and vitality; conservation and maintenance of soil and water resources; maintenance and enhancement of long-term multiple socio-economic benefits to meet the needs of societies; legal, institutional and economic framework for forest conservation and sustainable management. The Court also noted that “different components of the biodiversity system possess different kinds of value . . . that it is difficult to value an ecosystem, since it possesses a large number of characteristics, more than just market-oriented ones”. The Court thereafter dealt with the issue of valuation of NPV, fee to be charged on the basis of this valuation and as to who – centre or State – should get the amount so collected. For this purpose, the Court examined the evolution and framework of Indian forest laws, forest policy and other related issues, noting that: “. . . in 1977, forest and wildlife were taken out from the State List and incorporated in the Concurrent List. Considering the compulsions of the States and large depletion of forest, these legislative measures have shifted the responsibility from States to the Centre. Moreover any threat to the ecology can lead to violation of the right of enjoyment of healthy life guaranteed under Article 21, which is required to be protected. The Constitution enjoins upon this Court a duty to protect the environment.” The Court further noted:

. . . sustainable use of biodiversity is fundamental to ecological sustainability. The loss of biodiversity stems from destruction of the habitat, extension of agriculture, filling up of wetlands, conversion of rich biodiversity sites for human settlement and industrial development, destruction of coastal areas and uncontrolled commercial exploitation.

The Court, emphasizing that “. . . ecology is not the property of any State but belongs to all, being a gift of nature for the entire nation”, upheld the validity of CAMPA and valuation of NPV. For the purpose of evaluating NPV and other related issues outlined in the judgment, the Court constituted an expert committee. The Court also granted exemption from payment of NPV to certain government projects such as hospitals, dispensaries and schools.

*National and International Norms relating to Rights of the Child – UN General Assembly Special Session on the Rights of the Child – India’s Obligations under the 1992 Convention on the Rights of the Child*

R.D. UPADHYAY V. STATE OF ANDHRA PRADESH AND OTHERS

**Supreme Court of India, 13 April 2006**  
**AIR 2006 Supreme Court 1946**

The case concerned those children who were in jail with their mothers who were either under-trials or prisoners or convicts. The plight of children and their mothers was brought to the notice of the Court by some non-governmental organizations.<sup>31</sup>

The Court referred to various constitutional and legal provisions which were put in place specifically to take care of welfare and development of children belonging to different sections of society.<sup>32</sup> As regards India’s obligation under International Law, the Court noted:

India acceded to the UN Convention on the Rights of the Child in December 1992 to reiterate its commitment to the cause of the children. The objective of the Convention is to give every child the right to survival and development in a healthy and congenial environment.

The Court also noted that “the UN General Assembly Special Session on Children held in New York in May 2002 was attended by an Indian delegation led by Minister of Human Resources Development and consisted of Parliamentarians, NGOs and officials. It was a follow up to the world summit held in 1990. The summit adopted the declaration on the survival, protection and development of children and endorsed a plan of action for its implementation”.<sup>33</sup> The Court examined the reports

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<sup>31</sup> Women’s Action Research and Legal Action for Women (WARLAW); the Court also referred to the work done by *Mahila Pratiraksha Mandal, Navjyothi* and *Nari Niketan*.

<sup>32</sup> Article 15(3) of the Indian Constitution for making special provision for women and children; Article 21A (inserted by 86th Constitutional amendment) for free and compulsory education for children; Article 24 prohibiting employment of children below the age of fourteen years in any factory or mine or engagement in other hazardous employment; Article 39(e) . . . not to abuse tender age of children; Article 39(f) . . . State to ensure that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment; Article 42 for humane conditions of work and maternity relief; Article 45 for early childhood care and education for all children until they complete the age of six years; and Article 47 for raising nutritional health and improvement of public health. The Court also listed several national legislations such as Juvenile Justice Act, 2000 and other related enactments specific infants, children and persons with disabilities. It also referred to the National Policy for Children, 1974.

<sup>33</sup> The Court referred to National Charter for Children, 2003 to reiterate the commitment of the government to the cause of the children.

filed pursuant to its directions by various State governments and union territories and noted that there were 6,496 under-trial women with 1,053 children and 1,873 convicted women with 20 children. Referring to recommendations of various expert committees constituted to resolve this issue, the Court noted:

Various provisions of the Constitution and statutes have been noticed earlier which cast an obligation on the State to look after the welfare of children and provide for social, educational and cultural development of the child with its dignity intact and protected from any kind of exploitation. Children are to be given opportunities and facilities to develop in a healthy manner and in a condition of freedom and dignity. We have also noted UN conventions to which India is a signatory on the Rights of the Child . . . This Court has, in several cases, accepted International Conventions as enforceable when these Conventions elucidate and effectuate the fundamental rights under the Constitution. They have also been read as part of domestic law, as long as there is no inconsistency between the Convention and domestic law.<sup>34</sup>

The Court issued extensive guidelines with regard to treatment of children and mothers in jail. It also ordered that the Jail Manual and other relevant rules, regulations and instructions should be suitably amended incorporating these guidelines.

*Environment and Development – Stockholm Declaration – Rio Declaration – Report of the Brundtland Commission – Sustainable Development – Climate Change Issues*

**KARNATAKA INDUSTRIAL AREAS DEVELOPMENT BOARD V.  
C. KENCHAPPA AND OTHERS**

**Supreme Court of India, 12 May 2006  
(2006) Supreme Court Cases 371**

The respondent agriculturists, who were affected by the acquisition of lands of different villages, filed a writ petition under Article 226 of the Constitution with a prayer that the appellant Karnataka Industrial Areas Development Board (KIADB) be directed to refrain from converting the lands of the respondents for any industrial or other purposes and to retain the lands for use by the respondents for grazing their cattle. The High Court of Karnataka, after considering the case, ordered that the extent of lands reserved for grazing cattle, agricultural and residential purposes should not be disturbed. The High Court further held that whenever there was an acquisition of land for industrial, commercial or non-agricultural purposes, except

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<sup>34</sup> The Court referred to two of its earlier cases on the subject – *Vishaka v. State of Rajasthan* (1997) 6 SCC 241; and *Sheela Barse v. Secretary, Children's Aid Society* (1987) 3 SCC 50.

for residential purposes, the authorities must leave a 1 km area from the village limits as a free zone or green area to maintain ecological equilibrium. The appellant KIADB preferred a special leave petition before the Supreme Court challenging this order of the High Court. When the case came up for hearing before the Supreme Court no one from the side of the agriculturists appeared before the Court to defend their point of view. Accordingly, the Court appointed a counsel for this purpose as an *amicus curiae*.

The considered view of the Court was that before acquisition of the land necessary exercise regarding the impact of development on ecology and environment should be carried out. After referring to constitutional requirements to protect and preserve environment, the Court noted:

The rise in global temperature has also been confirmed by the Inter-Governmental Panel on Climate Change set up by the United Nations in its final report published in August 1990. The global warming has led to unprecedented rise in the sea level. Apart from melting of the polar ice it has led to inundation of low-lying coastal regions. Global warming is expected to profoundly affect species and ecosystem. Melting of polar ice and glaciers, thermal expansion of seas would cause worldwide flooding and unprecedented rise in the sea level if gas emissions continue at the present rate. Enormous amount of gases and chemicals emitted by the industrial plants and automobiles have led to depletion of ozone layers which serve as a shield to protect life on the earth from the ultraviolet rays of the sun.

Examining Principle 3 of the 1992 Rio Declaration on Environment and Development, which, *inter alia*, provided that “the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations”, the Court noted that it nowhere identified what these included. “Interestingly” the Court pointed out:

It eschews the term “entirely” in Principle 1, declaring instead that human beings “are entitled to a healthy and productive life in harmony with nature”. One of the few bodies to proffer a definition is the European Commission. In developing an “Action Programme on the Environment”, it defined “environment as the combination of elements whose complex interrelationships make up the settings, the surroundings and the conditions of life of the individual and of society as they are and as they are felt . . . Some understanding of what ‘the environment’ may encompass can be discerned from other treaty provisions. Those agreements which define ‘environmental effects’, environmental impacts” or “environmental damage” typically include harm to flora, fauna, soil, water, air, landscape, cultural heritage, and any interaction between these factors.

The Court also referred to the World Summit on Sustainable Development held in Johannesburg in 2002, the purpose of which was “to evaluate the obstacles to progress and the results achieved since the 1992 World Summit at Rio de Janeiro”.

Referring to the concept of “sustainable development” the Court stated:

A nation's progress largely depends on development, therefore, the development cannot be stopped, but we need to control it rationally. No government can cope with the problem of environmental repair by itself alone; people's voluntary participation in environmental management is a must for sustainable development. There is a need to create environmental awareness which may be propagated through formal and informal education. We must scientifically assess the ecological impact of various developmental schemes. To meet the challenges of current environmental issues, the entire globe should be considered the proper arena for environmental adjustment. Unity of mankind is not just a dream of the enlightenment but a biophysical fact.

The Court, referring to the need to "maintain a delicate balance between industrialisation and ecology", pointed out: "The courts in various judgments have developed the basic and essential features of sustainable development. In order to protect sustainable development, it is necessary to implement and enforce some of its main components and ingredients such as precautionary principle, polluter-pay pays and public trust doctrine. We can trace the foundation of these ingredients in a number of judgments delivered by this Court and the High Courts after the Rio Conference, 1992."

The Court, accordingly, directed that in future before acquisition of lands for development, the consequence and adverse impact of development on environment must be properly comprehended and the lands be acquired for development that they did not gravely impair the ecology and environment. The Court also made it mandatory to obtain clearance from Pollution Control Board before taking decision on the land use and its conversion in all such cases in future.

*Balance of power between the Union and States – Secret Ballot as a Democratic Principle and the value of Human Rights – Legal Validity of International Human Rights Instruments in Municipal Laws*

KULDIP NAYAR AND OTHERS V. UNION OF INDIA AND OTHERS

**Supreme Court of India, 22 August 2006  
(2006) 7 Supreme Court Cases 371**

Petitioners challenged the amendments made to the Representation of the People Act, 1951 through the Representation of the People (Amendment) Act 40 of 2003 which, *inter alia*, sought to delete the requirement of "domicile" in the State concerned for getting elected to the Council of States, *i.e.* *Rajyasabha*. The petitioner argued that this amendment violated the principle of federalism, a basic structure of the Constitution. The petitioner also challenged some other amendments which, *inter alia*, included the introduction of an open ballot system. The petitioner argued that this deletion of "secrecy" in voting, an essence of free and fair elections (as well as the voter's freedom of expression), violated the basic structure of the Constitution enshrined in Article 19(1), a subject matter of fundamental right.

The Court, in its elaborate judgment, considered primarily the history of the Representation of Peoples enactments of 1950 and 1951 and examined it within the framework of the Constitution. This examination included the arguments relating to domicile requirements of citizens in the context of balance of power structure between the Union and the States. The Court noted the argument that “the Council of States is a House of parliament constituted to provide representation of various States and Union Territories; that its members have to represent the people of different States to enable them to legislate after understanding their problems; that the nomenclature ‘Council of States’ indicates the federal character of the House and a representative who is not ordinarily resident and who does not belong to the State concerned cannot effectively represent the State”.

The Court thereafter examined and noted the submissions made on the question of “open ballot and secrecy” that laid “the foundation for ensuring free and fair election which in turn ensures a democratic government showing the true will of the people”. It was further argued by the petitioners, referring to Article 21 of the Universal Declaration of Human Rights and Article 25 of the International Covenant on Civil and Political Rights (ICCPR), that “it is democratic government that is ultimately responsible for protecting the human rights of the people viz. civil, political, social and economic rights”. The petitioners argued that “international instructions can be used for interpreting the municipal laws” and referred to Supreme Court’s jurisprudence on this aspect.<sup>35</sup> The Court concurred with the argument that “this Court may lay down guidelines in consonance with the principles laid down in the international instruments so as to effectuate the fundamental rights guaranteed under the Constitution”. The Court further noted:

There can be no quarrel with the proposition that the International Covenants and Declarations as adopted by the United Nations have to be respected by all signatory States and the meaning given to them has to be such as would help in effective implementation of the rights declared therein. The applicability of the Universal Declaration of Human Rights and the principles thereof may have to be read, if need be, into the domestic jurisprudence.

The Court, accordingly, concluded that “the law on the subject as settled in India is clear enough as to render it not necessary for the Court to look elsewhere, to deal with the issues that have been raised here. Further, in case of conflict, the municipal laws have to prevail”. The Court, dismissing the petition, noted: “*The higher principle, however, is free and fair elections. If secrecy becomes a source for corruption then sunlight and transparency have the capacity to remove it. We can*

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<sup>35</sup> *Kesavananda Bharati v. State of Kerala* (1973) 4 SCC 225; *Jolly George Varghese v. Bank of Cohin* (1980) 2 SCC 360; *People’s Union for Civil Liberties (PUCL) v. Union of India* (1997) 1 SCC 301; *Nilabati Behera v. State of Orissa* (1993) 2 SCC 746; *Kapila Hingorani v. State of Bihar* (2003) 6 SCC 1 and *State of West Bengal v. Kesoram Industries Ltd.* (2004) 10 SCC 201.

only say that legislation pursuant to a legislative policy that transparency will eliminate the evil that has crept in would hopefully serve the larger object of free and fair elections.”

*Commencement of Arbitration Proceedings – Appointment of Arbitrators – UNCITRAL Model Rules on Arbitration – Relationship between Indian Arbitration Law and UNCITRAL Model Rules*

RASHTRIYA ISPAT NIGAM LTD. AND ANOTHER V. VERMA  
TRANSPORT CO.

**Supreme Court of India, 8 August 2006  
(2006) 7 Supreme Court Cases 275**

The main issue in this case related to the applicability of section 8 of the Indian Arbitration and Conciliation Act, 1996 (hereinafter 1996 Act) which, *inter alia*, provided for the referring of parties to arbitration where there was a subsisting arbitration agreement between them. The appellant, a public-sector undertaking, sought to take recourse to section 8 when the respondent challenged the legal issues relating to the violation of contract that existed between them before the Civil Judge (Junior Division) Jalandhar in the State of Punjab. The lower Court directed the parties to maintain *status quo* pending adjudication of this question. Upon an appeal by the appellants seeking to take recourse to arbitration proceedings, the High Court of Punjab and Haryana refused to review this order of the lower Court. Accordingly, the Appellant filed this special leave petition before the Supreme Court.

The Court, noting various arguments of the parties, pointed out that the 1996 Act embodied the relevant rules of Model Law. The 1996 Act, the Court further noted, “was enacted by parliament in the light of the UNCITRAL Model Rules. In certain respects, parliament of India while enacting the said Act has gone beyond the scope of the said Rules”. Specifically referring to section 8 of the 1996 Act, the Court noted:

Section 8 of the 1996 Act, however, although lifted the first part of the said Article 8 did not contain the expression contained in the second part of therein. The Indian parliament has gone beyond the recommendations made by the UNCITRAL Model Rules in enacting Sections 8 and 16 of the 1996 Act.

The Court further noted:

The provisions of Sections 8 and 16 of the 1996 Act may be compared with Sections 45 and 54 thereof. Section 45 deals with the New York Convention, whereas Section 54 deals with the Geneva Convention Awards. The difference can be immediately noticed. Whereas under Sections 45 and 54, the court exercises its supervisory jurisdiction in relation to arbitration proceedings, in terms of Section 16 of the 1996 Act,

the arbitrator is entitled to determine his own jurisdiction. We, however, do not mean to suggest that Part II of the 1996 Act does not contemplate determination of his own jurisdiction by the Arbitral Tribunal as we are not called upon to determine the said question. We have referred to the aforementioned provisions only for the purpose of comparing the difference in the language used by the Indian parliament while dealing with the domestic arbitration vis-à-vis the international arbitration.

The Court, after considering several pleas raised by the respondents,<sup>36</sup> accordingly upheld the petitioners' plea that "what was necessary was to consider the substance of the dispute. Once it is found that the dispute between the parties arose out of the contract, Section 8 of the 1996 Act would be attracted".

## OTHER RELEVANT STATE PRACTICE

### *Measures to Eliminate International Terrorism*<sup>37</sup>

#### **Indian Statement in the Sixth Committee of the 61st Session of the United Nations General Assembly Resolution on Agenda Item 100: Measures to Eliminate International Terrorism on 11 October, 2006**

India noted that terrorism undermined the very foundation of freedom and democracy, enjoyment of human rights and continued existence of open and democratic societies. It also noted that the annual report of the UN Secretary-General on this item presented measures taken at the national and international levels for the prevention and suppression of international terrorism as well as information on incidents caused by international terrorism.

India also noted adoption of the United Nations Global Counter Terrorism Strategy which was launched at a high-level segment at the beginning of the 61st Session. India hoped that "the strategy would provide the impetus that unites the international community in its global fight against terrorism through practical measures that facilitate cooperation by way of extradition, prosecution, information flows and capacity building".

Referring to Comprehensive Convention against International Terrorism (CCIT), India further noted:

... notwithstanding the setback of not meeting the timeline set by the World Summit Outcome Document for concluding the convention, we continue to believe that agreement on the draft convention is attainable. The call for early conclusion of

<sup>36</sup> One of them being – illegal termination of contract and blacklisting of the respondent firm did not attract s. 8 of the 1996 Act.

<sup>37</sup> See <http://meaindia.nic.in> and <http://www.un.int/India/>

CCIT was reiterated by practically all the dignitaries in the general debate this session. A meeting is necessary to work for early conclusion of the CCIT. We must now work together for its finalization and adoption. We sincerely hope that, in a spirit of mutual accommodation and flexibility, Member States would respond constructively and help in the early conclusion of the Comprehensive Convention so that our mandate of completing the legal framework of conventions aimed at combating international terrorism can be brought to a successful close. We may determine whether appropriate reference to international humanitarian law could meet the pending concerns.

On the issue of implementation of the comprehensive legal framework relating to counter-terrorism, India stated:

The 13 UN Conventions and Protocols remain fundamental tools in the fight against terrorism. In this regard we also note the “Report of the Secretary-General on strengthening international cooperation and technical assistance in promoting the implementation of the universal conventions and protocols related to terrorism within the framework of the activities of the United Nations Office on Drugs and Crime”. We appreciate the growing activities of UNODC in counter terrorism efforts, especially its technical assistance activities at the national, sub-regional and regional levels, within the framework of its global project on strengthening the legal regime against terrorism. We are pleased to note that its work has contributed significantly to increasing the number of countries that have ratified all twelve universal legal instruments relating to terrorism. We understand that the focus of the technical assistance activities of UNODC is shifting from the phase of ratification support to the phase of legislative implementation and support for national counter terrorism capacity building for criminal justice systems. We therefore, support increased resource allocations for UNODC counter terrorism activities from the United Nations regular budget and voluntary contributions.

*Conventional Weapons, Small Arms and Light Weapons and CCW*<sup>38</sup>

**Indian Statement on the Thematic Debate on Conventional Weapons, Small Arms and Light Weapons and Convention on Certain Conventional Weapons (CCW) at the 61st Session of the First Committee of the UN General Assembly on 17 October 2006**

Referring to devastating consequences of unregulated and illicit trade in conventional weapons and small arms and light weapons, India placed its strong commitment to the full and effective implementation of the UN Programmes of Action on Preventing, Combating and Eradicating Illicit Trade in Small Arms and Light Weapons. India stated:

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<sup>38</sup> See for the Indian Statement <http://meaindia.nic.in> or <http://www.un.int/india/>

India's approach to disarmament and international security is guided by a strong commitment to international humanitarian law, of which the Convention on Certain Conventional Weapons is one of the principal instruments. India is among those 20 States Parties that adhere to the entire CCW package – the Convention, Amended Article I, and all five Protocols, including AP II. We support the draft Plan of Action, to be adopted at the forthcoming Review Conference, stipulating seven action points for promoting the universality of the Convention. India also favours strengthening the Convention through a compliance mechanism. Besides, we support the creation of a sponsorship programme to facilitate enhanced participation from mine and ERW-affected States Parties in CCW-related meetings. This may also broaden awareness about the Convention and help in promoting its universalization.<sup>39</sup>

On Anti-Personnel Mine Ban Convention, India noted that it:

... is conscious of the humanitarian risks resulting from the indiscriminate use and transfer of anti-personnel mines. We, therefore, support the humanitarian objectives of the Anti-Personnel Mine Convention. At the same time, we recognize the limitations of this Convention in not addressing national security concerns of States with long land borders, where minefields at frontiers will continue to form an important component of defence in times of conflict. While our security requirements necessitate the use of anti-personnel mines, these are used in accordance with internationally acknowledged security norms and safety parameters. We are in favour of strengthened cooperation in mine clearance technology, equipment and training; risk education; rehabilitation; victim assistance and socio-economic betterment of mine-affected communities.

India, while assuring to work towards steady progress in the areas of conventional disarmament, supported the UN Register of Conventional Arms as an important confidence-building measure and pointed out that it had submitted annual reports on the export and import of conventional arms.

*Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization*<sup>40</sup>

**Indian Statement on Agenda Item 79 at the Sixth Committee of the United Nations General Assembly on Report of Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization on 16 October 2006**

Noting proposals to improve the working methods of the Special Committee on the Charter (Charter Committee hereinafter) India provided its views on some of the

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<sup>39</sup> "ERW" refers to "Explosive Remnants of War"

<sup>40</sup> See for the Indian Statement <http://meaindia.nic.in> or <http://www.un.int/india/>

substantive proposals.<sup>41</sup> On the Russian proposal concerning effective implementation of Article 50 relating to Assistance to Third States affected by the application of sanctions under Chapter VII of the UN Charter, India suggested:

... immediate steps need to be taken to implement the relevant portion of the 2005 World Summit Outcome Document on sanctions, especially Paragraph 108, which calls upon the Security Council to improve the monitoring of the implementation of and effects of sanctions, ensure that sanctions are implemented in accountable manner, review regularly such monitoring and develop a mechanism to address special economic problems arising from the application of sanctions in accordance with the UN Charter.

Regarding the other Russian proposal on Peacekeeping Operations under Chapter VI of the UN Charter, India, while noting that the political and operational aspects of peacekeeping were being dealt with by other specialized committees, pointed out that this Charter Committee could contribute to the subject from the legal angle. India further noted that the allocation of the agenda item on “Comprehensive Review of the Peacekeeping Operations in all their respects” to the sixth committee this year would fill this need for focused legal scrutiny.

As regards the joint proposal of the Russian Federation and Belarus seeking an advisory opinion of the International Court of Justice (ICJ) on the legal consequences of use of force without a decision of the Security Council taken pursuant to Chapter VII, India held the view that “consideration of such a reference would provide an opportunity to clarify the position on certain important legal aspects”. On the Cuban proposal aimed at redefining the powers and functions of the General Assembly and its relationship with the Security Council, India noted that it attached great importance “to the reform of the United Nations, including the revitalization of the General Assembly and democratization of the Security Council and significantly enhanced transparency in its working methods”.

Referring to the ICJ, India noted:

The ICJ, except for a very few contentious proceedings and rare advisory opinions, has no automatic power of judicial review of Security Council decisions. It is therefore important to introduce checks and balances into the Security Council through expansion of its permanent and non permanent members. This would also make sanctions policy, of which we spoke earlier, more rational and optimal.

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<sup>41</sup> These proposals were: to avoid duplication of work of other UN bodies; to have the Committee focus on fewer topics; to have proposals submitted early enough for a thorough study by the Committee; to establish a cut-off mechanism to prevent prolonged and ineffective discussion of some proposals; to consider certain issues once every two or three years instead of annually; and to allow for the reconsideration of the duration of sessions.

Concluding, India supported the establishment of a Repertory of Practice of the UN organs as it would be a “valuable source of information on the application of the Charter and an indispensable tool for the preservation of the institutional memory of the United Nations”.

*Report of the United Nations Commission on International Trade Law (UNCITRAL) on the Work of its 39th Session*<sup>42</sup>

**Indian Statement on Agenda Item 77 at the Sixth Committee of the UN General Assembly on Report of the United Nations Commission on International Trade Law on the Work of its 39th Session on 10 October 2006**

Referring to the approval in principle of the key provisions of a draft legislative guide on secured transactions, India noted that “the legislative guide will assist countries in adopting modern secured transactions legislation – a necessary condition for increasing access to low-cost credit, thus facilitating the cross-border movement of goods and services and contributing to economic development”. India, taking note of the cooperation between UNIDROIT (International Institute for the Unification of Private Law) and UNCITRAL, sought to emphasize the need to “ensure consistency between the draft Unidroit securities convention and UNCITRAL legislative guide on secured transactions”.

Noting the adoption of revised legislative provisions on interim measures of protection and the form of the arbitration agreement,<sup>43</sup> India hoped that this would significantly update the provisions of Model Law. With regard to UNCITRAL’s future work programme in this area, specifically to revise the 1985 Arbitration Rules so as to make them compatible with emerging new areas such as intellectual property rights, investment disputes, insolvency or unfair competition, India stated:

Once again we would advise caution in undertaking a revision of UNCITRAL Arbitration Rules of 1976 which enjoy widespread recognition and have served as a model for national legislation of several countries and for dispute settlement mechanism in bilateral investment protection agreements. The desired flexibility, as was indicated by several States during the Session, should not be lost in any future revision.

While noting UNCITRAL’s progress in the areas of insolvency and transport law, India appreciated its Secretariat’s cooperation with the UN Office on Drugs and Crime in the area of commercial fraud.

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<sup>42</sup> See for the Indian Statement <http://meaindia.nic.in> or <http://www.un.int/india/>

<sup>43</sup> The new provisions on arbitration, as further noted by India, address the requirement for aligning the 1985 UNCITRAL Model Law on International Commercial Arbitration with current practices in international trade, particularly with respect to the form in which arbitration agreements are concluded and the granting of interim measures of protection.

*International Convention for the Protection of All Persons from Enforced Disappearance*<sup>44</sup>

**Explanation of Vote after the Vote by India on A/C.3/61/L.17 titled “International Convention for the Protection of All Persons from Enforced Disappearance” on 13 November 2006.**

India noted its consistent support to efforts to deal with the problem of enforced disappearance and believed that the “most effective instrument for prevention of enforced disappearance is the guarantee of a State that it respects civil and political rights and will fulfill its obligations to its people”. While pointing out that the existing body of international human rights law and international humanitarian law would provide a comprehensive framework to tackle this unacceptable phenomenon, India further noted that what was needed would be the enforcement and implementation of the law by the State. So, it laid emphasis on the strengthening of national capacities. Against this backdrop, India pointed out that it had approached the negotiations for a legally binding instrument on enforced disappearance. India further stated:

However, we were not convinced about the need for a separate Convention or the creation of a new monitoring body to deal with this issue. In our view, an Optional Protocol to the International Convention on Civil and Political Rights would have provided a preferred solution.

On the draft text of the Convention India noted:

It also remains of concern to us that the text still retains certain drawbacks. Thus, the “constructive ambiguity” in the definition of enforced disappearance creates two different standards of proof for the same crime, one here and another in Rome Statute. The missing element of “intent” and “knowledge” in the definition will not help in easing the burden of proof as *mens rea* is an essential element for criminalisation of any act. Accordingly, we would have preferred if “intent” had been more clearly incorporated in the definition of “enforced disappearance”. Furthermore, the exclusion of non-State actors from the definition ignores contemporary threats, which require our collective and determined response.

While noting that States have different legal systems and national contexts, India agreed to joined others in adopting this Convention with the following understanding:

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<sup>44</sup> For the Indian Statement see <http://meaindia.nic.in> and <http://www.un.int/India/>

... that the instrument allows national jurisdictions to criminalize the offence of enforced disappearance in accordance with their respective legal systems and constitutional procedures.

... as regards remedy and compensation, there is no statutory right to compensation in a Common Law system such as India's. However, the Indian judiciary, at all levels, as well as the National Human Rights Commission of India, regularly grant remedy and compensation to victims of human rights abuse.

*Report of the International Court of Justice (ICJ)*<sup>45</sup>

**Indian Statement on Agenda Item 70: Report of the International Court of Justice at the 61st Session of the UN General Assembly on 26 October 2006.**

India noted "the respect and the central role assigned to the ICJ within the UN Charter system". Referring to the creation of a number of specialized regional and international courts, India stated:

The political process connected with the establishment of special international judicial bodies has been, on occasion, perceived as diminishing the role of the ICJ in the field of peaceful settlement of international disputes. Moreover, legitimate questions have been raised about the legal basis underlying the establishment by the Security Council of the *ad hoc* international criminal tribunals established for former Yugoslavia and Rwanda. The Security Council does not have this power under the Charter and while, it can set up subsidiary bodies, it cannot give them powers that it does not have itself; the established legal principle of *nemo dat quod non habet*. The lack of challenge from the general UN membership does not mean acceptance of such exercise in the future, still less any general endorsement of a power that the Charter does not give.

Noting the variety of cases dealt by the ICJ in the last 50 years, India further emphasized that the Court "should not regard itself as precluded from questioning the validity of a Security Council resolution, insofar as it affects the legal rights of States". India also noted that this issue was raised very pointedly by Judge Shahabudin and others in the *Lockerbie* case. India further noted:

Many legal scholars rightly emphasize that the Court should not concede to the Security Council a place above the Charter; it should rather adopt a textual approach to Article 39, the wording of which contains all the necessary elements for a delimitation of the competences of the Security Council under chapter VII. The Court should

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<sup>45</sup> For the Indian Statement see <http://meaindia.nic.in> and <http://www.un.int/India/>

not hesitate to affirm the rule of law in the international legal order. In the *Lockerbie* and *Namibia* case the Court showed that it has the power of judicial review but, unfortunately, this is limited to a very few contentious proceedings and a very few advisory opinions that are sought. The power of judicial review is a crucial element in a democratic system of checks and balances. The most practical, and perhaps the only, way of introducing these into the functioning of the Security Council is through an expansion of the permanent and non-permanent membership of the Council and a transformation of its working methods.

India, while concluding, noted that the increasing relevance of the Court is reflected in the number of cases before the Court. Some of these cases, as pointed out by India, increasingly include fact-intensive cases which raise new procedural issues for it.

*Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994 and Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*<sup>46</sup>

**Indian Statement on Agenda Item 72 and 73: Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994 and Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991**

Noting increasing prominence of international criminal law with the establishment of international criminal tribunals and referring to the manner of the creation of these tribunals, India stated:

In questioning the competence of the Security Council to establish these tribunals, many legal scholars, after an extensive analysis of the *travaux préparatoires*, came to the conclusion that it was not the intention of the drafters of the Charter to endow the Council with such competence. However, some scholars rely on other concepts to

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<sup>46</sup> For the Indian Statement see <http://meaindia.nic.in> and <http://www.un.int/India/>

justify the attribution of legislative functions to the Council, namely, the concepts of “implied powers” and “subsequent practice”.

Referring to the *Reparation for Injuries* case in which ICJ, *inter alia*, had laid down the doctrine of “implied powers”, India further stated:

This doctrine and Article 29 of the Charter under which Security Council can establish subsidiary organs necessary for its functions, is often used in the context of justifying setting up of ICTY. This doctrine has been also confirmed by the ICTY in the Tadic case. However, this ignores the basic legal principle *nemo dat quod non habet*, which means you cannot give what you don't have. The Security Council has not been assigned any judicial functions under the Charter, therefore under Article 29, or under the concept of implied powers, it cannot set up a subsidiary body entrusting to it the functions which the Council itself does not possess. In so doing the Council did not take a legitimate peace-enforcement measure under any article or articles of Chapter VII, notably under Article 41. It took, simply, a lawmaking (not to mention law-determining and law-enforcing) measure which fell outside its functions under Chapter VII or any other provision of the Charter or general international law.

India noted that international humanitarian law required that trials for violations must be scrupulously fair and consistent with contemporary international standards. Referring to two goals of such trials, *i.e.* to punish the guilty and to promote socially desirable results, including deterrence of future offences, India pointed out that “there is a view that when such ‘international’ prosecutions are undertaken by foreign judicial systems or Tribunals, with little or no connection to the perpetrators, victims, or offenses, they are invariably decoupled from the political, social and economic context of the affected country”. Accordingly, India argued for “strengthening the national justice system by building local capacity of judicial personnel”.

*Report of the International Law Commission*<sup>47</sup>

**Indian Statement on Agenda Item 78: Report of the International Law Commission Chapter VI: Shared Natural Resources and Chapter VII: Responsibility of International Organisations at the Sixth Committee of the 61st Session of the UN General Assembly on 31 October 2006**

India welcomed the completion of the first reading of the set of 19 draft articles and commentaries on the law of transboundary aquifers. India also noted that international practice in this area was still evolving, despite abundant treaties and

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<sup>47</sup> For the Indian Statement see <http://meaindia.nic.in> and <http://www.un.int/India/>

other legal documents. It supported the inclusion of draft Article 3 which provided for the principle of State sovereignty over the portion of a transboundary aquifer or aquifer system located within its territory. On the principle of “equitable and reasonable utilization” as set out in draft articles and a specific reference to “accrual of benefits”, India stated, without elaborating, that it required some clarifications. It supported the inclusion of “precautionary” approach, “general obligation to cooperate” and other related issues.

India, with regard to Responsibility of International Organizations, sounding a “note of caution”, pointed out:

First, the attributes of a State and an international organization are not the same. Second, given the diversity of international organizations and differences in their objectives and functions, it would be difficult to assess which of the circumstances precluding wrongfulness listed in Chapter V of Part One of the articles on the responsibility of States could be applicable to international organizations, especially given the absence of definitive practice in this area.

On inclusion of a reference to “self-defence” in draft Article 18 and critiquing such an inclusion, India stated:

Since international organizations are not members of the United Nations, the reference to the Charter of the UN is replaced by “principles of international law embodied in the Charter of the United Nations. However, this comparison overlooks the essential difference between a State and an international organization, namely a circumstance such as self-defence is by its very nature only applicable to the actions of a State, it could be questioned whether the international obligations usually attributable to international organizations may be such that could reasonably lead to breach of a peremptory norm of general international law under article 26 of the articles on State Responsibility.

India was not sure about the extension of “concept of necessity” to international organizations. It further pointed out:

States are entitled to invoke necessity to safeguard their essential interests, but under what circumstances the same right should extend to international organizations is difficult to envisage due to lack of specific practice in the area. The application of this concept to Peace Mission also raises some difficulties as those Missions have to follow very clear rules of engagement. Therefore, we would prefer deletion of this article so that this concept may not be invoked as a pretext for non-compliance with international obligations or for infringement of the rights of any third State.

*Report of the International Law Commission*<sup>48</sup>

**Indian Statement on Agenda Item 78: Report of the International Law Commission, Chapter X: Effect of Armed Conflicts on Treaties, Chapter XI: The Obligation to Extradite or Prosecute, Chapter XII: Fragmentation of International Law at the Sixth Committee of UN General Assembly on 3 November 2006**

On the topic “Effects of armed conflicts on treaties”, India observed that “while the topic is generally part of the law of treaties and not that on the use of force, the topic is also closely related to other domains of international law, therefore, it is not possible to maintain a strict separation between the law of treaties and other branches of international law which may also be relevant to the topic”. It also pointed out that the scope of the topic should be limited to treaties concluded between States and should not include treaties concluded by international organizations. India suggested that the scope of an “armed conflict” should be limited to conflicts between States and not deal with internal conflicts.

While referring to the work on the topic “the obligation to extradite or prosecute”, India referred, *inter alia*, to its own practice. It stated:

India is a State party to the international conventions against drug trafficking, as well as the United Nations Conventions against terrorism, and is signatory to the Conventions on transnational organized crime and on corruption, all of which provide for the obligation to extradite or prosecute. While none of these conventions specifically permit reservations to this obligation, the absence of a bilateral extradition treaty may have such an effect in case the law of a State party does not allow extradition without an extradition treaty.

India also pointed out that all its extradition treaties provided for the obligation to extradite or prosecute.

Referring to the topic “Fragmentation of international law: difficulties arising from the diversification and expansion of international law” and the “42 conclusions” identified by the ILC, India noted that these conclusions “should prove very useful to practitioners and legal advisers as guidelines in dealing with the practical consequences of the widening scope and expansion of international law”.

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<sup>48</sup> For the Indian Statement see <http://meaindia.nic.in> and <http://www.un.int/India/>

*The Rule of Law at National and International Level*<sup>49</sup>**Indian Statement on Agenda Item 80: The Rule of Law at National and International Level at the Sixth Committee of the 61st Session of the United Nations General Assembly on 17 October 2006.**

India on the scope of application of “rule of law” noted:

It is often advanced as a solution to abusive governmental power, economic stagnation and corruption. It is considered fundamental in promoting democracy and human rights, free and fair markets and fighting international crimes and terrorism. It is also seen as an essential component of promoting peace in post-conflict societies. The rule of law may have different meaning and a different content depending on the objective it is seeking to achieve.

India further noted:

There is sufficient reason to seriously examine the concept of the rule of law as it functions at the national level and to explore ways of understanding the rather new internationalised context within which it operates today. In this regard it is essential to point out that supranational institutions which are set up to promote rule of law should themselves also be in accord with systems of democratic accountability presupposed by the rule of law. This applies inter-alia to the United Nations and international financial and trading institutions. This also means that, in accordance with the UN Charter, development of international law is a function of the General Assembly and not the Security Council.

Referring to strengthening of linkages between municipal law and international law, India termed the setting up of a rule of law assistance unit with a broad mandate as “useful”. It also noted:

The dissemination of regular information about actions taken by the General Assembly and other international organizations would be helpful in identifying and evaluating new trends in international law, such as the appearance of guidelines, recommendations and other “non-enforceable” texts. This so-called “soft law” often plays a significant role in the development of contemporary international law and in strategic efforts to amend it.

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<sup>49</sup> For the Indian Statement see <http://meaindia.nic.in> and <http://www.un.int/India/>

## JAPAN

JUDICIAL DECISIONS<sup>50</sup>

*Sovereign Immunity – Night-time Landing Practice of the United States Air Force in Japan – Japan–US Agreement Regarding Facilities and Areas and the Status of US Armed Forces in Japan*

X ET AL. V. THE UNITED STATES OF AMERICA

**Supreme Court, Second Petty Bench, 12 April 2002**  
**56 Minshu [Supreme Court Civil Reports] 729 [2002], 1786 Hanrei Jihou**  
**[Judicial Reports] 43 [2002]**

Japanese citizens who reside near the United States Armed Forces' air base in Yokota (hereinafter cited as Yokota Air Base), located at the west end of the metropolis of Tokyo, filed for an injunction against the Nighttime Landing Practice (hereinafter cited as NLP) in Yokota Air Base and instituted a claim against the United States of America for damages for their suffering from the terrible noise caused by the landing practice.

The Tokyo District Court (first trial) and the Tokyo High Court (appeal trial) had both acknowledged the sovereign immunity of the United States, but the reasons adopted by the two courts were different. The District Court found that the principle of absolute immunity still stands in customary international law regarding sovereign immunity and concluded that in this case Japanese courts may not exercise jurisdiction over the United States of America.

Meanwhile, the High Court found that Japan abandoned jurisdiction over claims for damages against the United States under Article 18(5) of the "Agreement Under VI of the Treaty of Mutual Cooperation and Security between Japan and the United States of America, Regarding Facilities and Areas and the Status of United States Armed Forces in Japan" (hereinafter cited as the Status of Forces Agreement), which is interpreted by the High Court to provide for the abandonment of the right of claim and civil jurisdiction. Therefore, the High Court also acknowledged the sovereign immunity of the United States in this case.

The appellants (X et al.) made an assertion that the High Court misinterpreted Article 18(5) of the Status of Forces Agreement on the ground that it does not lay down an abandonment of jurisdiction. They further argued that there has been an established principle regarding sovereign immunity under customary international law that a State or government cannot be immune from a foreign State's jurisdiction in respect of its own tortious acts committed inside the territory of that foreign State.

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<sup>50</sup> Contributed by TANAKA Norio, Professor of International Law, Ryukoku University and Associate Professor ITAKURA Minako, Shizuoka University.

However, the Second Petty Bench of the Supreme Court dismissed the appeal, rejecting the reasoning of the High Court concerning Article 18(5) of the Status of Forces Agreement. According to the Supreme Court, Article 18(5) is not a clause providing the United States with sovereign immunity from the civil jurisdiction of Japanese courts but simply a clause establishing an institution to deal with claims that arise from tortious acts committed by the US Armed Forces in Japan.

The Supreme Court stated as follows. With regard to civil jurisdictional immunity of foreign States, the so-called “absolute theory of immunity” traditionally has been recognized as a customary rule in international law. However, as the range of governmental activities has extended over larger areas, there has arisen the idea that civil jurisdictional immunity should not be applied so widely to a State’s acts in the private law sector, followed by accumulated practice of other States which attempt to restrict the scope of immunity. Despite such recent trends, however, it should be said that even today we can still recognize the survival of the foreign State’s immunity from civil jurisdiction as a principle of customary international law, in cases in which a foreign State’s act at issue could be considered a sovereign act.

In this case, the Supreme Court concluded as follows. The NLP carried out by the aircraft at Yokota Air Base is nothing but an official activity of the US Armed Forces in Japan, because the nature and purpose of this activity clearly show its character as a sovereign act. There can be no doubt, under customary international law, of its immunity from civil jurisdiction. Therefore, unless otherwise agreed between Japan and the United States, Japanese courts’ civil jurisdiction does not extend to the appellee in this case.<sup>51</sup>

*Racial Discrimination – Refusal of the Use of Public Bath by Foreigners – Effectiveness of International Human Rights Law between Individuals – Equal Right before Law*

X1, X2 AND X3 V. Y1 (A JOINT STOCK CORPORATION) AND Y2 (OTARU CITY)

**Sapporo District Court, Decision, 11 December 2002**  
**1806 Hanrei Jihou 84 [2003]**

All of the plaintiffs reside in Japan. X1 and X2 are foreigners, but X3 is a naturalized Japanese from America. When they tried to use Y1’s public bath in Otaru city, they were denied use of the bath on the grounds that they looked foreigners. Y1

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<sup>51</sup> 12 (1) Hachioji Branch of the Tokyo District Court, Decision, 14 March 1997, 1612 *Hanrei Jihou* [Judicial Reports] 101 [1997]. See also, 41 *The Japanese Annual of International Law* 91 [1998].

(2) Tokyo High Court, Decision, 25 December 1998, 1665 *Hanrei Jihou* 64 [1999]. See also 42 *The Japanese Annual of International Law* 38 [1999].

adopted a policy to limit customers of the bath to Japanese people only, because Y1 had had trouble many times before with foreigners who were crews of the fishing vessels visiting the harbour of Otaru city.

The plaintiffs argued that Y1's refusal of their right to use the facility was an instance of racial discrimination illegal under Article 14(1) of the Japanese Constitution, the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). They demanded reparations and publication of an apology from Y1 under the tort law as a part of the civil code. They also argued that the racial discrimination demonstrated by Y1's refusal of their right to use the bathing facility was followed by Y2's failure to take effective measures to eliminate racial discrimination, which was illegal under ICERD, thus demanding reparations from Y2 for the violation of their right under the National Redress Act.

On the first issue of applicability of international human rights law as well as the Japanese Constitution between individuals, the District Court stated as follows: Article 14(1) of the Japanese Constitution, which provides equal right for all people under the law, does not regulate directly the relationship between individuals, but the relationship between a public authority and individuals. Should Article 14(1) of the Constitution be applied directly to a relationship between individuals, the sphere of private life, where free decisions are permitted on the principle of individual autonomy, might be unjustly limited. Even if ICCPR and ICERD are applicable as domestic law in Japan, they do not directly regulate the relationships between individuals but the relationships between a public authority and individuals.

Second, on the issue of whether the plaintiffs' right was infringed by the refusal of use of the public bath, the District Court stated as follows: If an individual's right or freedom is violated by an act of another individual, and if such violation exceeds the limits of a socially permissible range, the first individual's interest should be given legal protection based on Articles 1 and 90 of the Civil Code concerning general restrictions on the principle of private autonomy, or rules of tort law. In the interpretation of the regulations of such laws concerning individual rights, Article 14(1) of the Japanese Constitution, the ICCPR and ICERD can be one of the standards of interpretation. The refusal of the use of the public bath in this case is not considered as an incident of discrimination on the basis of nationality, because even an American who got Japanese nationality faced the same refusal. However, it should be said that such refusal by Y1 amounts to a kind of racial discrimination for reasons of race, skin colour and ethnicity, which also should be eliminated even in the relationship between individuals, in the light of the object and purpose of Article 14(1) of the Japanese Constitution, Article 26 of ICCPR and ICERD.

Third, however, the District Court did not acknowledge the responsibility of Y2 by stating as follows: Article 2(1)(d) of ICERD stipulates that "States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end, each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organiza-

tion". Even if defendant Y2, as a local government, is under an obligation to prohibit racial discrimination, its obligation is only a political one and cannot be interpreted to place Y2 under the obligation to prohibit and bring to an end racial discrimination by enacting a municipal byelaw. On the other hand, it is acknowledged that Y2 tried to prevent racial discrimination in this case through some measures and policies regarding prohibition of discrimination, such as making a request to the owner of the public bath for equal treatment among users. Therefore, there is no illegal act on the part of Otaru city.

Thus, the District Court held that Y1 pay the plaintiffs a total of 1,000,000 yen and additionally 5% of this amount yearly from 16 February 2001 until Y1 completes the payment. The Court accepted a part of the claims presented by the plaintiffs, but all others were dismissed by the Court on the aforementioned grounds.<sup>52</sup>

*Recognition of Refugee Status – The Convention Relating to the Status of Refugees – Article 61–2(2) (Sixty-day Rule) of the Immigration Control and Refugee Recognition Act*

X V. THE MINISTER OF JUSTICE

**Tokyo High Court, 18 February 2003**  
**1883 *Hanrei Jihou* [Judicial Report] 41 [2003]**

X (the plaintiff in the first trial and the appellee in the appeal trial) is a foreigner who has Ethiopian nationality and was a member of the All-Amhara People's Organization (AAPO), which is a kind of ethnic organization in Ethiopia. As the Ethiopian government adopted a repressive policy towards the AAPO, X came up against circumstances threatening his safety. He made his escape from the country on 14 December 1997, based upon a recommendation of the AAPO. In fact, after he left the country, his mother and brother were arrested by the government. X entered Japan on 15 December 1997 and submitted to the Minister of Justice an application for recognition of his refugee status on 24 March 1998.

The Minister of Justice made a disposition of non-recognition of refugee status (hereinafter referred to as the Disposition) because his application was submitted after the due date as fixed by Article 61–2(2) (hereinafter referred to as the Sixty-day Rule) of the Immigration Control and Refugee Recognition Act (hereinafter referred to as the Act) and stated that there was no reason for its saving clause to take effect.<sup>53</sup>

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<sup>52</sup> (1) 46 *The Japanese Annual of International Law* 163 [2003].

<sup>53</sup> (1) Immigration Control and Refugee Recognition Act, Art. 61–2 (Recognition of Refugee Status), paragraph 2 provides as follows: The application mentioned in the preceding paragraph [application for recognition of refugee status] must be submitted within 60 days after the day the person landed in Japan, provided that this shall not apply if there are unavoidable circumstances.

X, who sought dismissal of the Disposition, argued that the Sixty-day Rule is in violation of the 1951 Convention Relating to the Status of Refugees (hereinafter referred to as the Convention) and that there were “unavoidable circumstances” in the sense of the saving clause of Article 61–2(2) of the Act. On 17 January 2002, the Tokyo District Court acknowledged that there were “unavoidable circumstances” in the sense of the saving clause and dismissed the Disposition. The Minister of Justice appealed to the Tokyo High Court.

The Tokyo High Court rejected his appeal. However, the Court did not recognize X’s argument on the Sixty-day Rule on the following grounds. Whereas the Convention provides the definition of refugee and prescribes the measures to be taken by the States Parties for the protection of refugees, it does not specify the procedures for recognition of refugee status. As a result, it should be interpreted that every State Party to the Convention has the discretion to lay down its own procedures. As passage of time might make it extremely difficult to ascertain the facts entitling the applicant to refugee status, Article 61–2(2) of the Act sets a due date for the submission of an application. The purpose of this article is also to ensure a fair administration of the refugee recognition system and to prevent fraudulent applications as far as possible. The due period is fixed to be 60 days, empirically long enough, taking into account the geographic and social circumstances of Japan. Thus, there is no reason to argue that Article 61–2(2) of the Act is in violation of the Convention.

On the other hand, the Tokyo High Court recognized the claimed “unavoidable circumstances” in the sense of the saving clause of Article 61–2(2) of the Act and rejected the appeal of the Minister of Justice. The Court found as follows. Considering whether the “unavoidable circumstances” did or did not exist, the subject matter to be considered should not be confined to the physical and objective circumstances such as disease or traffic disruption making it difficult for the plaintiff to come to the Immigration Control office. It is necessary to consider various circumstances causing the delay of the application for refugee status, including those of the departure from the country of origin, the content and degree of psychological barriers to have access to the system of refugee recognition in Japan, the content or presence of the certificate of the applicant, the language ability, or the length of the period elapsed. The delayed application for refugee status does not necessarily mean that the applicant is presumed not to be a refugee. After specifically considering the circumstances of X, the Court recognized the presence of “unavoidable circumstances” and maintained the original judgment which had dismissed the Disposition.<sup>54</sup>

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<sup>54</sup> 1798 *Hanrei Jihou* 60 [2002]. See also 46 *The Japanese Annual of International Law* 166 [2003]. The Sixty-day Rule was abolished upon the amendment of the Act in May 2004, Japanese Diet.

*Change in Recognition and Succession of governments*

## X V. THE REPUBLIC OF CHINA

**Supreme Court, Third Petty Bench, 27 March 2007**

***Saiko-Saibansho Minji-hanreishu (Supreme Court Civil Reports), Vol. 61, No. 2 (2007), p. 711***

This case was originally one of claim for evacuation of a building, but the fact that its original plaintiff was the government of the Republic of China (RC) and that during the proceedings the government of Japan recognized the government of the People's Republic of China (PRC) in place of that of the RC made this case significantly political and complex.

The disputed building was constructed in 1931 and Kyoto Imperial University (as it then was) rented it as a dormitory for Chinese students in April 1945. After the Second World War, the Embassy of the RC in Japan bought this building. In the mid-1960s, the relationship between the Embassy and some students living in it deteriorated, so the RC requested them to evacuate the building and filed the case in the Kyoto District Court in 1967. In 1972, by a Joint Communiqué of the government of Japan and the government of the PRC, Japan recognized the latter and the plaintiff lost the status of legitimate government of China in Japan.

Thus the issues on this dispute were the following:

- (a) Whether the RC retains a *locus standi* before a Japanese court after Japan's change in recognition of the government of China in 1972.
- (b) Whether the ownership of the real estate in Japan, maintained by the government of the RC until 1972, is transferred to that of the PRC as a result of Japan's switch of recognition from the former to the latter.

In this case, four judgments had been given before this latest one by the Supreme Court: the first one by the Kyoto District Court (the court of first instance) in 1977;<sup>55</sup> the second by the Osaka High Court (the intermediate appellate instance) in 1982;<sup>56</sup> the third by the Kyoto District Court (the remanded first instance) in 1986;<sup>57</sup> and the fourth by the Osaka High Court (the remanded intermediate appellate instance) in 1987.<sup>58</sup>

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<sup>55</sup> Kyoto District Court Judgment of 16 September 1977, in *Hanrei Jihou* (Judicial Reports) No. 890 (1978), p. 131.

<sup>56</sup> Osaka High Court Judgment of 14 April 1982, in *Hanrei Jihou* (Judicial Reports) No. 1053 (1982), p. 115.

<sup>57</sup> Kyoto District Court Judgment of 4 February 1986, in *Hanrei Jihou* (Judicial Reports) No. 1199 (1986), p. 131.

<sup>58</sup> Osaka High Court Judgment of 26 February 1987, in *Hanrei Jihou* (Judicial Reports) No. 1232 (1987), p. 119.

With respect to issue (a), all the four previous judgments reached an affirmative conclusion. As regards issue (b), although the first judgment affirmed the transfer of the ownership of the dormitory from the government of the RC to that of the PRC, the three subsequent judgments found that the switch of recognition had no impact on the ownership. Thereafter there had been 20 years of silence on the part of the judiciary.

The Supreme Court noted that the name “RC” had meant China as a State (“the State of China”) and found that as a result of the Japanese government’s change of recognition in 1972, the name of the State of China had changed from RC to PRC. Then the Court held that the plaintiff in this case was the State of China, renamed PRC since 1972. Pointing out that because the RC’s ambassador had lost his capacity to represent the State of China in Japan in 1972, the proceedings of this case should have been terminated at that time.

Thus the Court ordered the reversal of the original judgment (the fourth judgment) and the cancellation of the judgment in the remanded first instance (the third judgment). Then this case was remanded to the Kyoto District Court again.

### *Sovereign Immunity*

#### X V. THE STATE OF ISLAMIC REPUBLIC OF PAKISTAN

##### **Supreme Court, Second Petty Bench, 21 July 2006**

***Saiko-Saibansho Minji-hanreishu* (Supreme Court Civil Reports), Vol. 60, No. 6 (2006), p. 2542**

The appellants X were two Japanese companies. They sold computers and related parts to the Islamic Republic of Pakistan in 1986 and concluded quasi-loan contracts in 1988. But Pakistan allegedly breached these contracts and X filed this case.

The Tokyo District Court accepted all of the plaintiffs’ claims, pointing out that Pakistan did not contest the alleged facts because Pakistan had neither attended any public hearing of the proceedings nor submitted any written statements or documents.<sup>59</sup>

However, the Tokyo High Court reversed the original judgment, supporting the contention of Pakistan that the principle of sovereign immunity should apply in this case. The Japanese courts had maintained the principle of absolute immunity since the principle was adopted in 1928.<sup>60</sup> The Tokyo High Court, finding that Pakistan

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<sup>59</sup> Tokyo District Court Judgment of 27 August 2001, in *Saiko-Saibansho Minji-hanreishu* (Supreme Court Civil Reports), Vol. 60, No. 6 (2006), p. 2551.

<sup>60</sup> Grand Court of Cassation Judgment of 28 December 1928, in *Daishinin Minji-hanreishu* (Grand Court of Cassation Civil Reports), Vol. 7, No. 12 (1928), p. 1128.

had not waived such immunity, held that the State of Pakistan was not subject to Japanese jurisdiction in this case.<sup>61</sup>

The Supreme Court adopted the doctrine of restrictive immunity formally and declared a change in the applicable law. The Court noted that the United Nations Convention on Jurisdictional Immunities of States and Their Property,<sup>62</sup> as well as many countries, has adopted this restrictive approach and stated that there was no reason for recognizing the immunity against acts of a private character by a foreign State because such acts did *not, normally, infringe on the sovereignty of that foreign State* (emphasis added).

In the instant case, the Court found that the alleged acts by Pakistan were ordinary commercial transactions, which could be conducted by a private person *regardless of their purpose* (emphasis added). Therefore, the Court concluded that Pakistan could not have immunity from Japanese jurisdiction.

The Court, noting that both the contracts between X and Pakistan clearly provided that conflicts arising from this contract should be subject to Japanese judicial jurisdiction, held that such clauses meant in any case a waiver of immunity in principle. Thus the Court ordered the reversal of the original judgment and this case was remanded to the Tokyo High Court.

### *Nationality of Children Born out of Wedlock*

#### X V. THE STATE OF JAPAN

##### **Tokyo District Court, 29 March 2006**

##### ***Hanrei Jiho* (Judicial Reports), No. 1932 (2006), p. 51.**

The plaintiffs were nine children who were born from Philippine mothers and were recognized by their Japanese fathers after their birth. Although their mothers as their legal representatives applied to the Minister of Justice after recognition by their fathers to request that they be granted Japanese nationality, their application was not accepted and their acquisition of Japanese nationality denied.

Article 3(1) of the Nationality Law of Japan provides:

A child (excluding a child who was once a Japanese national) under twenty years of age who has acquired *the status of a legitimate child* by reason of *the marriage of its father and mother* and their recognition, may acquire Japanese nationality by making notification to the Minister of Justice, if the father or mother who has effected the recognition was, at the time of the child's birth, a Japanese national and such father

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<sup>61</sup> Tokyo High Court Judgment of 5 February 2003, in *Saiko-Saibansho Minji-hanreishu* (Supreme Court Civil Reports), Vol. 60, No. 6 (2006), p. 2554.

<sup>62</sup> UNGA Res.59/38 (2 December 2004). Not yet in force.

or mother is presently a Japanese national or was, at the time of his or her death, a Japanese national (emphasis added).

According to this clause, it is necessary to meet two requirements for acquiring Japanese nationality by legitimation: one is that the father and mother of the child have married and the other is that the child has acquired the status of a legitimate child.

The main issue in this case was whether these two requirements were consistent with Article 14(1)<sup>63</sup> of the Constitution of Japan. The Court affirmed the acquisition of Japanese nationality on the ground that the disputed requirements in Article 3(1) of the Nationality Law were in themselves inconsistent with Article 14(1) of the Constitution and consequently void.

The plaintiffs claimed that the disputed requirements also violated some international human rights conventions that Japan had already ratified, such as Article 9 of the Convention on the Elimination of All Forms of Discrimination against Women, 1979 (CEDAW), Article 24(1) and (3) of the International Covenant on Civil and Political Rights, 1966 (ICCPR), Articles 2 and 7 of the Convention on the Rights of the Child, 1989 (CRC).

First, the Court held that Article 9 of CEDAW could not be interpreted as requiring equality between legitimate and illegitimate children or equal treatment for a Japanese father and a Japanese mother with respect to the nationality of their children.

Second, the Court held that Article 24(1) of the ICCPR could not be interpreted as requiring the same status and equal rights for illegitimate children as legitimate children. And with respect to Article 24(3) of the ICCPR, the Court held that this clause did not oblige the States parties to give their nationality to all children born in their territory.

Third, the Court, noting that paragraph 1 of Article 2 of the CRC does not refer to illegitimate children clearly, stated that it did not intend to embrace a differentiated treatment between legitimate and illegitimate children with respect to the acquisition of nationality. And the Court found that “the status” in paragraph 2 should be interpreted as political or social status, not as personal or relational status. On the other hand, the Court held that Article 7 of CRC did not oblige the States parties to give their nationality to illegitimate children.

The Court further found that there was no need to examine the applicability of these articles in the domestic jurisdiction.

The plaintiffs had also invoked General Comment No. 17 (1998) of the Human Rights Committee (CCPR), the Concluding Observation of the Committee on the Rights of the Child (CRC) concerning the Nationality Law of UK (CRC/C/15/Add.188, 2002), the Concluding Observation of the CCPR concerning the fourth

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<sup>63</sup> Art. 14(1) of the Japanese Constitution provides: “All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin.”

periodic report (CCPR/C/79/Add.102, 1998) and the Concluding Observation of the CRC concerning the second periodic report (CRC/C/15/Add.231, 2004), both submitted by Japan. However, the Court found that these instruments had no binding force on the interpretation of these treaties by State organs including the judiciary.

Thus all contentions by the plaintiffs concerning international law were dismissed.

The respondent appealed to the Tokyo High Court.

*Refugee Status of an Indigenous Person Persecuted by Non-State Organs and Internal Protection Alternative*

X V. MINISTER OF JUSTICE, SUPERVISING IMMIGRATION INSPECTOR

**Tokyo District Court, 2 February 2007**

*Not yet reported*

The plaintiff was born in Bangladesh and has nationality of that country. He belongs to the Jumma people, who are indigenous inhabitants living in Chittagong Hill Tract (CHT) in that country. The political organization of Jumma indigenous people, the “*Parbatya Chattagram Jana Samhati Samiti* (CHT People’s United Party, PCJSS)” and its armed wing the “*Shanti Bahini*”, formed in 1973, had struggled against the national government for more than 20 years. In 1997, a Peace Accord was signed between the national government and the PCJSS. But some members of the PCJSS who opposed this Accord formed a new political organization named the United Peoples Democratic Front (UPDF) in 1998, leading to conflicts between the PCJSS and the UPDF.

The plaintiff was a central member of the UPDF, but withdrew from the organization immediately before coming to Japan. On 19 July 2002, he was admitted to enter Japan with a status of residence of “temporary visitor”. But since 10 January 2004, he had been staying without legal status of residence. On 2 December 2004 he was detained on suspicion of overstay and finally ordered to be deported from Japan on 24 January 2005. However, he had applied for recognition of his refugee status on 12 September 2002, but the Minister of Justice had turned down his application on 4 December 2003. He now advanced a request for the revocation of the deportation order and an invalidation of the denial of recognition of his refugee status.

The Court, pointing out that the word “fear of being persecuted” in the definition of “refugee” in Article 1 of the 1951 Convention Relating to the Status of Refugees<sup>64</sup> meant that an important requirement to recognize that refugee status is a

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<sup>64</sup> The Immigration Control and Refugee Recognition Act (Act No. 319 of 1951) adopts the same definition as the Convention Relating to the Status of Refugees (1951), providing that the term “refugee” means a refugee who falls under the provisions of Art. 1 of the Convention Relating to the Status of Refugees (Art. 2, item 3–2).

lack of protection by the country of his nationality, found that the requirement was fulfilled if there was a well-founded fear of being persecuted *even by non-State organs* with the government's connivance or neglect, and that the government of his country was not expected to afford an effective protection (emphasis added). While denying the alleged persecution by his national government, the Court recognized his refugee status on the ground that there was a well-founded fear of being persecuted by non-State organs such as the PCJSS or the UPDF.

The other issue in this case was whether the plaintiff could live without a fear of being persecuted in areas other than CHT within Bangladesh. It is known as the concept of "internal protection alternative".<sup>65</sup> The Court, noting that security was not good in Bangladesh as a whole and that the PCJSS could exercise considerable influence on the whole country because it had a close connection with the national government, held that there was a well-founded fear of being persecuted, even if the plaintiff lived in areas other than CHT.

Thus the Court fully accepted the plaintiff's claims.

*Abolition of National Clause in National Pension Law and Failure of Remedial Measures*

X V. THE STATE OF JAPAN

**Kyoto District Court, 23 February 2007**

*Not yet reported*

The plaintiffs were five Korean residents in Japan, who were born in Korea during the 1910s and 1920s and had lived in Japan since the 1920s or the 1930s. The National Pension Law of Japan, enacted in 1959, had a so-called national clause which limited the scope of insured persons to Japanese nationals. That national clause was abolished in 1981 when Japan became a party to the 1951 Convention Relating to the Status of Refugees and now insured persons are defined as "persons living in Japan aged 20 and over but under 60" (Article 7(1)). But because effective transitional or remedial measures were not taken at that time, some of the plaintiffs could not draw an old-age pension at all and the others could draw only a little.

The plaintiffs claimed that the national clause was contrary to the International Covenants on Human Rights (1966), Article 14(1) of the Constitution of Japan and customary international law, and that the failure to take effective transitional or

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<sup>65</sup> See European Legal Network on Asylum (ELENA), *Research Paper on the Application of the Concept of Internal Protection Alternative*, November 1998, updated as of autumn 2000, available at the official site of the European Council on Refugees and Exiles (ECRE) (<http://www.ecre.org/files/ipa.pdf>).

remedial measures constituted a violation of the State Redress Law. The Court held as follows.

First, with respect to the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR), the Court held that Articles 2 and 9 invoked by the plaintiffs only declared the contracting parties' political responsibilities to implement active policies for the right to social security of every person and held that these articles were not self-executing and could not apply in the domestic jurisdiction.

Second, with respect to the International Covenant on Civil and Political Rights (ICCPR), the Court recognized that Articles 2 and 26 invoked by the plaintiffs were self-executing and could apply in the domestic courts. But the Court held that Article 26 permitted a reasonable differentiated treatment between nationals and foreigners and that as for social security there was some discretion on the part of the States parties. The Court therefore found that the disputed national clause was not contrary to Articles 2 and 26. The Court also held that the failure to take effective transitional or remedial measures was not contrary to these articles either, on the ground that whether the parties took some transitional or remedial measures was within their discretion and it was not contrary to the International Covenants on Human Rights for the parties to give priority to nationals in the sphere of social policy.

Third, with respect to Article 7 of the Universal Declaration of Human Rights (1948), the Court found that some acts or omissions of the parties could not be estimated to constitute a strictly legal violation of the Declaration on ground that this Declaration did not have a legal binding force, without examining whether the Declaration became customary international law.

The Court also reached a negative conclusion with respect to the violation of Article 14(1) of the Constitution and rejected all claims.

*Forced Labour of Chinese Citizens during the Second World War – Waiver of War Reparation Claims of Nationals by Their Country*

NISHIMATSU CONSTRUCTION CO. V. Y

**Supreme Court, Second Petty Bench, 27 April 2007**

***Saiko-Saibansho Minji-hanreishu (Supreme Court Civil Reports), Vol. 61, No. 3 (2007), p. 1188***

The appellant, Nishimatsu Construction, made many Chinese people work forcibly on the site of construction in Hiroshima Prefecture under the national policy during the Second World War. The appellees Y (originally plaintiffs) were former workers and their survivors, all citizens of the People's Republic of China. They claimed compensation for the forced labour and resultant damages.

The Hiroshima High Court, recognizing the default of obligation for care and safety of Chinese workers, found that it was not admissible for the company to

invoke negative prescription which amounted to an abuse of rights and ordered the company to pay compensation.<sup>66</sup>

The legal issue in this case was whether the war reparation claims of Chinese citizens had been renounced by their country. The Hiroshima High Court had held that the Joint Communiqué of the Government of Japan and the government of the People's Republic of China<sup>67</sup> in 1972 had not extinguished the Japanese government's obligation to respond to the compensation claims of Chinese nationals. The ruling in the other case concerning the former Chinese comfort women, pointing out that the Treaty of Peace between the Republic of China and Japan in 1952 was the only peace treaty between Japan and China and that Article 11<sup>68</sup> of this treaty was also applied to the nationals of the PRC, held that the compensation claims of Chinese citizens were renounced by this clause.<sup>69</sup>

The Supreme Court held that section 5 of the Joint Communiqué meant comprehensive renouncement of the war reparations by China, including the compensation claims of its nationals. The Court did not find that the Treaty of Peace between the RC and Japan could apply to the nationals of the PRC because this treaty itself has a limited scope of application.<sup>70</sup> Then the Court, examining the wording of section 5 of the Joint Communiqué, held that this clause must be interpreted in the same way as a corresponding clause of the Treaty of San Francisco in 1951,<sup>71</sup> although it was not clear about the subject of claims renounced in section 5.

This was the first ever judgment of the Supreme Court on the issue of whether the war reparation claims of nationals are renounced by the waiver clause of the peace treaty their country concluded. On the same day, the Supreme Court declared

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<sup>66</sup> Hiroshima High Court Judgment of 9 July 2004, in *Hanrei Jiho* (Judicial Reports), No. 1865 (2004), p. 62.

<sup>67</sup> Section 5 of this Communiqué provides: "The government of the People's Republic of China declares that in the interest of the friendship between the Chinese and the Japanese peoples, it renounces its demand for war reparation from Japan."

<sup>68</sup> Art. 11 of the Treaty of Peace between the RC and Japan provides: "Unless otherwise provided for in the present Treaty and the documents supplementary thereto, any problem arising between the Republic of China and Japan as a result of the existence of a State of war shall be settled in accordance with the relevant provisions of the San Francisco Treaty."

<sup>69</sup> Tokyo High Court Judgment of 18 March 2005, in *Shomu Geppo* (Monthly Reports of Judicial Matters), Vol. 51, No. 11 (2005), p. 2858.

<sup>70</sup> Both plenipotentiaries confirmed in the *Exchange of Notes* in 1952 that "the terms of the present Treaty shall, in respect of the Republic of China, be applicable to all the territories which are now, or which may hereafter be under the control of its government."

<sup>71</sup> Art. 14(b) of the Treaty of San Francisco provides: "Except as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war, and claims of the Allied Powers for direct military costs of occupation."

the final dismissal of the compensation claims by the Chinese nationals for the same reason in the four other cases.<sup>72</sup>

#### OTHER RELEVANT STATE PRACTICE 2006–2007<sup>73</sup>

##### **Economic partnership agreements (EPA)**

Japan concluded the first EPA with Singapore in 2002. Since then the Japanese government has undertaken to conclude similar agreements with other States, and the EPA with Mexico came into effect in April 2005. In 2006, the Cabinet of the Japanese government decided to accelerate negotiations on EPAs. In accordance with the decision, several EPAs came into force or were signed during the years 2006–2007. The EPAs with Malaysia came into force in July 2006, with Chile in September 2007 and with Thailand in November 2007. The EPA with the Philippines was signed in September 2006, with Brunei in June 2007 and with Indonesia in August 2007, although none of them had come into force at the time of writing.

The main significance of the EPA between Japan and Malaysia is as follows. First, the establishment of a framework for expansion of the trade and investments between the two countries; second, a symbol of partnership in the new era; and third, the basis for acceleration of negotiations for EPAs in the East Asian region.

The EPA between Japan and Chile is the second EPA with the Latin American States. This EPA is important for Japan because it improves the conditions for trade and investments of Japanese nationals in Chile, contributes to the stable supply of mineral resources and secures the basis for expansion of economic transactions with the Latin American States.

Japan expects that the EPAs with Thailand and the Philippines will contribute to further expansion of the respective bilateral economic relationship and provide the basis for closer partnership with the East Asian region. The other specific feature of these agreements is that they contain provisions for freer movement of natural persons. In the case of the EPA with Thailand, it provides the movement of natural persons of a limited category and further negotiations are scheduled to be pursued. However, Article 110, paragraph 2 of the EPA with the Philippines guarantees natural persons with “the entry and temporary stay in accordance with the terms and conditions of the specific commitment set out in Annex 8, provided that the natural persons comply with immigration laws and regulations applicable to entry and temporary stay which are not inconsistent with the provisions of this Chapter” referred

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<sup>72</sup> Supreme Court, First Petty Bench, Judgment of 27 April 2007, in *Hanwei Jiho* (Judicial Reports), No. 1969 (2007), p. 38, and the three other judgments are not yet reported.

<sup>73</sup> Contributed by KAWANO Mariko, Faculty of Law, Waseda University; member of the Editorial Board.

to in paragraph 1. The specific commitment provided in paragraph 1 is as follows: “(a) short-term business visitors of the other Party, (b) intra-corporate transferees of the other Party, (c) investors of the other Party, (d) natural persons of the other Party who engage in professional services, (e) natural persons of the other Party who engage in supplying services, which require technology or knowledge at an advanced level or which require specialized skills belonging to particular fields of industry, on the basis of a contract with public or private organizations in the former Party, and (f) natural persons of the other Party who engage in supplying services as nurses or certified careworkers or related activities, on the basis of a contract with public or private organizations in the former Party or on the basis of admission to public or private training facilities in the former Party.”

The EPAs with Indonesia and Brunei are important not only as a basis for the expansion of bilateral economic relations but also for securing stable supply of mineral resources including oil and natural gas.

As far as the EPA with Singapore is concerned, the Protocol Amending the Agreement between Japan and the Republic of Singapore for a New-Age Economic Partnership was signed in March 2007. By this Protocol it is expected that the liberalization and facilitation of trade in goods and services between them will be promoted and the economies of both countries further invigorated.

Japan intends to expand its EPAs and is pursuing bilateral negotiations with Viet Nam, Korea, India, Australia and Switzerland respectively. Japan is also undertaking negotiations to conclude an ASEAN–Japan Comprehensive Economic Partnership Agreement and Free Trade Agreements with the members of the GCC (UAE, Oman, Qatar, Saudi Arabia and Bahrain).

### **Accession to the Rome Statute of the International Criminal Court**

Japan deposited the instrument of accession to the Rome Statute of the International Criminal Court with the UN Secretary-General on 17 July 2007 and became a State Party to the Statute on 1 October 2007.

To accede to the Statute, Japan enacted the Act for the Cooperation with the International Criminal Court on 11 May 2007. The new Act provides for procedural measures and new crimes to fulfil the obligations under the Rome Statute.

Ms Saiga Fumiko, Ambassador in Charge of Human Rights and a member of the Committee on the Elimination of All Forms of Discrimination against Women, was elected as a Judge on 30 November 2007.

### **Signature of the Convention on Jurisdictional Immunity of States and its Property**

Japan signed the United Nations Convention on Jurisdictional Immunities of States and Their Property on 11 January 2007. In the United Nations International Law Commission, Ambassador Ogiso, former Japanese member of the Commission, served as a *Special Rapporteur*. Ambassador Yamada, the present Japanese member

of the ILC, served as a *Rapporteur* for the Working Group in the reconsideration of the text of the final reading in the ILC in 1999 and played a very important role in the negotiations in the Sixth Committee from 1999 to 2000. The Japanese government intends to ratify the Convention in due time.

### **Japan's new reservation to the declaration accepting the compulsory jurisdiction of the International Court of Justice**

Japan made a declaration to accept the compulsory jurisdiction of the International Court of Justice in 1958, in which it declared that it:

recognizes as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation and on condition of reciprocity, the jurisdiction of the International Court of Justice, over all disputes which arise on and after the date of the present declaration with regard to situations or facts subsequent to the same date and which are not settled by means of peaceful settlement.

It can be said that this declaration did not contain any substantive reservation to the compulsory jurisdiction of the Court.

Japan maintained its declaration for about 50 years and made a new declaration on 9 July 2007. In the new declaration, Japan attaches a new paragraph for reservation as follows:

This declaration does not apply to any dispute in respect of which any other party to the dispute has accepted the compulsory jurisdiction of the International Court of Justice only in relation to or for the purpose of the dispute; or where the acceptance of the Court's compulsory jurisdiction on behalf of any other party to the dispute was deposited or notified less than twelve months prior to the filing of the application bringing the dispute before the Court.

## **NATIONAL LAWS ON INTERNATIONAL LAW MATTERS<sup>74</sup>**

### **Promulgation of the Basic Act of Ocean Policy**

Japan promulgated the Basic Act of Ocean Policy on 20 July 2007. The Act was drafted by some members of the Diet from several political parties.

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<sup>74</sup> Contributed by KAWANO Mariko, Faculty of Law, Waseda University, Tokyo, Japan; member of the Editorial Board.

Chapter one provides for the general principles. Article 1 stipulates the purpose of this Act. In accordance with Article 1, the Headquarters for Ocean Policy was established in order to promote measures with regard to the oceans comprehensively and systematically and to emphasize the importance of contribution to the coexistence of the oceans and mankind. Six basic principles provided in the Act are as follows: harmonization of the development and use of the oceans with the conservation of marine environment (Article 2); securing the safety and security on the oceans (Article 3); improvement of scientific knowledge of the oceans (Article 4); sound development of ocean industries (Article 5); comprehensive governance of the oceans (Article 6); and international partnership with regard to the oceans (Article 7). The Act differentiates between the responsibilities of the four relevant parties – the State, local governments, business operators and citizens – regarding the ocean issues in Articles 8 through 11, while Article 12 recognizes the importance of the coordination and cooperation among these four parties.

In Chapter two, Article 16 provides that the government shall formulate a basic plan to promote measures with regard to the oceans comprehensively and systematically.

In Chapter three, 12 basic measures on ocean policy are provided: promotion of development and use of ocean resources (Article 17); conservation of marine environment and others (Article 18); promotion of development of exclusive economic zone and others (Article 19); securing maritime transport (Article 20); securing the Safety and Security of the oceans (Article 21); promotion of ocean survey (Article 22); promotion of research and development in ocean science and technology and other related matters (Article 23); promotion of ocean industries and strengthening the international competitiveness (Article 24); integrated management of the coastal zone (Article 25); conservation of the remote islands and the like (Article 26); securing international coordination and promotion of international cooperation (Article 27); and enhancement of citizens' understanding of the oceans and their issues (Article 28).

Chapter four establishes the organs to fulfil the task and undertake the measures as provided in the Act. The Headquarters for Ocean Policy is established in the Cabinet (Article 29) and Article 30 stipulates its competence. The Headquarters consists of the Director-General, the Vice-Director and the Members (Article 31). Article 33 provides for the Minister for Ocean Policy.

In accordance with the Act, the Headquarters have taken efforts to formulate the basic plan on ocean policy and it was expected to be made public in March 2008.

KOREA<sup>75</sup>

## JUDICIAL DECISIONS

*The Restrictions on the Freedom of a Dual National to Renounce Citizenship*

## THE CORROBORATION OF UNCONSTITUTIONALITY IN KOREAN NATIONALITY ACT ARTICLE 12, PARAGRAPH 1

**Petitioner: Yoon****Pronounced on 30 November 2006, by the Constitutional Court of the Republic of Korea (Decision based on 2005 HunMa739)****Facts**

The petitioner (Yoon) was brought up in the United States by a Korean father and holds a dual nationality: Korean and American. Yoon was residing in Korea until the Military Administration enlisted him on 1 January 2004, in accordance with the Military Service Law. In May 2005, a revision of the Military Service Law was carried out in order to prohibit the evasion of military service by dual nationals. This amended version states that a dual national, who is a direct descendant (of a Korean national) and was born in a foreign country without purpose of permanent residence, should serve the Korean military prior to renunciation of his Korean nationality. The petitioner claimed that such an article is unconstitutional and filed a constitutional appeal.

**Legal issues**

Article 12 of the amended Military Service Law regulates the basics of the selection of nationality. It states that a person who acquires dual nationality status before the age of 20 must make a choice between the two before the age of 22, and he or she who acquires dual nationality after the age of 22 must make the choice within two years from acquisition. Should such responsibility be neglected until the expiration of the proposed period, the subject shall be denationalized.

The freedom to renounce and change one's nationality is guaranteed by Article 14 of the Constitution. Does Article 12, Paragraph 1 of Military Service Law, which limits the freedom of deciding one's nationality, then, violate the constitution?

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<sup>75</sup> Contributed by Eric Yong-Joong Lee, Dr iur. He is professor of Dongguk, University College of Law, Seoul, Korea and president of YIJUN Institute of International Law (<http://www.yijuninstitute.org>).

**Decision**

Article 12, Paragraph 1 of the Military Service Law does not infringe Article 14 of the Constitution. The petition was rejected. The decision is based on the following reasoning.

The proviso of Article 12, Paragraph 1 of the Military Service Law purports to prohibit a Korean citizen from avoiding his obligatory military service through renunciation of nationality. A dual national may be exempted from military service by renouncing his Korean nationality within three months after his service is assigned; however, after the expiration of such period the subject must fulfil the military service before renouncing Korean citizenship.

The military service is essential to national existence; hence an indispensable Constitutional element. Article 5, Paragraph 2 and Article 39 of the Constitution elucidate such significance of the service. The absence of Article 12, Paragraph 1 of the Military Service Law will facilitate the evasion of service by a dual national, thereby infringing on both the universal military service system stated in Article 39 and the equality of military service stated in Article 11 of the Constitution.

Moreover, the right to choose one's nationality is only partially restricted by the proviso of Article 12, Paragraph 1 of the Military Service Law. Three months of time is granted to make a free selection, and the period of restriction lasts only until the subject reaches the age of 36 when the obligation to military service is lifted. Furthermore, clearance of duty, by either discharge or exemption, brings back the right to renounce Korean nationality at any time.

**The issue related to the Reliance Principle**

The First Article of the supplementary provision of the revised Korean Nationality Act States that the law must be enforced with promulgation and the Second Article extends the scope of effect to those who were born prior to its enforcement. Thus, according to the latter article and purport of amendment, it is clear that Article 12, Paragraph 1 of the Military Service Law applies to the petitioner. Therefore, the assertion that the above stated law is unclear is unfounded and so conforms to the reliance principle.

*The Legal Criteria for the Status of Refugee*

## THE COURT OF ADMINISTRATIVE LITIGATION

**(2006GooHap 28345 Judgment)****Facts**

The petitioner, a former Egyptian Muslim, converted to Copt (Egyptian Christianity) after marrying a Christian woman in April 2005. The Egyptian Islamic groups

repeatedly threatened and kidnapped him for re-conversion. Consequently, on 27 September 2005, he entered Korea under the pretence of a business trip and requested refugee status. Nevertheless, the Minister of Justice concluded that the petitioner's assertion lacked credibility and refused.

## **Judgment**

### *Refugee convention and requisites*

In defining the term "refugee", the 1951 Convention relating to the Status of Refugees (hereinafter 1951 Convention) requires a well-founded fear of being persecuted for reasons of race, religion, nationality or membership of a particular social group or political opinion. Here, "persecution" is generally seen as unreasonable discrimination, pain, disadvantage or further life or freedom-threatening conduct by any body, its scope unlimited to the government agency.

In order to acquire the status of refugee, simply informing the government of the applicant's fear is insufficient; the applicant must provide substantial evidence of such threats. In other words, the subjective State of the applicant should be grounded on objective circumstances. A circumstance in which any rational individual will suffer similar hardships should conform to the required objectivity.

Furthermore, not only the basic human rights environment of the applicant's homeland but whether the contemporary situation of the country may lead to such persecution of the applicant should also be considered. The applicant is responsible for the substantiation of such a situation.

### *The Court's judgment on the petitioner's circumstance*

The Egyptian government currently bans conversion from Muslim to Christianity and persecutes the corresponding population with imprisonment by means of secret service. The petitioner has undergone conversion and there is a good possibility that oppression will follow deportation, accordingly.

Moreover, previous records of the petitioner's suffering of threats by Muslim groups and escape from his homeland show the likelihood of the repetition of such. Incoherence within the petitioner's testimony notwithstanding, it seemed that the investigation was conducted on an unstable petitioner, who probably had neither the composure nor explanatory material to support his assertion. In addition, the petitioner might have not known the difference between Catholic and Christianity since his conversion was only recent, by which the Court cannot affirm that the petitioner's testimony lacks due credibility.

### *Conclusion*

As the petitioner has a well-founded fear of persecution as stated in the 1951 Convention, he thereby holds the status of a refugee according to Article 2, Subpara-

graph 2 of 2, Immigrant Control Law. Therefore, the decision of the defendant that the petitioner is not a refugee is illegal.

*The Claim of Damages by Requisition during Japanese Colonial Period*

**Decision made on 2 February 2007 Busan District Court (2000 GaHap7960 Judgment)**

**Facts**

The petitioners, born in South Korea during the Japanese colonial period, were drafted and assigned to Mitsubishi Corporation in Hiroshima, Japan in 1944. After being injured by the US bombing on Hiroshima, they returned to Korea, suffering from the after-effects of the incident. In December 1995, they filed a case against the Mitsubishi Corporation claiming damages and back payment. After losing in the first trial, they filed the same suit in Korea. According to the petitioners, Mitsubishi Corporation took advantage of the war not only by forcing work within a coarse environment but also by leaving them without any necessary aid after the bombing. Moreover, they claimed the corporation neglected its responsibility to safely transport the petitioners back to South Korea after the requisition had ended. The Corporation also failed to keep the promise of remitting half of the wage to their families back in Korea, returning the partially reduced wages that they were told were being saved for private savings. According to them the corporation even refused to pay anything at all, towards the end of the draft.

**Legal issues**

The petitioners asserted that the Mitsubishi Corporation should take responsibility for causing such damages, as it violated international laws such as the international common law that bans slavery, the International Labor Organization Agreement No. 29 that rejects all kinds of compulsory labour, and the Nuremberg Codes.

**Judgment**

Neither the ILO Agreement No. 29 nor the Nuremberg Codes State possibilities in which the victim of compulsory labor can directly claim for damages. Should the prohibition of slavery be recognized as enforcing according to international law as asserted by the petitioners, even so the argument that an international common law exists to allow direct claim for damages is unfounded. Therefore, petitioners do not have the right to ask Mitsubishi Corporation to take direct responsibility for damages caused by the compulsory labour.

*The issues related to the extinctive prescription*

The petitioners claimed that the damages done by the Mitsubishi Corporation were followed by crime against humanity, to which general extinctive prescription must not be applied. However, the Court found such a claim to be unfounded. The extinctive prescription initiates when the corresponding right is objectively generated and can be exercised. Likewise, it is interrupted when the right cannot be exercised due to obstacles – de jure, not de facto; and the ignorance of an individual of such law, even as a result of misinformation, would clearly fall for the latter. In relation to Article 2, 1965 Korea–Japan Claims Settlement Agreement, and its minutes, whether the Korean government had only disclaimed its diplomatic protectorate of its citizens or also surrendered the individual claims for damages against Japan and/or its people has been unclear. Nevertheless, even if the petitioners believed that their rights could not be properly exercised by insufficient understanding of the agreement, the presence of such agreement, or the enactment of a Japanese law that disallows individual claims of Korean people against Japan and/or its people, are not legal obstacles by which the prescription is interrupted. Therefore, the initial date in reckoning was not 26 August 2005, as asserted by the petitioners, and their claim had lapsed due to extinction, prior to litigation.

NEPAL<sup>76</sup>*Right to Equality – Equality test is unlikely to be invoked against procedural and customary matters*

## FORUM FOR WOMEN, LAW AND DEVELOPMENT, KATHMANDU AND OTHERS V. PRIME MINISTER AND OFFICE OF THE COUNCIL OF MINISTERS AND OTHERS

**Special Bench of the Supreme Court of Nepal, decided on 1 September 2006<sup>77</sup>**

The fact in issue in the case was about naming a newly born child. The law had given priority to a father in naming a child; a mother could name a child only when the father was missing or dead. The writ petitioner had therefore asked the Supreme Court of Nepal to declare section 3(1)<sup>78</sup> of the Children Act, 1992 of Nepal *ultra*

<sup>76</sup> Contributed by Surendra Bhandari, Law Associates Nepal, Kathmandu.

<sup>77</sup> The Special Bench of the Supreme Court of Nepal consisted of Justice Ram Nagina Singh, Justice Ram Prasad Shrestha, and Justice Khil Raj Regmi.

<sup>78</sup> Section 3.1(a) of the Children Act, 1991 of Nepal provides: “On the birth of a child, name should be given in accordance with their religion, culture and custom by father, and by mother if the father is not available, and by other members of the family if the mother is also not available. In case of missing or death of father, mother, and other members of the family, person or organization rearing the child should give a name.”

*vires* the equality provision of the Constitution of the Kingdom of Nepal, 1990. The writ petitioner had challenged section 3(1) of the Children Act, 1992 as it contravened Article 11(1)<sup>79</sup> of the Constitution of the Kingdom of Nepal 1990, Article 7 of the Universal Declaration of Human Rights 1948,<sup>80</sup> Article 26 of the International Covenant on Civil and Political Rights 1966<sup>81</sup> and equality provisions of the Convention on Elimination of All Forms of Discrimination against Women, 1979 (CEDAW).

The Supreme Court rejected the writ petition on two grounds. First, naming a child is an activity traditionally shared by all the family members. To invoke an equality test on customary matters like this is improbable. The Court refrained from testing whether the customary practice of naming a child and section 3(1) of the Children Act, 1992 were reinforcing or contradicting each other. The Court was also silent as to the legal consequences if the law was not compatible with customary practice. Second, the Court acknowledged that the government had found section 3(1) of the Children Act discriminatory and was ready to amend it. Despite the fact, the Court did not declare section 3(1) discriminatory.

The Court concluded that there was no urgency to issue a writ petition declaring the impugned provision *ultra vires* the provisions of law, in particular when the government has already carried out a study to identify laws discriminatory between men and women and was taking steps in the direction of amending discriminating laws.

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<sup>79</sup> Article 11(1) of the Constitution of the Kingdom of Nepal, 1990 provides: "All citizens shall be equal before the law. No person shall be denied the equal protection of the laws." In January 2007, the 1990 Constitution has been withdrawn by an Interim Constitution 2007. However, the provisions on non-discrimination and equality in the Interim Constitution are similar to the 1990 Constitution.

<sup>80</sup> Article 7 of the Universal Declaration of Human Rights provides: "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."

<sup>81</sup> Article 26 of the International Covenant on Civil and Political Rights, 1966 provides: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

*Gender Discrimination based on Infertility – Rules of International Law prevail over Domestic Laws to the extent that the Domestic Laws are inconsistent*

ADV. MIRA DHUNGANA AND OTHERS V. PRIME MINISTER AND OFFICE OF THE COUNCIL OF MINISTERS AND OTHERS

**Special Bench of the Supreme Court of Nepal, decided on 30 March 2006<sup>82</sup>**

Delivering a landmark decision, the Supreme Court of Nepal enunciated a principle that domestic laws inconsistent with the treaty provisions are *ultra vires* to the extent of inconsistency. Further the Supreme Court explained that international laws ratified by government prevail over domestic laws under section 9(1)<sup>83</sup> of the Treaty Act, 1990 of Nepal if the domestic laws did not comply with the treaty provisions.

The writ petitioners had raised a question that section 1(1)<sup>84</sup> of Chapter 12 on Husband and Wife of the National Code, 1963 of Nepal was inconsistent to Article 11<sup>85</sup> of the Constitution of the Kingdom of Nepal, Articles 2, 3, 5 and 23(4) of ICCPR, and Articles 1, 2, 3 and 16.1(c) of CEDAW. The impugned section 1(1) provided a right to a husband to get divorced from his wife after ten years of marriage on the ground of his wife's infertility certified by a medical board recognized by government. But section 1(2) of the same law provides a right to a wife to get divorced from her husband on the ground of impotency. The main line of

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<sup>82</sup> The Special Bench of the Supreme Court of Nepal consisted of Justice Ram Nagina Singh, Justice Anup Raj Sharma, and Justice Gauri Dhakal.

<sup>83</sup> Section 9(1) of the Treaty Act, 1990 of Nepal provides that in case of inconsistency between domestic laws and international treaties to which Nepal is a Party, the provisions of treaty law shall prevail over the domestic laws.

<sup>84</sup> Section 1(1) of Chapter 12 on Husband and Wife of the National Code, 1963 provides that a husband can get divorced with his wife after the completion of ten years of marriage if the medical board recognized by government certifies infertility of a wife.

<sup>85</sup> Article 11 of the Constitution of the Kingdom of Nepal follows:

- (1) All citizens shall be equal before the law. No person shall be denied the equal protection of the laws.
- (2) No discrimination shall be made against any citizen in the application of general laws on the grounds of religion, race, sex, caste, tribe or ideological conviction or any of them.
- (3) The State shall not discriminate among citizens on grounds of religion, race, sex, caste, tribe, or ideological conviction or any of these.

Provided that special provisions may be made by law for the protection and advancement of the interests of women, children, the aged or those who are physically or mentally incapacitated or those who belong to a class which is economically, socially or educationally backward.

- (4) No person shall, on the basis of caste, be discriminated against as untouchable, be denied access to any public place, or be deprived of the use of public utilities. Any contravention of this provision shall be punishable by law.
- (5) No discrimination in regard to remuneration shall be made between men and women for the same work.

argument of the writ petitioners was that “infertility” and “impotency” were two different conditions, which the Supreme Court agreed. According to the impugned law a husband could get divorced on the ground of “infertility” but a wife could not get divorced on the ground of “infertility”, therefore the impugned law believed that only women can be prone to infertility and men are not prone to infertility. Therefore, the law was discriminatory and the petitioners asked the Supreme Court to declare it *ultra vires*. The Supreme Court discussed Articles 2, 3, 5 and 23(4) of ICCPR, and Articles 1, 2, 3 and 16.1(c) of CEDAW and found the impugned section inconsistent to these provisions of international law and declared the impugned section 1(1) null and void effective from the date of the delivery of the decision. Further, the Supreme Court directed the government to enact law if needed to provide a right to divorce on the ground of infertility but without making any discrimination between men and women and paying respect to the ratified treaties.

*Gender Discrimination in Reproductive Health Rights – The Rules of the Multilateral Convention to which Nepal is a Party are self-enforceable*

ADV. PRAKASH MANI SHARMA AND OTHERS V. MINISTRY OF CIVIL AVIATION AND TRANSPORTATION AND OTHERS

**Special Bench of the Supreme Court of Nepal, decided on 30 December 2005<sup>86</sup>**

The facts in issue in this case were that Royal Nepal Airlines Corporation, a State-owned and operated company, had provided maternity leave under section 115 of its byelaws only to married women and had denied the same rights to single or unmarried mothers. The writ petitioners had challenged the impugned section 115 claiming that it was inconsistent with Articles 11 and 12(1)<sup>87</sup> of the Constitution of the Kingdom of Nepal 1990, Article 11(2)<sup>88</sup> of CEDAW, Article 24(2) of the Convention on the Rights of the Child 1989 and different provisions of the Convention

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<sup>86</sup> The Special Bench of the Supreme Court of Nepal consisted of Justice Min Bahadur Rayamajhi, Justice Sarada Shrestha, and Justice Balam K.C.

<sup>87</sup> Article 12(1) of the Constitution of the Kingdom of Nepal, 1990 provides: “No person shall be deprived of his personal liberty save in accordance with law, and no law shall be made which provides for capital punishment.”

<sup>88</sup> Article 11(2) of the CEDAW provides: “In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:

- (a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;
- (b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;
- (c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in

Concerning Maternity Protection, 2000. The Supreme Court examined in detail the provisions of the cited international laws and concluded that different legal systems have different normative mechanisms with regard to international law. For example, some countries apply the rules of international law only when the rules are incorporated into domestic laws. The Nepalese legal system has accorded higher normative hierarchy to the international laws to which Nepal is a party. Therefore, the government and all State agencies bear a responsibility to give effect to the rules of international laws irrespective of whether they are incorporated into domestic laws or not. Being convinced that the impugned section 115 was discriminatory, the Supreme Court ordered the Royal Nepal Airlines Corporation to amend the impugned discriminatory provision and make it compatible with the provisions of cited international laws within three months from the date of the issuance of the order.

This case is one of the landmark decisions of the Supreme Court of Nepal establishing jurisprudence on the relationship between domestic laws and international laws. Most importantly it established the following three principles:

- First, international laws are self-enforcing when Nepal is a party to them.
- Second, the State and all its agencies are responsible to give effect to such international laws as to the domestic laws.
- Third, international laws prevail over domestic laws, if the domestic laws are inconsistent with such international laws.

## PHILIPPINES<sup>89</sup>

### JUDICIAL DECISIONS

#### *Right of citizens to information upheld*

SENATE OF THE PHILIPPINES, represented by FRANKLIN M. DRILON, in his capacity as Senate President v. EDUARDO R. ERMITA, in his capacity as Executive Secretary, et al.

#### **G.R. No. 169777, 20 April 2006.**

In *Drilon et al. v. Executive Secretary*, the Supreme Court of the Philippines struck down an Executive Order (EO No. 464) issued by President Arroyo preventing heads of departments of the executive branch from appearing and answering questions in

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particular through promoting the establishment and development of a network of child-care facilities;

- (d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.”

<sup>89</sup> Contributed by Harry Roque Jr, Faculty Member, College of Law, University of Philippines, Diliman, Quezon City.

hearings in aid of legislation before Congress. EO No. 464 was perceived as a measure undertaken by the Arroyo administration to stymie the Senate's efforts to investigate alleged incidents of election-rigging in the 2004 national elections as well as irregularities in the *North Rail* project contract entered into by the Philippine government with a Chinese contractor. It required all heads of departments of the Executive Branch of the government – including senior military, police and national security officials – to secure the consent of the President before appearing before either chamber of the Philippine Congress. By virtue of this EO, several senior military and executive officials who had been issued subpoenas by the Senate refused to attend the scheduled legislative inquiries and military officials who attended in defiance of the EO were relieved from their military posts and made to face court-martial proceedings.

The EO invoked the doctrine of “executive privilege” to justify the prohibition on the attendance by executive officials to legislative hearings, resulting in a stalemate and a near “constitutional crisis”. Pitted against each other were the Executive's right to such privilege and confidentiality on one hand and the Legislative's constitutionally vested power and right to conduct inquiries in aid of legislation as well as the citizens' right to be informed on matters of public concern on the other. Several petitions were filed by legislators, members of the Bar, political parties and citizens; groups assailing the constitutionality of the EO on the grounds that it infringes on the rights and duties of Congress to fulfil its duties and denies the people their right to information on matters of public concern.

Drawing on established legal principles and jurisprudence on the scope of “executive privilege” and the constitutional power of inquiry held by the Philippine Congress, the Court invalidated the portion of the EO (section 3 thereof) which required executive officials to secure the consent of the President prior to attending hearings conducted by Congress in aid of legislation. Also worth noting is the Court's reiteration of its protection of the right of the people to be informed of public matters – a right guaranteed under its Constitution<sup>90</sup> and international law<sup>91</sup> – saying thus:

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<sup>90</sup> 1987 Const., art. III, § 7.

<sup>91</sup> International Covenant on Civil and Political Rights, available at [http://www.unhcr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhcr.ch/html/menu3/b/a_ccpr.htm). Article 19 of the Covenant states:

1. Everyone shall have the right to hold opinions without interference.
2. *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - (a) for respect of the rights or reputations of others;
  - (b) for the protection of national security or of public order (*ordre public*), or of public health or morals (emphasis supplied).

To the extent that investigations in aid of legislation are generally conducted in public, however, any executive issuance tending to unduly limit disclosures of information in such investigations necessarily deprives the people of information which, being presumed to be in aid of legislation, is presumed to be a matter of public concern. The citizens are thereby denied access to information which they can use in formulating their own opinions on the matter before Congress – opinions which they can then communicate to their representatives and other government officials through the various legal means allowed by their freedom of expression.

*Right of citizens to peaceful assembly upheld*

BAYAN, et al., V. EDUARDO ERMITA, in his capacity as Executive Secretary, et al.

**G.R. No. 169838, April 25, 2006.**

In *BAYAN et al. v. Ermita et al.*, the Supreme Court was asked to declare unconstitutional Batas Pambansa Blg. 180,<sup>92</sup> the statute governing public assemblies and demonstrations in the Philippines, and the policy of *Calibrated Pre-emptive Response* (CPR) adopted by the Arroyo administration as enunciated in a press statement by Executive Secretary Ermita which purported to set a new standard for responses by law enforcement officers to unauthorized demonstrations. While BP 880 required police officers to observe “maximum tolerance” in dealing with protestors and rallyists, CPR declared a policy of “calibrated pre-emptive response” to be in effect *in lieu* of the maximum tolerance standard set forth in BP 880.<sup>93</sup> Several petitions were filed by citizens’ groups assailing BP 880 as unconstitutional for curtailing the people’s right to assembly and freedom of expression as it requires a permit for rallies to be conducted, thereby limiting the people’s choice of venue. A declaration that CPR is void was likewise sought from the court for being an *ultra vires* act of the Executive, as it purported to alter a statutory standard set by the Legislature.

The Court revisited long-established jurisprudence on the right to freedom of assembly in the Philippines and ultimately upheld the validity of BP 880, holding that it was not an absolute ban of public assemblies but a reasonable restriction regulating the time, place and manner of the exercise of the right. The ground for the denial of a permit to rally under the law – clear and present danger to public order, public safety, public convenience, public morals or public health – was found to be a

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<sup>92</sup> An Act Ensuring the Free Exercise by the People of their Right Peaceably to Assemble and Petition the government [and] for Other Purposes, 22 May 1985.

<sup>93</sup> See Palace orders strict enforcement of “no permit, no rally” policy, available at: <http://www.op.gov.ph/news.asp?newsid=13532>

valid exception to the exercise of the right by the Court, which cited the Universal Declaration of Human Rights<sup>94</sup> and the International Covenant on Civil and Political Rights.<sup>95</sup> With the validity of BP 880 and its standard of “maximum tolerance”, CPR was struck down by the Court as being devoid of legal purpose and giving rise to abuses by police forces.

*Status of terrorism under international law*

PROF. RANDOLF S. DAVID, et al, V. GLORIA MACAPAGAL-ARROYO, AS PRESIDENT AND COMMANDER-IN-CHIEF, et al.

**G.R. No. 171396, 3 May 2006.**

Amidst this growing political dissent against the Arroyo administration, the Supreme Court of the Philippines took cognizance of the status of terrorism under international law to strike down an issuance of President Arroyo declaring a state of national emergency during the commemoration of the 1986 People Power Revolution. In *David v. Arroyo* seven consolidated petitions challenged the constitutionality of Presidential Proclamation No. 1017 (PP 1017) and General Order No. 5 (GO No. 5) in the wake of the arrests of numerous civilians and political oppositionists during the course of their participation in political demonstrations. Raids and confiscations were also carried out on the offices of several newspapers by the armed forces. The assailed PP 1017 declared a state of national emergency on the 20th anniversary of the EDSA People Power Revolution, citing as cause the existence of a conspiracy between elements of the Philippine opposition and extremist communist insurgents and their repeated attempts to bring down the Arroyo administration. GO No. 5 was enacted on the same day as implementing PP 1017 and calling on the Armed Forces of the Philippines and the Philippine National

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<sup>94</sup> Articles 20 and 29 of the UDHR state:

Article 20

Everyone has the right to freedom of peaceful assembly and association.

Article 29

1. Everyone has duties to the community in which alone the free and full development of his personality is possible.
2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

<sup>95</sup> Art. 19, *supra* n. 3.

Police to “immediately carry out the necessary and appropriate actions and measures prevent and suppress acts of terrorism and lawless violence in the country”.

PP 1017 declared the following:

NOW, THEREFORE, I, Gloria Macapagal-Arroyo, President of the Republic of the Philippines and Commander-in-Chief of the Armed Forces of the Philippines, by virtue of the powers vested upon me by Section 18, Article 7 of the Philippine Constitution which States that: “The President . . . whenever it becomes necessary, . . . may call out (the) armed forces to prevent or suppress . . . rebellion . . .” and in my capacity as their Commander-in-Chief, do hereby command the Armed Forces of the Philippines, to maintain law and order throughout the Philippines, prevent or suppress all forms of lawless violence as well as any act of insurrection or rebellion and to enforce obedience to all the laws and to all decrees, orders and regulations promulgated by me personally or upon my direction; and as provided in Section 17, Article 12 of the Constitution do hereby declare a State of National Emergency.

G.O. No. 5 implemented PP 1017 by stating thus:

NOW, THEREFORE, I GLORIA MACAPAGAL-ARROYO, by virtue of the powers vested in me under the Constitution as President of the Republic of the Philippines, and Commander-in-Chief of the Republic of the Philippines, and pursuant to Proclamation No. 1017 dated February 24, 2006, do hereby call upon the Armed Forces of the Philippines (AFP) and the Philippine National Police (PNP), *to prevent and suppress acts of terrorism and lawless violence in the country;*

I hereby direct the Chief of Staff of the AFP and the Chief of the PNP, as well as the officers and men of the AFP and PNP, to *immediately carry out the necessary and appropriate actions and measures to suppress and prevent acts of terrorism and lawless violence (emphasis added).*

The Supreme Court resolved to rule on the merits notwithstanding the prior lifting of PP 1017 and the declaration that the state of national emergency has ceased. Petitioners’ facial challenge to the constitutionality of both issuances called for their invalidity on the basis of the *overbreadth* and *void for vagueness* doctrines, but were held by the Court to be untenable in the case of PP 1017. GO No. 5 was likewise held valid as an executive issuance, but the Court held the use of the phrase “acts of terrorism” in the GO to be invalid and struck down the inclusion of such phrase in the issuance as unconstitutional. While the phrase “lawless violence” finds meaning in its use in the constitutional grant to the President of emergency powers, no such legal definition of “terrorism” was found by the court that would prevent GO No. 5 from being enforced and implemented arbitrarily. The Court proceeded with an examination of the prevailing state of international law and developments in the international community as well as of the laws of the Philippines and found

no legal definition of “terrorism” that could serve as basis for the implementation of GO No. 5. The Court considered “terrorism” at this point in time to be an “amorphous and vague” concept of which no definition has been agreed upon and accepted by the international community:

What, then, is the defining criterion for terrorist acts – the *differentia specifica* distinguishing those acts from eventually legitimate acts of national resistance or self-defense?

Since the times of the Cold War the United Nations Organization has been trying in vain to reach a consensus on the basic issue of definition. The organization has intensified its efforts recently, but has been unable to bridge the gap between those who associate “terrorism” with any violent act by non-State groups against civilians, State functionaries or infrastructure or military installations, and those who believe in the concept of the legitimate use of force when resistance against foreign occupation or against systematic oppression of ethnic and/or religious groups within a State is concerned.

The dilemma facing the international community can best be illustrated by reference to the contradicting categorization of organizations and movements such as Palestine Liberation Organization (PLO) – which is a terrorist group for Israel and a liberation movement for Arabs and Muslims – the Kashmiri resistance groups – who are terrorists in the perception of India, liberation fighters in that of Pakistan – the earlier Contras in Nicaragua – freedom fighters for the United States, terrorists for the Socialist camp – or, most drastically, the Afghani Mujahedeen (later to become the Taliban movement): during the Cold War period they were a group of freedom fighters for the West, nurtured by the United States, and a terrorist gang for the Soviet Union. One could go on and on in enumerating examples of conflicting categorizations that cannot be reconciled in any way – because of opposing political interests that are at the roots of those perceptions.

How, then, can those contradicting definitions and conflicting perceptions and evaluations of one and the same group and its actions be explained? In our analysis, the basic reason for these striking inconsistencies lies in the divergent interest of States. Depending on whether a State is in the position of an occupying power or in that of a rival, or adversary, of an occupying power in a given territory, the definition of terrorism will “fluctuate” accordingly. A State may eventually see itself as protector of the rights of a certain ethnic group outside its territory and will therefore speak of a “liberation struggle,” not of “terrorism” when acts of violence by this group are concerned, and vice-versa.

The United Nations Organization has been unable to reach a decision on the definition of terrorism exactly because of these conflicting interests of sovereign States that determine in each and every instance how a particular armed movement (i.e. a non-State actor) is labeled in regard to the terrorists-freedom fighter dichotomy. A

“policy of double standards” on this vital issue of international affairs has been the unavoidable consequence.

This “definitional predicament” of an organization consisting of sovereign States – and not of peoples, in spite of the emphasis in the Preamble to the United Nations Charter! – has become even more serious in the present global power constellation: one superpower exercises the decisive role in the Security Council, former great powers of the Cold War era as well as medium powers are increasingly being marginalized; and the problem has become even more acute since the terrorist attacks of 11 September 2001 in the United States.

The absence of a law defining “acts of terrorism” may result in abuse and oppression on the part of the police or military. An illustration is when a group of persons are merely engaged in a drinking spree. Yet the military or the police may consider the act as an act of terrorism and immediately arrest them pursuant to G.O. No. 5. Obviously, this is abuse and oppression on their part. It must be remembered that an act can only be considered a crime if there is a law defining the same as such and imposing the corresponding penalty thereon.

The absence of any law defining terrorism may, the Court ultimately declared, result in abuse and oppression on the part of the police, the military, and even the President herself. Said the Court:

Since there is no law defining “acts of terrorism,” it is President Arroyo alone, under G.O. No. 5, who has the discretion to determine what acts constitute terrorism. Her judgment on this aspect is absolute, without restrictions. Consequently, there can be indiscriminate arrest without warrants, breaking into offices and residences, taking over the media enterprises, prohibition and dispersal of all assemblies and gatherings unfriendly to the administration. All these can be effected in the name of G.O. No. 5. These acts go far beyond the calling-out power of the President. Certainly, they violate the due process clause of the Constitution. Thus, this Court declares that the “acts of terrorism” portion of G.O. No. 5 is unconstitutional.

Significantly, there is nothing in G.O. No. 5 authorizing the military or police to commit acts beyond what are necessary and appropriate to suppress and prevent lawless violence, the limitation of their authority in pursuing the Order. Otherwise, such acts are considered illegal . . .

*Treaties on Industrial Property; Protection of Trademarks and Tradenames*

PHILIP MORRIS, INC., BENSON & HEDGES (CANADA), INC., and FABRIQUES DE TABAC REUNIES, S.A., (now known as PHILIP MORRIS PRODUCTS SA) V. FORTUNE TOBACCO CORPORATION.

**G.R. No. 158589. 27 June 2006.**

In *Philip Morris, Inc. v. Fortune Tobacco Corp.* petitioners (corporations registered under the laws of the State of Virginia in the United States) sought the reversal of an appellate court decision affirming the dismissal of their complaint for trademark infringement and damages against the respondent for the latter's alleged use of trademarks for their cigarettes which were deceptively similar to those of the petitioners. The trial court dismissed the complaint on the ground that the respondents did not commit trademark infringement against the petitioners and that the petitioners were barred from maintaining any action in Philippine courts. Invoking the Paris Convention for the Protection of Industrial and Intellectual Property (Paris Convention), the petitioners assert that they can sue before Philippine courts for infringement of trademarks or for unfair competition without need of obtaining registration or a licence to do business, or of actually doing business in the Philippines, by virtue of their being corporate nationals of member countries of the Paris Union. They argue that upon the request of an interested party, a country of the Union may prohibit the use of a trademark which constitutes a reproduction, imitation or translation of a mark already belonging to a person entitled to the benefits of the said Convention.

Reiterating a previous ruling,<sup>96</sup> the Supreme Court held that while Petitioners had standing to sue to enforce trademark rights, such right to sue does not necessarily include a right to protection of their registered marks in the absence of actual use in the Philippines. While it may be true that the Philippines' adherence to the Paris Convention effectively obligates the country to honour and enforce its provisions regarding the protection of industrial property of foreign nationals in its territory, any protection accorded has to be made subject to the limitations of Philippine laws. Hence, foreign nationals must still observe and comply with the conditions imposed by Philippine law on its nationals, as Article 2 of the Paris Convention substantially provides that nationals of member countries shall have rights specially provided by the Convention as are consistent with the laws of the country where protection is sought, and enjoy the privileges that the laws of that country now grant or may hereafter grant to its nationals.

Considering that the applicable Philippine laws on intellectual property at the time mandate actual use of the marks and/or emblems in local commerce and trade before they may be registered and ownership thereof acquired, the petitioners could

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<sup>96</sup> *Philip Morris, Inc., et al. v. CA, et al.*, G.R. No. 91332, 16 July 1993, 224 SCRA 576, at 595.

not, according to the Court, dispense with the element of actual use. Their being nationals of member countries of the Paris Union did not automatically entitle them to the relief they demanded.

## NATIONAL LAWS ON INTERNATIONAL LAW MATTERS

### **Law on the Rights of Children in Conflict with the Law The Juvenile Justice Act (Republic Act No. 9344 of 28 April 2006)<sup>97</sup>**

Republic Act No. 9344 was a response to the increasing number of children and minors in conflict with the law in the country and the miserable plight of children and minors in prison – especially those for whom no formal charges have even been filed. The Act declares as policy the commitment by Philippine law enforcement authorities to international standards of protection for children<sup>98</sup> and the primacy of respecting their dignity and worth in all proceedings involving minors alleged or accused of infringing penal laws. It also sets forth several rights of children in conflict with the law,<sup>99</sup> adopting as well the provisions of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), the United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines) and the United Nations Rules for the Protection of Juveniles Deprived of Liberty. The Act likewise imposes a penalty on any person who commits violation against these rights.

Rep. Act No. 9344 also puts in place a number of administrative mechanisms for the effective implementation of its guarantees, including the establishment of a Juvenile Justice Welfare Council and the setting up of comprehensive juvenile intervention and community-based programmes on juvenile justice and welfare by the local government units. It also sets forth guidelines for the treatment of children in conflict with the law at the various stages of criminal investigation and prosecution,<sup>100</sup> giving additional importance to prevention and rehabilitation.

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<sup>97</sup> An Act Establishing a Comprehensive Juvenile Justice and Welfare System, Creating the Juvenile Justice and Welfare Council Under the Department of Justice, Appropriating Funds Therefor and for Other Purposes, 102 OG 3913 No. 25 (June 19, 2006).

<sup>98</sup> The Act in § 2(d) makes express reference to Art. 40 of the United Nations Convention on the Rights of the Child.

<sup>99</sup> See §5(a)–(o)

<sup>100</sup> See Titles IV (Treatment of Children Below the Age of Criminal Responsibility), V (Juvenile Justice and Welfare System) and VI (Rehabilitation and Reintegration)

*Law Prohibiting the Imposition of the Death Penalty in the Philippines  
Anti-Death Penalty Law ( Republic Act 9346 of 24 June 2006)*

On 24 June 2006, Republic Act No. 9346<sup>101</sup> was passed into law by President Arroyo amidst political pressure calling for a ban on the imposition of the death penalty in the country. With the 1987 Philippine Constitution, the imposition of capital punishment was suspended and all death sentences were reduced to *reclusion perpetua*. There was, however, no outright prohibition on its imposition, except that such imposition would require the enactment of an enabling law by Congress “for compelling reasons involving heinous crimes”.<sup>102</sup> An enabling law was then passed on 20 March 1996 in Republic Act No. 7659,<sup>103</sup> otherwise known as the Death Penalty Law. Seven convicts were subsequently made to suffer death by lethal injection until the passage of Rep. Act No. 9346. The Act substitutes *reclusion perpetua* and life imprisonment for the death penalty.

*Enactment of a Biofuels Act*

**Republic Act No. 9367**

Concern for the environment and the adverse effects of automobile emissions led to the enactment of legislation mandating the use of biofuels – fuel additives derived from renewable substances (primarily indigenous organic matter or biomass) that promote more efficient fuel burn and reduce toxic and pollutant emissions. Republic Act no. 9367,<sup>104</sup> otherwise known as the Biofuels Act, is considered a significant piece of legislation aimed at reducing the Philippines’ reliance on imported fossil fuel and at the same time contributing to the international campaign to reduce greenhouse gas emissions. The Act was a consolidation of House Bill No. 4629<sup>105</sup> and Senate Bill No. 2226.<sup>106</sup> An essential feature of both draft bills that made it to the final enacted Act was the introduction of fiscal and non-fiscal incentives – such

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<sup>101</sup> An Act Prohibiting the Imposition of Death Penalty in the Philippines, 102 OG 5307 No. 33 (14 Aug. 2006)

<sup>102</sup> 1987 Const., art. III, § 19.

<sup>103</sup> “An Act to Impose the Death Penalty on Certain Heinous Crimes, Amending for that Purpose the Revised Penal Code, as Amended, Other Special Penal Laws, and for other Purposes.”

<sup>104</sup> “An Act To Direct The Use Of Biofuels, Establishing For This Purpose The Biofuel Program, Appropriating Funds Therefor, And For Other Purposes.”

<sup>105</sup> “An Act Mandating the Use of Bioethanol or Ethyl Alcohol as Transport Fuel and Supporting the Development and Use of other Biofuels, Establishing for the Purpose the National Biofuels Program, Appropriating Funds therefor, and for other Purposes.”

<sup>106</sup> An Act to Mandate the Use of Biofuels in the Transport Sector, Establishing for this Purpose the Philippine Biofuel Program. Appropriating Funds therefor, and for Other Purposes, 103 OG 1221 No. 11 (12 March 2007).

as tax exemptions, investment incentives and provision of financial assistance by government financial institutions – which would encourage private investment in the production and distribution of biofuels.<sup>107</sup> The Act mandates a phasing-out of harmful gas additives within six months from its effectivity. In place of such additives, the Philippine government, through a proposed National Bioethanol Programme, will require the blending (5% by volume) of *bioethanol* in all gasoline distributed and sold in the country within two years. The mandated amount of bioethanol will subsequently be increased to 10% within four years from effectivity. To implement these provisions, the Bills call for the involvement and cooperation of the concerned executive departments through the creation of a National Biofuel Board, namely, the Department of Energy, Department of Agriculture, Department of Environment and Natural Resources, Department of Trade and Industry, Department of Science and Technology, Department of Finance, the Philippine Coconut Authority and the Sugar Regulatory Administration. The enactment into law of the Biofuels Act was relatively expeditious, with both draft bills gaining substantial support and being approved by their respective houses on 29 November 2006. The Act itself was signed into law on 27 January 2007.

#### OTHER RELEVANT STATE PRACTICE

*Action addressing wave of extrajudicial killings and enforced disappearances; recognition and application of the doctrine of command responsibility*

#### **Creation of an independent commission to address media and activist killings**

The year 2006 saw an alarming increase in incidents of alleged human rights violations committed by the Philippine government against political dissenters, journalists and activists. The concern and outrage of Filipino citizens for these incidents found expression in the media and the demonstrations by militant groups critical of the Arroyo administration, and ultimately caught the attention and concern of the international community. Expressing concern over the wave of attacks against activists and media, President Arroyo issued Administrative Order No. 157 (“Creating an Independent Commission to Address Media and Activist Killings”) on 21 August 2006, forming an independent commission to formulate a report and suggest effective policy measures to address and eliminate the causes of the growing problem of media and activist killings. The Melo Commission (so named after its chairperson, retired Supreme Court Justice Jose Melo) soon thereafter released its report, in

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<sup>107</sup> § 6 of the Act provides for incentives in the form of exemptions from specific tax, value-added tax, waste-water charges under the Philippine Clean Water Act and the provision of financial assistance to qualified investors.

January 2007. The Melo Report<sup>108</sup> applied the principle of “command responsibility” and implied that the Philippine government was partly responsible for killings attributable to its military forces. In its report the Commission said:

Certain facts, taken together with admissions and statements by the witnesses, lead the Commission to conclude that there is some circumstantial evidence that a certain group in the military, certainly not the whole military organization, is responsible for the killings. To maintain otherwise would be closing one’s eyes to reality.<sup>109</sup>

....

General Palparan’s numerous public statements caught on film or relayed through print media give the overall impression that he is not a bit disturbed by the extra-judicial killings of civilian activists, whom he considers enemies of the State. He admits having uttered statements that may have encouraged the said killings. He also obviously condones these killings, by failing to properly investigate the possibility that his men may have been behind them.

General Palparan’s statements and cavalier attitude towards the killings inevitably reveals that he has no qualms about the killing of those whom he considers his enemies, whether by his order or done by his men independently. He mentions that if his men kill civilians suspected of NPA connections, “it is their call,” obviously meaning that it is up to them to do so. This gives the impression that he may not order the killings, but neither will he order his men to desist from doing so. Under the doctrine of command responsibility, General Palparan admitted his guilt of the said crimes when he made this statement. Worse, he admittedly offers encouragement and “inspiration” to those who may have been responsible for the killings.<sup>110</sup>

The report makes an implied indictment of the Philippine government’s responses to the wave of killings:

... it becomes equally plain that some ranking officers in the Army (for the Navy, Air Force and Coast Guard are not herein involved), have not performed their function of investigating or preventing the said killings, as well as punishing their perpetrators.<sup>111</sup>

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<sup>108</sup> Report of the Independent Commission to Address Media and Activist Killings, 22 January, 2007. Available at: <http://www.inquirer.net/verbatim/Meloreport.pdf> (hereinafter *Melo report*). The Commission stated as part of its findings that General Palparan – a high-ranking military official said to be the one ordering the killings as part of a systematic anti-insurgency campaign – and some of his superior officers may be held responsible for failing to prevent, punish or condemn the killings under the principle of command responsibility, squarely implying culpability on the part of the Philippine government.

<sup>109</sup> *Ibid.*, at 53.

<sup>110</sup> *Ibid.*, at 59.

<sup>111</sup> *Ibid.*, at 61.

The report also discusses the history, development and status of the doctrine of command responsibility as already forming part of customary international law:

Hence, it is clear that the doctrine of command responsibility in general has been adopted by the Philippines, as a generally accepted principle of international law, and hence, as part of the law of the land. The doctrine's refinements and restatements – AP I and the Rome Statute, while signed by but as of yet lacking ratification by the Philippines, may be considered similarly applicable and binding. This was probably put best by Justice Perfecto in his separate opinion in *Yamashita v. Styer*, where he stated:

“While communist insurgency must be addressed, the fight against it must not be at the expense of the Constitution and the laws of the nation, and it hardly needs emphasizing, not at the expense of innocent civilians. The armed forces is not a State within a State, nor are its members outside the ambit of the Constitution or of the rule of law. Ours is a government of laws, not of men.”

## SRI LANKA<sup>112</sup>

### JUDICIAL DECISIONS

*Fundamental Rights – death of petitioner's husband while in police custody – international documents on the rights of and treatment of prisoners*

LAMA HEWAGE LAL (DECEASED): RANI FERNANDO (WIFE OF DECEASED LAL) V. OFFICER-IN-CHARGE, MINOR OFFENCES, SEEDUWA POLICE AND OTHERS

**SUPREME COURT, 17 September 2003 and 14 June 2004**  
**[2005] 1 Sri Lanka Law Report 40**  
**BANDARANAYAKE J, DE SILVA J AND JAYASINGHE J**

This case was filed by the wife and three minor children of one Lama Hewage Lal (the deceased) who was arrested by an officer of the Seeduwa Police Station. He subsequently died while in the custody of the Negombo prison officials. The petitioners alleged that death was due to torture which the deceased suffered while he was in detention. Considering all the facts and the medical evidence the Court determined that death was due to assault which took place in the Negombo prison on 7 November 2002.

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<sup>112</sup> Contributed by Camena Guneratne, Senior Lecturer, Department of Legal Studies, Open University of Sri Lanka.

The Court referred to several Sri Lankan cases on torture and cruel, inhuman and degrading treatment and punishment and also noted the decision of the UN Human Rights Committee in the case of *Thomas v. Jamaica*.<sup>113</sup> Bandaranayake J observed that there had been several International Covenants and Declarations on the issue of the rights of prisoners and cited the following:

- General Assembly Resolution 43/174 of 9 December 1988 which adopted the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.
- The United Nations Congress on the Prevention of Crime and the Treatment of Offenders which adopted the Standard Minimum Rules for the Treatment of Prisoners adopted at the Congress held in Geneva in 1955 and approved by the Economic and Social Council by its Resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

The Court observed that “[c]onsidering the Rules contained in the Prisons Ordinance and the Standard Minimum Rules for the Treatment of Prisoners adopted by the first United Nations Congress, it is quite obvious that the Prison Officers are bound not only to perform such duties for the purpose of preserving discipline and enforcing diligence, cleanliness, order and conformity to the rules of the prison, but also to treat the prisoners with kindness and humanity”.

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<sup>113</sup> Communication No. 366/1989, Views of UN Human Rights Committee, 2 November 1993.

*International Covenant on Civil and Political Rights – Optional Protocol to the Covenant – Communication to the UN Committee on Human Rights – State obligations under the Covenant – monism and dualism – State sovereignty*

NALLARATNAM SINGARARSA (PRESENTLY SERVING A TERM OF IMPRISONMENT IN THE KALUTARA PRISON) V. THE ATTORNEY GENERAL<sup>114</sup>

**SUPREME COURT, 15 September 2006**

**S.N. SILVA C.J., N. JAYASINGHE J., N.K. UDALAGAMA J,**

**N. E. DISSANAYAKE J AND G. AMARATUNGA J**

**SUPREME COURT SPECIAL LEAVE APPLICATION NO. 182/99**

**(UNREPORTED)<sup>115</sup>**

The petitioner is a Sri Lankan citizen resident in Batticaloa in the Eastern Province of Sri Lanka. He had no schooling and was illiterate in all languages at the time of his arrest. On 16 July 1993, while he was sleeping at home, he was arrested by Sri Lankan security forces and brought to the Komanthurai Army Camp, where he was assaulted by soldiers. Later he was handed over to the Counter Subversive Unit of the Batticaloa Police where he was subject to further assaults, threats and abuse.

In or around August 1993 the petitioner was produced before a magistrate and remanded back to the custody of the Batticaloa police. On 30 September 1993 Police Constable (PC) Hashim of the Batticaloa police got the petitioner to put his thumb impression on several typed pages in the Sinhala language after getting particulars of the petitioner and his family.<sup>116</sup> On 11 December 1993 the petitioner was taken to the Assistant Superintendent of Police (ASP) Herath's office where he allegedly made a confessionary statement to the ASP which was recorded by PC Hashim. On 2 September 1994 the Attorney General filed indictment against the petitioner on five counts<sup>117</sup> and the indictment was served on 30 September 1994.

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<sup>114</sup> In the matter of an application for revision and/or review of the Judgment and order to Supreme Court (Special) Leave Application No. 182/99 dated 28 January 2000 and pursuant to the findings of the Human Rights Committee set up under the International Covenant on Civil and Political Rights in Communication No. 1033 of 2001 made under the Optional Protocol thereto.

<sup>115</sup> The information for this analysis is taken from the petition, the written submissions of the petitioner, the written submissions of the respondent and the judgment of the Supreme Court. In some instances the wording of these documents has been re-produced verbatim.

<sup>116</sup> The petitioner, being Tamil by ethnic origin, would have spoken in the Tamil language. His evidence was translated into Sinhala by PC Hashim.

<sup>117</sup> The first count was under Regulation 23(a) of the Emergency (Miscellaneous Provisions and Powers) Regulations No. 1 of 1989 of having conspired by unlawful means to overthrow the government with several other persons and persons unknown. The other four counts were under certain provisions of the Prevention of Terrorism Act No. 30 of 1981 (PTA) of having attacked four army camps with a view to achieving the objective set out in count 1.

Trial commenced in the High Court of Colombo on 30 September 1994. The petitioner pleaded not guilty to all counts and objected to the admissibility of the confession on the grounds that it was not voluntary. Having heard the evidence of the petitioner and the two police officers involved, the High Court judge found an inconsistency in the petitioner's evidence on one issue – namely the time he spent in the ASP's office when the statement was being typed. On this issue alone, and ignoring the entirety of his testimony or the nature of the burden resting on him,<sup>118</sup> the evidence of the police officers was accepted and the confession admitted in evidence as being voluntary.

The trial resumed with the two police officers being the prosecution witnesses. The judge referred to their evidence including the confession and concluded that it was true. Accordingly the petitioner was found guilty and sentenced to 10 years' rigorous imprisonment on all counts. On appeal, the Court of Appeal accepted that the prosecution's case rested solely on the confession. However, it rejected the contention that the facts in the confession should be corroborated by independent evidence. It held that the petitioner's confession was voluntary and had been properly recorded. The medical evidence that the petitioner had been assaulted after his arrest and his evidence that the confession had not been made by him voluntarily was dismissed without examining the circumstances. The conviction was upheld but the sentence was reduced to seven years on all counts. The petitioner's application for special leave to appeal to the Supreme Court was dismissed without reasons given, on 28 January 2000.

On 21 November 2001 the petitioner submitted a communication to the UN Committee on Human Rights (HRC) as provided for under the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR).<sup>119</sup> The HRC, after considering the material placed before it by the Petitioner and the State, found the following violations:

- (a) That both the evidentiary provisions of the Prevention of Terrorism Act (PTA) which had been relied upon to convict the Petitioner, and the factual circumstances surrounding his alleged confession, negate the provisions of the ICCPR relating to a fair trial.
- (b) That the Petitioner's right to a review of the High Court decision without delay (Articles 14.3(c) and 14.5 of the ICCPR) had been violated.
- (c) That the burden of proving whether a confession was not voluntary was on the accused by section 16 of the PTA, and even if the threshold of proof is placed very low and "a mere possibility of involuntariness would suffice to sway a court in favour of the accused" (as claimed by the State), there had been a willingness

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<sup>118</sup> Under s.16 of the PTA the burden of proving that a confession is not voluntary is on the accused person.

<sup>119</sup> Sri Lanka acceded to the ICCPR on 11 June 1980 and to the Optional Protocol on 3 October 1997.

of the Courts at all stages to dismiss complaints of torture and ill treatment. This was a violation of Articles 14.2 and 14.3(g) of the ICCPR (which relate to the presumption of innocence and the guarantee not to be compelled to testify against oneself or to confess guilt).

(d) That Section 16 of the PTA violated Articles 14.2 and 14.3(g) of the ICCPR.

The HRC also stated that “[i]n accordance with Article 2, para 3(a) of the Covenant, the State party is under an obligation to provide the author (i.e. the Petitioner) with an effective and appropriate remedy, including retrial and compensation. The State party is under an obligation to avoid similar violations in the future and should ensure that the impugned sections of the PTA are made compatible with the provisions of the Covenants”. The HRC requested the State to provide it with information within 90 days as to what measures it had taken with regard to give effect to its views.

The Sri Lanka government in its response to the HRC dated 2 February 2005 stated that it had declined to do anything for the following reasons.

The Constitution of Sri Lanka and the prevailing legal regime do not provide for release or re-trial of a convicted person after his conviction is affirmed by the highest Appellate Court, the Supreme Court of Sri Lanka. Therefore the State does not have the legal authority to execute the decision of the Human Rights Committee to release the convict or grant a re-trial. The government of Sri Lanka cannot be expected to act in any manner which is contrary to the Constitution of Sri Lanka.

The petitioner thereafter made an application to the Supreme Court for the exercise of the Court’s inherent power of revision and/or review of a conviction and sentence. He argued that the position of the Sri Lanka government did not accurately represent the State’s obligations under the ICCPR which requires the State to provide an effective remedy for violations of rights guaranteed by it.<sup>120</sup> Referring to General Comment 31 of the HRC and Article 27 of the Vienna Convention on the Law of Treaties (1969), he argued that the executive branch of the government cannot avoid compliance with the ICCPR by arguing that an act which violated its provisions was carried out by another branch of government. Therefore, when the HRC forwarded its views to the State, Article 2(3) of the ICCPR required it to give an “effective remedy” for the violation. The petitioner therefore argued that the State’s response frustrated his legitimate expectation that the government, by acceding to the Optional Protocol, would consider itself bound to give effect to the views of the HRC.

The petitioner also pleaded that all three courts erred in law and fact in their findings, which resulted in his conviction and a grave miscarriage of justice. These errors related to the alleged confession which he made, the lack of independent

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<sup>120</sup> Article 2(3)(a) of the ICCPR.

corroboration of the confession, the provisions of the PTA which shifted the burden of proof and required him to establish the involuntariness of the confession, and the decision of the High Court which shifted the burden on him to prove his innocence. His right to a fair trial was violated by the Court's failure to consider exculpatory evidence, *i.e.* the medical evidence which showed that he had been assaulted while in police custody, lack of an independent translation of his confession which he was made to sign and the making of the confession at a time when he had had no access to a lawyer for several months. He further argued that the Emergency Regulations under which he had been convicted were *ultra vires* the Constitution of Sri Lanka.

The petitioner therefore prayed the Court, *inter alia*, to permit him to support the application, set aside the conviction of the High Court and the judgments and orders of the Court of Appeal and the Supreme Court, and to make order for his release and the granting of compensation.

### **The decision of the Supreme Court**

The unanimous judgment of the five Member Divisional Bench of the Supreme Court was delivered by the Chief Justice with the other judges concurring. Rather than considering the substantive issues raised by the petitioner in his appeal, the Court chose instead to focus on the issue of the ICCPR and its Optional Protocol and their relevance to the Sri Lankan constitutional processes.

The Court firstly considered whether Sri Lanka followed a monist or a dualist system. Citing Articles 3 and 4 of the Constitution which refers to sovereignty, Silva CJ stated: "Sovereignty within and in respect of the territory constituting one country is reposed in the People. Sovereignty includes legislative, executive and judicial power, exercised by the respective organs of government for and in trust for the People. There is a functional separation in the exercise of power derived from the Sovereignty of the People by the three organs of government . . . The organs of government do not have a plenary power that transcends the Constitution and the exercise of power is circumscribed by the Constitution and the written law that derive its authority therefrom."

In the light of his conclusion that Sri Lanka followed a dualist legal system, the Chief Justice went on to say that the President as head of State is empowered to enter into treaties or accede to a Covenant, the contents of which are not inconsistent with the Constitution or written law. The President is not the repository of plenary executive power which, in all spheres, constitutes the inalienable sovereignty of the people. While he/she may enter into international treaties, such treaties must be implemented by the exercise of the legislative power of parliament in order to have internal effect and attribute rights and duties to individuals. "Without taking such measures, in 1997 the Optional Protocol was acceded to purporting to give a remedy through the Human Rights Committee in respect of the violation of rights that have not been enacted to the law of Sri Lanka."

Citing the declaration made by the President as head of State and government

upon accession to the Optional Protocol,<sup>121</sup> Silva CJ stated that one of its components was a recognition of the power of the HRC to receive and consider such a communication of alleged violations of rights under the Covenant. He argued that such a purported conferment is inconsistent with the Constitution, making accession to the Optional Protocol in 1997 by the then President *ultra vires* the Constitution and Presidential powers. He held that “[t]he accession and declaration does not bind the Republic *qua* State and has no legal effect within the Republic”.

Considering the submissions of the petitioner in regard to the findings of the HRC, he took the view that the alternative remedies specified by the HRC cannot be comprehended in the context of Sri Lanka’s court procedure and the “Committee at Geneva, not linked with the Sovereignty of the People, has purported to set aside the order made at all three levels of Courts that exercise the judicial power of the People of Sri Lanka”. Therefore, “the Petitioner cannot seek to vindicate and enforce his rights through the Human Rights Committee at Geneva which is not reposed with judicial power under our Constitution”. The Supreme Court which is the highest and final superior court of record in Sri Lanka, cannot vary or set aside its order on the findings of the HRC. Therefore, the Court held that the petitioner’s application was misconceived and without legal basis and dismissed it accordingly.

## NATIONAL LAWS ON INTERNATIONAL LAW MATTERS

### **Convention on the Suppression of Terrorist Financing Act No. 25 of 2005**

This is an Act to give effect to the Convention on the Suppression of Terrorist Financing which was adopted by the United Nations General Assembly in December 1991 and which Sri Lanka ratified in September 2000.

The offences under the Act have been set out in section 3. Any person who provides or collects funds directly or indirectly, unlawfully or wilfully with the intention or knowledge that such funds will be used to commit the specified acts is guilty of an offence under this law. The acts include any act which constitutes an offence within the scope of or definition of any other Treaties specified in Schedule I<sup>122</sup> or

<sup>121</sup> Available at [http://www.unhchr.ch/html/menu3/b/treaty6\\_asp.htm](http://www.unhchr.ch/html/menu3/b/treaty6_asp.htm) accessed on 3 June 2008.

<sup>122</sup> The Treaties are – Convention for the Suppression of Unlawful Seizure of Aircraft (1970), Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971), Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (1973), International Convention against the Taking of Hostages (1979), Convention on Physical Protection of Nuclear Material (1980), 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), Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988), Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf (1988) and International Convention for the Suppression of Terrorist Bombings (1997).

“any other act, intended to cause death or serious bodily injury, to civilians or to any other person not taking an active part in the hostilities, in a situation of armed conflict, and 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”. Further, it is not necessary to show that the funds were actually used in the commission of the offence.

Attempting, aiding or abetting or acting with a common purpose with another person to commit the offence is also a violation of these provisions. If an offence is committed by a body of persons, every member, director, manager, secretary, officer or servant of such body of persons shall be guilty of the offence unless it can be proved that it was done without his/her knowledge or that he/she exercised due diligence to prevent it.

The punishment for committing such offences shall be imprisonment for between 15 and 20 years. Further, on indictment of any person in the High Court, all funds collected in contravention of this law shall be seized or frozen until the conclusion of the trial, whether lying in an account with any bank or in the possession of such person. On conviction of such person, the funds shall be forfeited to the State subject to the provisions of the Act.

Offences under this Act shall be tried by the High Court of Colombo or of the Western Province situated in Colombo. If the offence is committed outside Sri Lanka, the Court will have jurisdiction to try it as if it were committed within Sri Lanka under the following circumstances – the accused is present in Sri Lanka; the act is committed by a Sri Lankan citizen, or a citizen of a country which is a Party to the Convention, or by a stateless person who has his/her habitual residence in Sri Lanka; such act is committed against or on board a ship or aircraft registered in Sri Lanka or under the laws of another State which is a Party to the Convention at the time it was committed; or the person in relation to whom the offence was committed is a citizen of Sri Lanka; or such act is committed to compel the government of Sri Lanka to do or abstain from doing any act; such act is committed against a State or a government facility of that State situated in another country, including any diplomatic or consular premises of such State; or such act is committed against any property owned, leased or used by the government of Sri Lanka including an embassy or other diplomatic or consular premises of Sri Lanka.

Several provisions deal with non-Sri Lankan citizens who may be arrested for the commission of such offences. Such accused persons have been accorded rights of communication with their State of nationality or in the case of stateless persons the State where they were habitually resident. The Extradition Law, No. 8 of 1977, and the provisions of the Mutual Assistance in Criminal Matters Act, No. 25 of 2002, will also be applicable in specified and relevant circumstances. The Minister of Foreign Affairs is also empowered to make necessary regulations to give effect to the Act.

**Convention on Preventing and Combating Trafficking in Women and Children for Prostitution Act No. 30 of 2005**

This is an Act to give effect to the Convention on Preventing and Combating Trafficking in Women and Children for Prostitution adopted by the South Asian Association for Regional Co-operation (SAARC) in January 2002 and to which Sri Lanka became a signatory.

The provisions of the Act are fairly straightforward. "Trafficking" has been defined for the purposes of the Act as "the moving, selling or buying of women and children for prostitution within and outside a country for monetary or other considerations with or without the consent of the person being subjected to trafficking". Section 2 states that any person who keeps, maintains or manages, knowingly finances or takes part in the financing of, or knowingly lets or rents a building or other place or any part thereof for the purpose of trafficking of women and children for prostitution or any matter connected thereto, shall be guilty of an offence under this Act. Any person who attempts to commit, aids or abets in the commission of or conspires to commit any of these offences shall also be guilty of an offence. Punishments for the offences have been set out as imprisonment of either description for a minimum period of three years and a maximum of 15 and a fine. The Court may recover compensation to be paid to the victim by way of such fine and a further term of five years may be imposed for failure to pay such fine.

The remaining provisions of the Act relate to the procedural aspects of dealing with the offences. The High Court of Colombo and the High Court of the Western Province sitting in Colombo have exclusive jurisdiction to handle such offences. Where an offence under the Act is committed outside Sri Lanka the Court shall nevertheless have jurisdiction to try it if the offender is present in Sri Lanka, or is a Sri Lankan citizen, or a stateless person who is habitually resident in Sri Lanka, or the victim is a Sri Lankan citizen.

Certain aggravating circumstances listed in section 4 may also be taken into account by the Court trying the case. These circumstances include situations where the offender is involved in organized crime, has inflicted violence or used arms in the commission of the offence, is holding public office and has misused the powers of such office, has a record of such offences or is involved in the victimization or trafficking of children. Further, if the offender is in a custodial or educational institution or social facility to which children have access for various purposes, this is also deemed to be an aggravating circumstance.

The extradition laws have been appropriately amended to facilitate the extradition to and from Sri Lanka of those accused of such offences. Non-Sri Lankan citizens arrested under this Act have been accorded rights of communication and visitation by representatives of their countries of citizenship. The provisions of the Mutual Assistance in Criminal Matters Act No. 25 of 2002 will also be applicable in dealing with offences under the present Act.

The Minister is empowered to issue any general or specific directions which may be necessary for the implementation of this Act. These include direction in regard to measures which may be necessary to provide victims of trafficking with

accommodation and shelter, to create awareness among the law enforcement agencies and the judiciary of the offences under the Convention, to appoint officers to any regional task force that may be established in order to implement the provisions of this Act; to share relevant information, to promote public awareness of the issues and their causes, to repatriate victims of cross border trafficking including the provision of legal advice and health care. Importantly, necessary measures will also be taken to monitor institutions involved in foreign employment to prevent women and children being trafficked in the guise of being provided employment.

### **Geneva Conventions Act No. 4 of 2006**

This is an Act to give effect to the first, second, third and fourth Geneva Conventions on armed conflict and humanitarian law.<sup>123</sup> The Preamble notes that these Conventions came into force in relation to Sri Lanka on 28 February 1959 and it has become necessary to make legislative provisions to give effect to Sri Lanka's obligations under them.

Part I of the Act is entitled "Preliminary" and relates to offences committed under the four Conventions. Section 2 states that any person, whether a Sri Lankan citizen or not, who commits or attempts to commit or aids, abets, conspires or procures the commission of a grave breach of any of the enumerated Articles of the Convention shall be guilty of an offence. Such offence may be committed within or outside Sri Lanka.

For the purposes of the Act, a grave breach of each Convention is defined in section 2(2) as one which is a breach of the Convention in question involving an act referred to in the following Articles and committed against persons or property protected by that Convention:

- First Convention – Article 50;
- Second Convention – Article 51;
- Third Convention – Article 130;
- Fourth Convention – Article 147.

Where in the course of proceedings under the Act, a question arises under section 2 relating to the circumstances in which that Convention applies in relation to the breach, a certificate under the hand of the Secretary to the Ministry of Foreign

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<sup>123</sup> The four Conventions are respectively – Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field (1949), Geneva Convention for the Amelioration of the Conditions of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1949), Geneva Convention Relative to the Treatment of Prisoners of War (1949) and Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949).

Affairs stating that the Convention applies in a particular situation shall be admissible as evidence and shall be *prima facie* evidence of such fact.<sup>124</sup>

The terms “aids”, “abets”, “conspires” and “procures” shall have the same meaning as that in the Penal Code of Sri Lanka. Any person convicted of an offence shall be punished with death where the offence involves the wilful killing of a person protected by any of the Conventions, and imprisonment of either description not exceeding 20 years for any other offence.<sup>125</sup>

The offences shall be triable by the High Court of the Western Province, holden in Colombo.<sup>126</sup> All offences under the Act are cognizable and non-bailable within the meaning and for the purposes of the Criminal Procedure Code Act No. 15 of 1979.<sup>127</sup> The Court may, where it is considered appropriate in the public interest or the interests of justice, exclude the public or any person from its proceedings.<sup>128</sup> Every prosecution shall be by way of direct indictment filed by the Attorney General. However, this provision will not affect the provisions of the Army Act, Navy Act or Air Force Act<sup>129</sup> relating to the jurisdiction of courts martial trying persons who commit civil offences under their provisions.

Part II of the Act is entitled “Legal proceedings in respect of protected persons”. Such protected persons are protected prisoners of war<sup>130</sup> and protected internees.<sup>131</sup> A trial shall not proceed in respect of such persons unless it is proved to the satisfaction of the Court that the following matters (insofar as they are known to the prosecutor) had been served three weeks previously on the protecting power if any, and if the accused is a protected prisoner of war, on the accused and the prisoners’ representatives. The matters to be so served are the name, date of birth and description of the accused; where the accused is a protected prisoner of war (POW), his rank and his army, regimental, personal and serial numbers; the accused’s place of detention, internment or residence; the offence with which he/she is charged; and the Court before which the trial is to take place and the date and time of such trial.

Section 8 relates to legal representation of prisoners of war. Under this section, where any person is brought to trial for an offence under Section 2 or where a protected POW is brought to trial for any offence, the trial shall not continue unless the accused is represented by counsel or the Court is satisfied that a period of 21 days has elapsed since instructions for his/her representation were first given by the Court.

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<sup>124</sup> Section 5.

<sup>125</sup> Section 2(4).

<sup>126</sup> Section 4(1).

<sup>127</sup> Section 4(2).

<sup>128</sup> Section 4(4).

<sup>129</sup> Chapters 357, 358 and 359 respectively of the Legislative Enactments.

<sup>130</sup> Section 7. Section 4(3) of Part I States that any person referred to in Art. 5 of the Third Convention may apply to the High Court for a declaration that he has the status of a protected prisoner of war.

<sup>131</sup> The interpretation clause defines a “protected internee” as “a person protected by the Fourth Convention and interned in Sri Lanka”.

Where there is no counsel accepted by the accused as representing him/her, counsel instructed for that purpose by the protecting power shall be regarded as so representing him/her. In cases where the Court has adjourned proceedings due to lack of counsel, the Court shall direct that a counsel be assigned to watch over the interests of the accused at future proceedings in connection with offence. Where there is no other counsel at such future proceedings, such counsel so assigned by the Court shall be regarded as representing the accused.

Section 9 relates to appeals against conviction and sentence. Section 10 relates to the reduction of sentence of custody of protected POWs and internees. Where a protected POW has been convicted and sentenced to death, the Court shall, taking all the facts into consideration, consider whether such sentence can be commuted to life imprisonment. In fixing a term of imprisonment or other penalty, the period of custody of the convicted person shall be taken into account.

Part III relates to “Abuse of the Red Cross and other Emblems”. Under this Part it is an offence to display specified emblems for any purpose whatsoever in Sri Lanka or outside or on board any ship or aircraft registered in Sri Lanka, without the written authorization of the Minister or anyone authorized by him/her. These emblems are the Red Cross, the Red Crescent, the Red Lion and Sun and the heraldic emblem of the Swiss Confederation as described in the respective sections. Any other additional distinctive emblem subsequently adopted by the High Contracting Parties to the Geneva Conventions may also be brought within this section by Order of the Minister published in the Gazette. Defences to the offence and punishments for contravention of this section have also been set out.

## TAJKISTAN<sup>132</sup>

### NATIONAL LAWS ON INTERNATIONAL LAW MATTERS

#### **The Law on “Protection of the Objects of Historical and Cultural Heritage” Adopted 3 March 2006**

The Law on Protection of the Objects of Historical and Cultural Heritage is the first normative framework adopted after independence of the Tajik State in 1991 and is dedicated to the protection and use of objects belonging to historical and cultural heritage under the territorial jurisdiction of the Republic of Tajikistan. The preamble of the Law imparts the status of common property of the people of Tajikistan to the objects of historical and cultural significance.

The Law sets the general framework regarding the objects of historical and cultural heritage and in addition provides the definition of the term “objects of historical and cultural heritage” employed throughout the text of the law. The scope

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<sup>132</sup> Contributed by Dr Tahmina Karimova.

of responsibilities of the State agencies, legal entities and individuals with regard to the protection and use of the aforementioned objects<sup>133</sup> are also the subject of the law's regulation.

The term "objects of historical and cultural heritage", according to Article 3 of the Law, stands for all monuments related to historical events of the people, monuments concerning the development of society and the State, products of material and non-material art that hold historical, scientific, and artistic value, and other valuables of national significance.

The objects of historical and cultural heritage are classified into two categories, namely movable and immovable objects, and each is subdivided into different categories. The movable monuments include unitary pieces and complex objects and immovable monuments consist of historical monuments, archeological monuments, monuments of town planning and landscapes.

The unitary pieces include archeological findings, pieces of antiquity, disjointed elements of immovable monuments, anthropological and ethnological materials, historical relics, objects of art (paintings, graphics, applied art, cinema, and photographs) located in different State and non-State museums; funds, libraries, depositories, collections; documentary materials, manuscript, graphic, typescript, cinematographic documents, video-audio materials, and rare publications kept in national archive funds. The complex objects consist of historical complexes, funds and collections of unitary pieces that constitute one ensemble, as well as complexes, funds and collections that hold a scientific value, or a holistic significance.

As for historical monuments, these objects include buildings, constructions, memorials, historical necropolis, monuments and memorials related to the most significant events of the life of the people of Tajikistan, development of the society, the State and the culture as well as monuments concerning the lives of prominent persons in the sphere of politics, science and culture.<sup>134</sup>

Archeological monuments are considered to be the objects such as caves, sites, mounds, relics of ancient settlements, fortifying constructions, ancient mines, irrigation systems, roads and bridges, grave mounds and necropolis, petroglyphic illustrations and inscriptions. The objects of historical and cultural heritage are furthermore classified into objects possessing national significance and those objects that are of local significance, *e.g.* are especially valuable for the history and the culture of a specific region, a city or a district.<sup>135</sup>

The objects of historical and cultural heritage are recognized as such only upon registration in the State Registrar of Objects of Historical and Cultural Heritage. This registrar according to the law is made available to the public. The lists of objects belonging to individuals are made public only upon permission of the owners of these objects. The registrar includes information about name, place, location, date,

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<sup>133</sup> The Law on Protection of the Objects of Historical and Cultural Heritage, Art. 1.

<sup>134</sup> *Ibid.*, Art. 4.

<sup>135</sup> *Ibid.*, Art. 5.

researches conducted on the object, State, parameters, type of ownership over the object, etc. The information on the movable objects should also include information about the type and material of the object, techniques used to create the object, particularities of the style of the creator, etc.<sup>136</sup>

Having set the regulatory framework at the level of definitions and classification of the objects protected by the law in question, the legal instrument further on provides a general framework for the government's commitment with regards to the protection and the use of the objects of historical and cultural significance. Thus, among other obligations, the government exercises the function of forming the State policy, financing of researches, identification, maintenance and restoration of the objects of historical and cultural heritage. The government in addition is vested with an authority to develop and approve programmes on protection, maintenance, researches, and use of the objects.

More specific tasks are delegated to a central ministerial authority and to the local governments. The functions of oversight on implementation of the Law on Protection of the Objects of Historical and Cultural Heritage, management of the State Registrar, inspection of the objects, development of State programmes and international cooperation are vested to the central authority. The local authorities on protection of the objects of historical and cultural heritage are organized by the central-level authorities and are primarily engaged in identification of objects, their registration, protection, restoration and their use.<sup>137</sup> According to Article 11, the State protection of the objects of historical and cultural heritage is ensured through the following actions: (1) State registration of the objects that are of historical and cultural value; (2) provision of historical and cultural inspection of the objects; (3) development of projects on establishment of the zones of protection for the aforementioned objects; (4) licensing activities related to restoration of the objects of historical and cultural heritage; (5) granting permissions to researches related to the objects; (6) securing protection signs; and (7) monitoring of the State of the objects of cultural heritage. The historical and cultural inspection taken care of by the State agencies solely is conducted for several reasons, such as identification of the object of cultural and historical significance; collection of evidence for registration of the object in the State Registrar of Objects of Historical and Cultural Heritage; determination of the category to which the object belongs; and collection of the evidence for exclusion of the object from the State Registrar.

Article 17 of the Law stipulates that some objects of historical and cultural heritage can be included in the list of World Cultural Heritage in accordance with the rules established by the Convention concerning the Protection of World Cultural and Natural Heritage.

Section 4 of the Law thoroughly reflects the issues of financing of the objects of historical and cultural heritage and their maintenance and restoration. The legal

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<sup>136</sup> *Ibid.*, Art. 12.

<sup>137</sup> *Ibid.*, Arts. 9 and 10.

provisions under the section harmonize in detail rules regarding the sources of financing the protection and use of the objects falling within the jurisdiction of the Law and their maintenance and restoration. According to the Law both budgetary and non-budgetary allocations may be expended for the purposes of protection and use of the objects. Among the measures of restoration, the legal provisions prescribed by Article 21 determine the following steps: preliminary research of the object; conservation of the object with an aim to preserve the current State of the object and prevent from further destruction; repair of the object; restoration of the object consisting of a combination of measures including research, projects implemented to identify and protect the esthetical and historical value of the object; regeneration of the object that includes measures aimed at restitution of the wholeness of the graphics, sketches of constructions and buildings; reconstruction of the historical and cultural heritage entailing a number of research, project and production works with an aim to improve the technical State and functional qualities of the objects through introduction of partial changes into the construction that do not alter significantly the uniqueness of the object; and adjusting the object of historical and cultural heritage to the general use.

The Law on Protection of the Objects of Historical and Cultural Heritage recognizes State and private ownership of the objects of historical and cultural significance. Use of the objects for military purposes and privatization of the objects are prohibited.<sup>138</sup> The Law additionally sets the rules determining the scope of obligations of the owner of the object and prescribes that in some cases based on the exigencies related to protection, maintenance, use of the object as well as with an aim to ensure rights of individuals, legal entities and the State, the property rights of the owner of the object of historical and cultural heritage may be restricted. The law does not provide guidance on/does not give specific references on the procedures followed to impose restrictions on the owner. The legal provision however, determines that the rights of the owner are fully restituted upon elimination of circumstances and conditions that have caused imposition of the restrictions.

The Law foresees creation of protected national historical territories for objects that present a special historical, scientific, artistic value and that are included in the State Registrar. The legal provision on the issue differentiates two types of such territories: (1) historical and cultural conservation areas and (2) historical places.

The concluding part of the Law sets general principles of liability for persons acting in violation of the provisions of the Law on protecting objects of historical and cultural heritage and prescribes that all disputes related to the protection and use of these objects shall be dealt with in accordance with the domestic legislation, *e.g.* the laws of Tajikistan.

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<sup>138</sup> *Ibid.*, Art. 24.

**Unified Concept of the Republic of Tajikistan on Suppression of Terrorism and Extremism**  
**Adopted 28 March 2006**

Tajikistan legislative framework provides a wide range of laws covering issues of terrorism and extremism. Moreover, the Supreme Court of Tajikistan has developed best practices of implementation of the anti-terrorism laws that give interpretation to the provisions in the area. Yet the work has been ongoing and the Unified Concept of the Republic of Tajikistan on Suppression of Terrorism (hereinafter the Concept) was adopted in March 2006. The document stipulates that the Concept represents a system of opinions on the content, main directions and forms of suppression of terrorism and extremism and includes the key aspects of the State policy in this regard.

The Concept document notes that terrorism is a crime of a global nature that requires cooperation between States and law enforcement agencies. Further, the threat of terrorism is of special concern to Tajikistan and the entire region (*e.g.* Central Asia) since this phenomenon has been persistent for the entire period of the establishment of the new and independent State of Tajikistan. Furthermore, terrorism has a tendency to connect to different forms of transnational crimes including illegal drug trafficking, illegal weapon proliferation (thus becoming one of the sources of financial support), illegal migration and trafficking in humans. The concept indicates that Tajikistan is a potential object of terrorist and extremist attacks due to its geopolitical and economic situation. Lack of coherence in interstate cooperation, regional and local armed conflicts, emerging structures of transnational organized crimes are deemed to be at the root of the global threat of the terrorism. In this regard, Tajikistan has taken a particularly active position in pursuing cooperation to strengthen peace and security in the region. Furthermore, the Concept stipulates that the areas of joint action should be geared towards identification, prevention and suppression of illegal activities.

The Concept recalls international obligations of Tajikistan with regards to the suppression of terrorism and extremism and stipulates that Tajikistan is bound to ban terrorist and extremist activities against other States in its territory and should create an effective system of fight against funding and propaganda of terrorism and extremism. The Concept identifies the following areas as the basis for establishing anti-terrorism structures: (1) international cooperation (among the States, organizations, law enforcement bodies, etc.) based on the provisions of international instruments; (2) use of best practices of other States in combating terrorism; and (3) establishment of a coordinated mechanism to combat terrorism and to suppress potential channels of illegal weapons sale. The document reiterates that the core of international cooperation remains with the system of the United Nations which has been a driving force in the development of the normative basis for suppression of terrorism.

The concept sets the following principles and objectives of the State policy on suppression of terrorism:

- (1) Security and protection from terrorism and its threat for the State, its citizens and other persons under the jurisdiction of its territory.
- (2) Elimination of terrorist and extremist threats in the territory of Tajikistan.
- (3) Establishment of the atmosphere of intolerance towards terrorism and extremism in all its forms of manifestation in the territory of Tajikistan.
- (4) Identification, elimination and prevention of causes and conditions conducive to emergence and propagation of terrorism and extremism in the territory of Tajikistan as well as elimination of the consequences of crimes of extremist and terrorist character.
- (5) Improvement of cooperation among the authorities in charge of prevention, identification, suppression and investigation of crimes of terrorist and extremist character, identification and suppression of activities of organizations and persons involved in terrorist and extremist activity as well as resistance to financing of terrorism and extremism.
- (6) Development of common approaches for partners directly involved in suppression of terrorism and extremism.
- (7) Strengthening of the role of the State as the guarantor of security of individuals and society at large in situations of the threat of terrorism and extremism.
- (8) Implementation of international norms on suppression of the financing of terrorism and extremism.
- (9) Development of the necessary international normative framework for cooperation among international organizations, States, development and harmonization of international norms, domestic legislation in the area of suppression of terrorism and extremism.
- (10) Development of cooperation of law enforcement structures and agencies of State control to identify and prevent financing of international terrorism and extremism.

The concept develops the following set of guiding principles for the achievement of objectives and activities to suppress terrorism and extremism:

- commitment to suppress terrorism and extremism;
- inevitability of liability of both individuals and legal entities for participation in terrorist and extremist activities;
- integrated approach in suppression of terrorism and extremism with the use of combination of preventive, legislative, political, socio-economical and other measures;
- averting exercise of the policy of double standards in international relations involving suppression of terrorism and extremism;
- strict observance of principles and norms of international law.

In accordance with the Concept the principal directions of the activities of agencies and authorities involved in suppression of terrorism and extremism include, *inter alia*: (1) analysis of factors and conditions conducive to the emergence of terrorism and extremism, forecasting of tendencies of the development and manifestation of

these phenomenon in the territory of Tajikistan; (2) prevention, identification, suppression and investigation of crimes of terrorist and extremist character; (3) provision of assistance to victims of crimes of terrorist and extremist character; (4) suppression of terrorism in all types of transportation, objects of survival and critical infrastructure; (5) prevention of the use or threat of use of weapons of mass destruction and means of its transportation, radioactive, toxic and other dangerous agents, materials and technologies of its production for terrorist aims; (6) suppression of financing of terrorist and extremist activities; (7) prevention of the use or threat of use of local and global computer networks for terrorist purposes (suppression of cyberterrorism); (8) improvement of normative framework of cooperation in the area of suppression of terrorism and extremism; (9) cooperation with civil society and mass media with an aim to increase effectiveness of activities against terrorism and extremism; (10) suppression of propaganda of terrorism and extremism; (11) participation in anti-terrorist activities of the international community, including cooperation in the framework of international organizations and collective anti-terrorist operations, joining efforts and assistance to development of a global strategy of suppression of new challenges and threats under the umbrella of the United Nations organization; and (12) improvement of the material and technical basis of units performing activities on suppression of terrorism and extremism, development of means and special techniques and equipment for the support of these units.

The implementation of the Concept document is supported by an integrated approach involving measures and determined actions of the State agencies and public institutions as well as individuals participating in the anti-terrorist activities. The system to implement measures on suppression of terrorism is established in addition to the concept through implementation of provisions of the Constitution of Tajikistan, the Criminal Code, the Law on Suppression of Terrorism, the Law on Suppression of Extremism, the Concept on National Security as well as a number of international treaties adhered to by the Republic of Tajikistan. The concept provides involvement of a wide range of stakeholders in the activities on suppression of terrorism including but not limited to executive, legislative and judicial branch of power, and local authorities.

### **Integrated Programme on Combating Trafficking in Humans Adopted 6 May 2006**

Following a consistent normative work on issues of trafficking in humans, Tajikistan has adopted an integrated programme on Suppression of Trafficking in Humans in the Republic of Tajikistan for the years 2006 to 2010. The normative process has commenced by ratification of the UN Convention Against Transnational Organized Crime and its supplementing Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, and Protocol against the Smuggling of Migrants by Land, Air and Sea.

The programme reiterates that according to the Constitution of the Republic of Tajikistan, the international treaties adhered to by Tajikistan become part of the

domestic legal system and in cases of inconsistency with the domestic legislation the provisions of the international treaties prevail. As part of the national response, the Tajik government has established a Working Group on Trafficking in Humans and its Prevention and has passed the Law on Combating Trafficking in Humans. In addition to this, there is a Multisectoral Commission on Combating Trafficking in Humans, including representatives of a number of ministries and agencies such as the General Prosecution Office, Ministry of Internal Affairs, Ministry of Security, Ministry of Labour and Social Protection, Ministry of Education, Ministry of Health, etc. It is stipulated that the Commission is authorized to advance the State policy of combating trafficking in humans and to develop recommendations to improve the effectiveness of the actions taken by other relevant agencies.

In addition to interagency bodies, specialized departments within the structures of individual agencies on trafficking in humans were set up. Thus, such a department was established in the Ministry of Internal Affairs. With regards to the activities of this department, the programme provides statistics on the results achieved for the period of time the department has been functioning.

In view of the international obligations and commitment at the national level, amendments have been introduced into the Criminal Code. These amendments include among others introduction of the new elements of crime “trafficking in humans”, amendments to the criminalization of the falsification of documents for the purpose of trafficking, and “trafficking in minors”. The latter provision has been particularly reinforced in view of the country’s commitment and obligation under the UN Convention on the Rights of the Child and the ILO Convention on Worst Forms of Child Labour.

The programme elaborates on the fundamental principles of the Law on Combating Trafficking in Humans, defines the scope of application of the law and areas of direct interventions. Along other areas of intervention, the programme particularly outlines awareness raising on accessible judicial remedies to protect rights of victims of trafficking, health services available, reintegration of victims of trafficking into the society and provision of temporary shelter for victims of the trafficking.

The programme identifies future areas of work such as introduction of amendments and additions to the current legislation of Tajikistan, development of the information database, launching researches on the nature and the scale, including mechanisms of the trafficking, training of the law enforcement bodies, health system personnel, migration services and other key partners involved and improvement of international cooperation in combating trafficking in humans.

The programme is designed for the years 2006 and 2010 and sets a list of objectives with a matrix of activities, timeframe, executive bodies and indicators. The programme determines the following objectives to be achieved for the period mentioned: (1) monitoring of the trafficking in humans; (2) establishment of the training components on trafficking in humans for the State agencies and agencies involved in the anti-trafficking activities; (3) elimination of the social problems fostering the ground for the expansion of the traffickers in humans; (4) setting up conditions for return, reintegration of victims of trafficking in humans; and (5) improvement of legislation and international cooperation.

## OTHER STATE PRACTICE

**Subregional Framework Convention on Protection of the Environment for the Sustainable Development in Central Asia**<sup>139</sup>**Signed 22 November 2006**

The five Central Asian republics signed the Framework Convention on Protection of the Environment for the Sustainable Development in Central Asia in view of the existent challenges in the areas of environment and sustainable development in Central Asia. The preamble of the document recalls firsthand the commitment of Central Asian States to cooperate in protection of the unique environment of Central Asia and its sustainable use of natural resources and stipulates that this commitment is geared towards: (1) promotion of the economic and social development with a view to the protection of the environment; (2) acknowledging the signification of ecological policy and legislation in the field of protection of environment and development aimed at meeting fundamental needs of the people and improving the quality of life and a secure future; and (3) development of regulatory framework for regional cooperation in the area of protection of the environment; further development of the existent agreements among the States of Central Asia (in the area of protection of environment and rational use of natural resources for the sustainable development).

The main objective of the Framework Convention is to ensure effective protection of the environment for the sustainable development of Central Asia, including improvement of the ecological situation, rational use of the natural resources, as well as the decrease and prevention of transboundary damage to the environment through harmonization and coordination of ecological policy and actions of the contracting parties via establishment of mutual rights and obligations.<sup>140</sup>

The Convention defines a number of concepts, including terms such as “biological diversity”, “degradation of soil”, “pollution” and “sustainable development”.<sup>141</sup>

According to Article 2 of the Framework Convention, the provision of the instrument applies to all territories under the jurisdiction of the contracting parties, with special attention to the territory of the Aral Sea basin and to all types of activities implemented by either of the contracting parties within their territory.

The Framework Convention determines that for the purposes of implementation of the provisions of the convention, the parties to the agreement shall be guided by the UN Charter, principles of the international law and the following principles:<sup>142</sup>

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<sup>139</sup> The Framework Convention determines that the term Central Asia refers to Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan, Art. 1.

<sup>140</sup> *Ibid.*, Art. 3.

<sup>141</sup> *Ibid.*, Art. 1.

<sup>142</sup> *Ibid.*, Art. 4.

- (1) States have a sovereign right to develop their own resources in accordance with their policy on environment and are responsible to ensure that actions undertaken within their jurisdiction does not inflict damage to the environment of the other party.
- (2) Protection of the environment is an unalienable constituent of the process of the achievement of sustainable development and cannot be viewed as a separate process.
- (3) Emphasis is on preventive measures in ensuring the protection to the environment.
- (4) In times of serious and irreversible threats to the environment, the lack of the scientifically proved methods shall not be utilized as a justification for delays in effective decision making and measures to suppress deterioration of the ecological situation.
- (5) Natural resources and other components of the environment shall be consumed in a rational way to meet the needs of the present and future generations.
- (6) Transboundary damages and other detrimental consequences shall be diminished by means of cooperation of the parties to the Convention on a bilateral and multilateral basis and in the framework regional organizations. This process shall include: (1) impact assessment of the specific action towards the environment; (2) preliminary, timely and sufficient information to the State parties at risk of detrimental consequences and consultation in bona fide with such State parties; (3) integration of a "polluter pays" system of environmental fines in accordance with which the polluter compensates measures of prevention, control and elimination of the detrimental effects to the environment.

The Framework Convention sets a list of general obligations of the State parties, including an obligation to cooperate in the spirit of partnership, a commitment to undertake national measures and actions, to integrate interests of the environment into the strategies, plans and programmes of economic and social development, to consume transboundary natural resources in fair and reasonable mode, to cooperate in the development of protocols to the Framework Convention establishing additional measures, procedures and standards of implementation of the obligations under the agreement and to undertake measures to improve the ecological situation in the Aral Sea basin.

The protection of the environment and sustainable development are emphasized throughout the treaty and the treaty requires State parties to the Convention to include management of the natural resources in their national and regional programmes and plans of development. According to the Convention this should be based on the environment protection policy and all policy frameworks should undergo a regular ecological impact assessment.<sup>143</sup> To this end, the Convention

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<sup>143</sup> *Ibid.*, Art. 6.

obliges the State parties to adopt a set of rules and procedures of impact assessment in the framework of additional protocol.<sup>144</sup>

The Framework Convention sets a framework of regulations for the protection of atmospheric air, water resources, land resources, wastes, mountain ecosystems and biological diversity.

The contracting parties shall take all necessary measures for gradual decrease and prevention of the pollution of the air, including the transboundary pollution, protection of the water resources and the use of the land. The instrument sets in general terms a standardized framework of obligations for the areas mentioned. According to the provisions of the Convention, the States are bound to cooperate and make use of the relevant mechanisms, regional projects and multilateral schemes. Obligations under the Framework Convention with regards to the protection of atmospheric air, water resources and the use of land shall be further developed in the framework of separate protocols. The protocols will be based on rules and procedures covering monitoring of situation and sources of pollution of atmospheric air, establishment of the structure for regional information exchange, identification and prioritization of the polluters, and development of the regional system of indicators of the air pollution, protection of the water resources and the use of land.<sup>145</sup>

As for the management of the wastes, the Convention stipulates analogous framework of obligations, *e.g.* taking all necessary measures through relevant regional projects, bilateral or multilateral schemes and mechanisms of cooperation. The Convention stipulates that provisions governing the management of wastes require further elaboration in the form of a separate protocol and should be based on rules and procedures established by the States. In particular the following areas may serve as areas to be covered by these rules and procedures: (1) improvement of the national registers of places of collection and disposal of wastes; (2) establishment and introduction of a regional register of places of collection and disposal of wastes that potentially may have a transboundary impact; (3) establishment of a regional network of centres of safe productions and technologies; and (4) measures and actions to prevent transboundary radioactive pollution from mining and testing areas.

Similar lines of legal provisions are proposed in relation to the mountain ecosystems and biological diversity. In terms of rules and procedures, the following actions, among others, are included in the list to be taken into consideration: improvement of the national systems of identification and monitoring of the components of the biological diversity that are significant for its preservation and sustainable usage; and joint measures to protect biological diversity *in-situ* and *ex-situ*.<sup>146</sup>

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<sup>144</sup> *Ibid.*, Art. 7.

<sup>145</sup> *Ibid.*, Arts. 8, 9 and 10.

<sup>146</sup> *Ibid.*, Art. 13.

According to the Convention, the State parties should ensure constant cooperation in exchange of scientific and technological researches, exchange of the results for the purposes of development and implementation of the policies and programmes on protection of the environment. In addition the Convention recommends establishment of regional scientific and technological centres for further cooperation, development of ecological education and best practice sharing.

Aiming at effective implementation of the instrument, a regular exchange of information on implementation of the provisions of the Framework Convention is prescribed by Article 17. Furthermore the provision requires that the State parties ensure access to information on the situation of the environment to the public on the condition that this is done in accordance with domestic legislation and with consideration of the provisions of international law. Participation of the public at large is subject to adoption of rules and procedures by the State parties in this regard.<sup>147</sup>

In accordance with the Framework Convention the State parties are bound to take measures to set up and improve their national infrastructure to effectively implement the provisions of the Convention. These measures may include adoption or amendment of the domestic legislation.<sup>148</sup> The conference of the State party may develop rules and procedures to encourage implementation of the provisions of the Convention and may even consider provision of assistance in situations of justified failure to comply with the requirements of the instrument. The State parties are free to adopt stricter measures of protection of the environment on the condition that these measures are in compliance with the Convention and norms of the international law. The Framework Convention prescribes each State party to appoint a national body and delegate authority to take actions in relation to the implementation of the Convention.<sup>149</sup> Each national body submits a report on the status of the provisions of the Framework Convention and protocols to it. The periodicity of the submission of the reports as well as the format are to be decided by the coordinating body established under the Convention.<sup>150</sup>

The Convention sets a body of rules for the treaty bodies, namely the Conference of Parties and the Secretariat, for the purpose of ensuring implementation of the provisions of the Convention.

The Conference of Parties being the representative body is composed of one representative from each State party. The first meeting is to be held not later than 12 months upon entry into force of the Framework Convention. The first meeting of the Conference of Parties shall look, *inter alia*, into the following issues: establishment of other bodies to the Convention if necessary; setting up the secretariat of the Convention; and development of procedural and financial rules for the treaty bodies. The following functions are vested in the Conference's mandate: review and taking

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<sup>147</sup> *Ibid.*, Art. 18.

<sup>148</sup> *Ibid.*, Art. 19.

<sup>149</sup> *Ibid.*, Art. 15.

<sup>150</sup> *Ibid.*, Art. 20.

decisions on implementation of the provisions of the Framework Convention and protocols to it; review and approval of protocols, amendments to the Convention; review of the State reports on implementation of the provisions of the Convention, as well as the review of the progress achieved by each of the parties and obstacles to the implementation of the provisions of the Convention; review of the reports prepared by the Secretariat; establishment and maintenance of liaisons and cooperation with relevant bodies of the regional cooperation as well as international organizations, agencies, financial and scientific institutions, on issues related to the implementation of the Convention; establishment of support bodies that might be necessary for the implementation of the provisions of the Convention and protocols to it; appointment of the Executive Secretary and other relevant staff; performance of any other functions that may be necessary for the achievement of the objectives of the Convention.

The Framework Convention furthermore creates a Secretariat. In accordance with Article 24 the Secretariat is composed of the Executive Secretary and other personnel as required. The functions include administrative organization of the Conference of Parties and its supplementary bodies; preparation and transfer of notifications, reports and other information; review of the queries and information from the State parties and consultations on issues related to the implementation of the Convention and protocols to it; preparation and dissemination of the reports on issues related to the Framework Convention; setting up and regular maintenance of the data and dissemination of domestic legislation and international rules that relate to the implementation of the Convention; organization of the technical assistance and consultation at the request of one of the State parties for the effective implementation of the Convention and protocols to it and cooperation with other organizations of regional or international level.

The concluding part of the Framework Convention is dedicated to the issues of amendments and the procedural rules of integrating the amendments to both the Convention and the Protocols, resolution of disputes, ratification of the Convention and the status of the reservations. According to Article 30 reservations are not permitted under the Framework Convention.

## PARTICIPATION IN MULTILATERAL TREATIES\*

### Introduction

This section records the participation of Asian States in open multilateral lawmaking treaties which mostly aim at worldwide adherence. It updates the treaty sections of earlier volumes until 31 December 2007, unless indicated otherwise (see first note below). 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 have been derived from *Multilateral Treaties Deposited with the Secretary-General*, <http://untreaty.un.org>, available as at 15 November 2007. The Editors thank the United Nations Treaty Section for the permission to use the on-line United Nations Treaty Collection.
- Where reference is made to the Hague Conference on Private International Law, data have been derived from [http://www.hcch.net/index\\_en.php?act=conventions.listing](http://www.hcch.net/index_en.php?act=conventions.listing)
- Where reference is made to the International Atomic Energy Agency (IAEA), data have been derived from <http://ola.iaea.org/OLA/treaties/index.asp>
- Where reference is made to the International Civil Aviation Organization (ICAO), data have been derived from <http://www.icao.int/cgi/airlaw.pl>
- Where reference is made to the International Labour Organization (ILO), data have been derived from <http://www.ilo.org/ilolex/english/convdisp1.htm>
- Where reference is made to the International Maritime Organization (IMO), data have been derived from *Status of Multilateral Conventions and Instruments in respect of which the International Maritime Organization or its Secretary-General Performs Depository or other Functions*, as at 31 December 2007, available at <http://www.imo.org>
- Where reference is made to the Hague Conference on Private International Law, data have been derived from <http://www.hcch.net>

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\* Compiled by Dr Karin Arts, Associate Professor in International Law and Development, Institute of Social Studies, The Hague.

- Where reference is made to the United Nations Educational, Scientific and Cultural Organization (UNESCO), data have been derived from [http://portal.unesco.org/en/ev.php-URL\\_ID=12025&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=-471.html](http://portal.unesco.org/en/ev.php-URL_ID=12025&URL_DO=DO_TOPIC&URL_SECTION=-471.html)
- 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; Ratif. registered = Ratification registered; Min. age spec. = Minimum age specified.

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Antarctica	International trade
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Family matters	Privileges and immunities
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## ANTARCTICA

Antarctic Treaty, Washington, 1959: *see* Vol. 6 p. 234.

## COMMERCIAL ARBITRATION

**Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958:** *see* Vol. 12 p. 234.

## CULTURAL MATTERS

Agreement for Facilitating the International Circulation of Visual and Auditory Materials of an Educational, Scientific and Cultural Character, 1948: *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 International 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. 6 p. 235.

Regional Convention on the Recognition of Studies, Diploma's and Degrees in Higher Education in Asia and the Pacific, 1983: *see* Vol. 11 p. 244.

**CULTURAL PROPERTY**

Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 1970: *see* Vol. 12 p. 235.

Convention concerning the Protection of the World Cultural and Natural Heritage, 1972: *see* Vol. 10 p. 267.

**Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954**

(Continued from Vol. 12 p. 235)

(Status as provided by UNESCO)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Japan		10 Sept 2007

**Protocol for the Protection of Cultural Property in the Event of Armed Conflict, 1954**

(Continued from Vol. 12 p. 235)

(Status as provided by UNESCO)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Japan		10 Sept 2007

**Second Protocol for the Protection of Cultural Property in the Event of Armed Conflict**

The Hague, 26 March 1999

Entry into Force: 9 March 2004

(Status as provided by UNESCO)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>	<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Iran		24 May 2005	Tajikistan		21 Feb 2006
Japan		10 Sept 2007			

**Convention for the Safeguarding of the Intangible Cultural Heritage, 2003**  
(Continued and corrected from Vol. 12. p. 235)  
(Status as provided by UNESCO)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>	<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Indonesia		15 Oct 2007	Philippines		18 Aug 2006

**Convention on the Protection and Promotion of the  
Diversity of Cultural Expressions**  
Paris, 20 October 2005  
Entry into Force: 18 March 2007  
(Status as provided by UNESCO)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>	<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Bangladesh		31 May 2007	Laos		5 Nov 2007
Cambodia		19 Sep 2007	Mongolia		15 Oct 2007
China		30 Jan 2007	Tajikistan		24 Oct 2007
India		15 Dec 2006	Vietnam		7 Aug 2007

#### 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:  
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#### DISPUTE SETTLEMENT

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of the Statute of the Court:**  
(Continued from Vol. 6 p. 238)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Japan		9 Jul 2007

#### 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 Relating to Intervention on the High Seas in Cases of Oil  
Pollution Casualties, 1969: *see* Vol. 9 p. 284.

International Convention on Civil Liability for Oil Pollution Damage, 1969: *see* Vol. 12 p. 236.  
 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.  
 Convention for the Protection of the Ozone Layer, 1985: *see* Vol. 11 p. 246.  
 Protocol on Substances that Deplete the Ozone Layer, 1987: *see* Vol. 11 p. 246.  
 Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1989: *see* Vol. 11 p. 247.  
 International Convention on Oil Pollution Preparedness, Response, and Cooperation, 1990: *see* Vol. 12 p. 237.  
 Convention on Biological Diversity, 1992: *see* Vol. 12 p. 247.  
 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. 12 p. 238

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

(Continued from Vol. 10 p. 269)  
 (Status as provided by UNESCO)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Kazakhstan		2 Jan 2007

**Protocol Relating to the 1973 International Convention for the Prevention of Pollution from Ships, as amended, 1978**

(Continued from Vol. 12 p. 237)  
 (Status as provided by IMO)

<i>State</i>	<i>Cons.</i> <i>(Deposit)</i>	<i>Excepted</i> <i>annexes</i>	<i>State</i>	<i>Cons.</i> <i>(Deposit)</i>	<i>Excepted</i> <i>annexes</i>
China (for Annex IV)	2 Nov 2006		Thailand	2 Nov 2007	III, IV and V

**Protocol to amend the 1971 Convention on Wetlands of International Importance especially as Waterfowl Habitat, 1982**

(Continued from Vol. 6 p. 240)  
 (Status as provided by UNESCO)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Kazakhstan		2 May 2007

**Amendments to Articles 6 and 7 of the 1971 Convention on Wetlands of International Importance especially as Waterfowl Habitat, 1987**

(Continued from Vol. 10 p. 270)

(Status as provided by UNESCO)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
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Kazakhstan		2 May 2007
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**Amendment to the Montreal Protocol, 1990**

(Continued from Vol. 12 p. 237)

<i>State</i>	<i>Cons.</i>
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Cambodia	31 Jan 2007
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**Protocol to amend the 1969 International Convention on Civil Liability for Oil Pollution Damage, 1992**

(Continued from Vol. 12 p. 237)

(Status as provided by IMO)

<i>State</i>	<i>Cons.</i>	<i>E.i.f.</i>
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Iran	24 Oct 2007	
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**Framework Convention on Climate Change, 1992**

(Continued from Vol. 12 p. 228)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
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Brunei		7 Aug 2007
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**Amendment to the Montreal Protocol, 1992**

(Continued from Vol. 12 p. 238)

<i>State</i>	<i>Cons.</i>
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Cambodia	31 Jan 2007
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**Amendment to the Montreal Protocol, 1997**

(Continued from Vol. 12 p. 238)

<i>State</i>	<i>Cons.</i>
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Cambodia	31 Jan 2007
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**Amendment to the Montreal Protocol, 1999**

(Continued from Vol. 12 p. 239)

<i>State</i>	<i>Cons.</i>		<i>State</i>	<i>Cons.</i>
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Cambodia	31 Jan 2007		Singapore	10 Jan 2007
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**Cartagena Protocol on Biosafety to the Convention on Biological Diversity  
Montreal, 29 January 2000**  
(Continued from Vol. 12 p. 239)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Korea (DPR)	6 Sep 2000	3 Oct 2007

**Rotterdam Convention on the Prior Informed Consent Procedure for Certain  
Hazardous Chemicals and Pesticides in International Trade, 1998**  
(Continued from Vol. 12 p. 239)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>	<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Kazakhstan		1 Nov 2007	Vietnam		7 May 2007
Nepal		9 Feb 2007			

**Stockholm Convention on Persistent Organic Pollutants, 2001**  
(Continued from Vol. 12 pp. 239–240)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>	<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Bangladesh	23 May 2001	12 Mar 2007	Nepal	5 Apr 2002	6 Mar 2007
Kazakhstan	23 May 2001	9 Nov 2007	Tajikistan	21 May 2002	8 Feb 2007
Korea (DPR)		25 Jan 2007			

## FAMILY MATTERS

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

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

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

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

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

**Convention on Protection of Children and Co-operation in Respect of  
Intercountry Adoption, 1993**  
(Continued from Vol. 12 p. 240)

(Status as provided by the Hague Conference on Private International Law)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Cambodia		6 Apr 2007

## FINANCE

Agreement Establishing the Asian Development Bank, 1965: *see* Vol. 7 p. 327.

Convention Establishing the Multilateral Investment Guarantee Agency, 1988: *see* Vol. 12 p. 240.

## HEALTH

Protocol Concerning the Office International d'Hygiène Publique, 1946: *see* Vol. 6 p. 245.

**World Health Organization Framework Convention on  
Tobacco Control, 2003**  
(Continued from Vol. 12 p. 241)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Kazakhstan	21 Jun 2004	22 Jan 2007

## HUMAN RIGHTS, INCLUDING WOMEN AND CHILDREN

Convention on the Political Rights of Women, 1953: *see* Vol. 10 p. 273

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

Convention against Discrimination in Education, 1960: *see* Vol. 7 p. 328.

International Covenant on Civil and Political Rights, 1966: *see* Vol. 12 p. 242.

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

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.

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990: *see* Vol. 11 p. 251.

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

**International Covenant on Economic, Social and Cultural Rights, 1966**  
(Continued from Vol. 12 p. 241)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Laos	7 Dec 2000	13 Feb 2007

**Optional Protocol to the International Covenant on  
Civil and Political Rights, 1966**  
(Continued from Vol. 12 p. 242)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Kazakhstan		25 Sep 2007

**Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984**  
(Continued from Vol. 12 p. 242)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Thailand		2 Oct 2007

**Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, 1999**  
(Continued from Vol. 12 p. 242)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Nepal	18 Dec 2001	15 Jun 2007

**Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 2000**  
(Continued from Vol. 12 p. 243)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Nepal	8 Sep 2000	3 Jan 2007

**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. 12 p. 243)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Iran		26 Sept 2007

**Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 2002**  
(Continued from Vol. 12 p. 243)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>		<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Cambodia	14 Sept 2005	30 Mar 2007		Kazakhstan	25 Sept 2007	

**Convention on the Rights of Persons with Disabilities**  
New York, 13 December 2006  
Entry into Force: not yet

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>	<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Bangladesh	9 May 2007		Korea (DPR)	30 Mar 2007	
Cambodia	1 Oct 2007		Maldives	2 Oct 2007	
China	30 Mar 2007		Philippines	25 Sept 2007	
India	30 Mar 2007	1 Oct 2007	Sri Lanka	30 Mar 2007	
Indonesia	30 Mar 2007		Thailand	30 Mar 2007	
Japan	28 Sept 2007		Vietnam	22 Oct 2007	

**Optional Protocol to the Convention on the Rights of Persons  
with Disabilities**

New York, 13 December 2006

Entry into Force: not yet

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Cambodia	1 Oct 2007	

**International Convention for the Protection of All Persons from  
Enforced Disappearance**

New York, 20 December 2006

Entry into Force: not yet

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>	<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
India	6 Feb 2007		Maldives	6 Feb 2007	
Japan	6 Feb 2007		Mongolia	6 Feb 2007	

**HUMANITARIAN LAW IN ARMED CONFLICT**

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

Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1977: *see* Vol. 12 p. 243.

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.

**INTELLECTUAL PROPERTY**

Convention for the Protection of Industrial Property, 1883 as amended 1979: *see* Vol. 11 p. 253.

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

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

International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 1961: *see* Vol. 12 p. 245.

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. 12 p. 245.

Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms, 1971: *see* Vol. 12 p. 245.

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

**Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, 1957 as amended in 1979**

(Status as included in WIPO doc. 423(E) of 15 January 2008)

<i>State</i>	<i>Cons.</i>	<i>Latest Act to which State is party</i>
Malaysia	28 Sept 07	Geneva

INTERNATIONAL CRIMES

Slavery Convention, 1926 as amended in 1953: *see* Vol. 7 p. 331.

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. 7 p. 331.

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.

Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, 1988, *see* Vol. 12 p. 247.

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 Safety of United Nations and Associated Personnel, 1994: *see* Vol. 11 p. 255.

**Convention on the Prevention and Punishment of Crimes Against  
Internationally Protected Persons Including Diplomatic Agents, 1973**  
(Continued from Vol. 12 p. 246)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Thailand		23 Feb 2007

**International Convention Against the Taking of Hostages, 1979**  
(Continued from Vol. 12 p. 246)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>	<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Malaysia		29 May 2007	Thailand		2 Oct 2007

**Convention for the Suppression of Unlawful Acts Against the Safety of  
Maritime Navigation, 1988**  
(Continued and corrected from Vol. 12 p. 246)  
(Status as provided by IMO)

<i>State</i>	<i>Cons.</i> <i>(Deposited)</i>	<i>E.i.f.</i>
Cambodia	18 Aug 2006	16 Nov 2006

**Convention on the Marking of Plastic Explosives for the  
Purpose of Detection, 1991**  
(Continued from Vol. 12 p. 247)  
(Status as provided by the ICAO Secretariat)

<i>State</i>	<i>Sig.</i>	<i>Eff. Date.</i>
Malaysia	27 Nov 2007	

**International Convention for the Suppression of Terrorist Bombings, 1997**  
(Continued from Vol. 12 p. 247)

<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
Thailand		12 Jun 2007

**Statute of the International Criminal Court, 1998**  
(Continued from Vol. 11 p. 255)

<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
Japan		17 Jul 2007

**International Convention for the Suppression of the  
Financing of Terrorism, 1999**  
(Continued from Vol. 12 p. 248)

<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
Malaysia		29 May 2007

**United Nations Convention Against Transnational Organized Crime, 2000**  
(Continued from Vol. 12 p. 248)

<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
Singapore	13 Dec 2000	28 Aug 2007

**United Nations Convention Against Corruption**  
New York, 31 October 2003  
Entry into Force: 14 December 2005

<i>State</i>	<i>Sig.</i>	<i>Rat.</i>	<i>State</i>	<i>Sig.</i>	<i>Rat.</i>
Afghanistan	20 Feb 2004		Mongolia	19 Apr 2005	11 Jan 2006
Bangladesh		27 Feb 2007	Myanmar	2 Dec 2005	
Bhutan	15 Sept 2005		Nepal	10 Dec 2003	
Brunei	11 Dec 2003		Pakistan	9 Dec 2003	31 Aug 2007
Cambodia		5 Sept 2007	Papua New Guinea	22 Dec 2004	16 Jul 2007
China	10 Dec 2003	13 Jan 2006	Philippines	9 Dec 2003	8 Nov 2006
India	9 Dec 2005		Singapore	11 Nov 2005	
Indonesia	18 Dec 2003	19 Sept 2006	Sri Lanka	15 Mar 2004	31 Mar 2004
Iran	9 Dec 2003		Tajikistan		25 Sept 2006
Japan	9 Dec 2003		Thailand	9 Dec 2003	
Korea (Rep)	10 Dec 2003		Timor-Leste	10 Dec 2003	
Kyrgyzstan	10 Dec 2003	16 Sept 2005	Turkmenistan		28 Mar 2005
Laos	10 Dec 2003		Vietnam	10 Dec 2003	
Malaysia	9 Dec 2003				
Maldives		22 Mar 2007			

## 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. 11 p. 256.

UN Convention on the Liability of Operators of Transport Terminals in International Trade, 1991: *see* Vol. 6 p. 257.

**Convention on Transit Trade of Land-locked States, 1965**

(Continued from Vol. 6 p. 257)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Kazakhstan		1 Nov 2007

## JUDICIAL AND ADMINISTRATIVE COOPERATION

Convention Relating to Civil Procedure, 1954: *see* Vol. 6 p. 258.

Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, 1961: *see* Vol. 12 p. 249.

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. 9 p. 292.

## LABOUR

Freedom of Association and Protection of the Right to Organize Convention, 1948 (ILO Conv. 87): *see* Vol. 9 p. 292.

Right to Organize and Collective Bargaining Convention, 1949 (ILO Conv. 98): *see* Vol. 10 p. 280.

Equal Remuneration Convention, 1951 (ILO Conv. 100): *see* Vol. 10 p. 281.

Discrimination (Employment and Occupation) Convention, 1958 (ILO Conv. 111): *see* Vol. 12 p. 250.

Employment Policy Convention, 1964 (ILO Conv. 122): *see* Vol. 8 p. 186.

Minimum Age Convention, 1973 (ILO Conv. 138): *see* Vol. 11 p. 257.

Worst Forms of Child Labour Convention, 1999 (ILO Conv. 182): *see* Vol. 11 p. 257.

**Forced Labour Convention, 1930 (ILO Conv. 29)**

(Continued from Vol. 12 p. 249)

(Status as provided by the ILO)

<i>State</i>	<i>Ratif. registered</i>
Vietnam	5 Mar 2007

**Abolition of Forced Labour Convention, 1957 (ILO Conv. 105)**

(Continued from Vol. 12 p. 250)

(Status as provided by the ILO)

<i>State</i>	<i>Ratif. registered</i>
Nepal	30 Aug 2007

**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, as Amended by Protocol 1972: *see* Vol. 12 p. 251.

Protocol amending the Single Convention on Narcotic Drugs, 1972: *see* Vol. 11 p. 257.

**Single Convention on Narcotic Drugs, 1961**  
(Continued from Vol. 12 p. 251)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Korea (Rep.)		19 Mar 2007

**Convention on Psychotropic Substances, 1971**  
(Continued from Vol. 9 p. 294)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>	<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Korea (DRP)		19 Mar 2007		Nepal	9 Feb 2007

**United Nations Convention Against Illicit Traffic in Narcotic Drugs and  
Psychotropic Substances, 1988**  
(Continued from Vol. 12 p. 251)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Korea (Rep.)		10 Mar 2007

NATIONALITY AND STATELESSNESS

Convention relating to the Status of Stateless Persons, 1954: *see* Vol. 6 p. 264.  
 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. 6 p. 265.  
 Convention on the Physical Protection of Nuclear Material, 1980: *see* Vol. 12 p. 252.  
 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 Early Notification of a Nuclear Accident, 1986: *see* Vol. 9 p. 295.  
 Convention on Assistance in the Case of a Nuclear Accident or Radiological  
 Emergency, 1986: *see* Vol. 9 p. 295.  
 Convention on Nuclear Safety, 1994: *see* Vol. 12 p. 252.  
 Protocol to amend the Convention on Civil Liability for Nuclear Damage, 1997:  
*see* Vol. 8 p. 188.  
 Convention on Supplementary Compensation for Nuclear Damage, 1997: *see* Vol. 8  
 p. 189.

**Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management, 1997**

(Continued from Vol. 12 p. 252)

(Status as provided by IAEA)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i> <i>(deposit)</i>
Tajikistan		12 Dec 2007

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. 6 p. 266.

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. 10 p. 284.

PRIVILEGES AND IMMUNITIES

Convention on the Privileges and Immunities of the United Nations, 1946: *see* Vol. 10 p. 284.

Convention on the Privileges and Immunities of the Specialized Agencies, 1947: *see* Vol. 7 p. 338.

Optional Protocol to the Vienna Convention on Diplomatic Relations concerning the Compulsory Settlement of Disputes, 1961: *see* Vol. 6 p. 269.

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. 12 p. 253.

**Vienna Convention on Diplomatic Relations, 1961**

(Continued from Vol. 12 p. 253)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Maldives		2 Oct 2007

**Vienna Convention on Consular Relations, 1963**  
(Continued from Vol. 12 p. 253)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Sri Lanka		4 May 2006

REFUGEES

Convention relating to the Status of Refugees, 1951: *see* Vol. 12 p. 254.  
Protocol relating to the Status of Refugees, 1967: *see* Vol. 12 p. 254.

ROAD TRAFFIC AND TRANSPORT

Convention on Road Traffic, 1968: *see* Vol. 12 p. 254.  
Convention on Road Signs and Signals, 1968: *see* Vol. 7 p. 338.

SEA

Convention on the Territorial Sea and the Contiguous Zone, 1958: *see* Vol. 6 p. 271.  
Convention on the High Seas, 1958: *see* Vol. 7 p. 339.  
Convention on Fishing and Conservation of the Living Resources of the High Seas, 1958: *see* Vol. 6 p. 271.  
Convention on the Continental Shelf, 1958: *see* Vol. 6 p. 271.  
Optional Protocol of Signature concerning the Compulsory Settlement of Disputes, 1958: *see* Vol. 6 p. 272.  
United Nations Convention on the Law of the Sea, 1982: *see* Vol. 10 p. 285.  
Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, 1994: *see* Vol. 12 p. 255.  
Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea (. . .) relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 1995: *see* Vol. 12 p. 255.

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. 12 p. 256.  
International Convention on Tonnage Measurement of Ships, 1969: *see* Vol. 6 p. 274.  
Special Trade Passenger Ships Agreement, 1971: *see* Vol. 6 p. 275.  
Convention on the International Regulations for Preventing Collisions at Sea, 1972 as amended: *see* Vol. 10 p. 286.

International Convention for Safe Containers, as amended 1972: *see* Vol. 10 p. 286.  
 Protocol on Space Requirements for Special Trade Passenger Ships, 1973: *see* Vol. 6 p. 275.

International Convention for the Safety of Life at Sea, 1974, as amended: *see* Vol. 6 p. 286.

Convention on a Code of Conduct for Liner Conferences, 1974: *see* Vol. 6 p. 276.

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>Sig.</i>	<i>Cons.</i>		<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Iran	31 Oct 2006	31 Jan 2007		Mongolia	19 Apr 2007	19 Jul 2007

### 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

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.

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

### **Constitution of the Asia-Pacific Telecommunity, 1976**

(Continued from Vol. 8 p. 192)

<i>State</i>	<i>Cons.</i>
Cambodia	5 Apr 2007

### **Amendments to the Constitution of the Asia-Pacific Telecommunity, 2002**

(Continued from Vol. 12 p. 257)

<i>State</i>	<i>Cons.</i>	<i>State</i>	<i>Cons.</i>
China	27 Feb 2006	Maldives	19 Apr 2007
Iran	21 Jul 2006	Pakistan	18 Jun 2007

## TREATIES

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

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

## 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 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.

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 the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, 1972**

(Continued from Vol. 12 p. 258)

(Status at 31 December 2007, <http://disarmament.un.org/TreatyStatus.nsf>)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Kazakhstan		15 Jun 2007

**Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 1997**

(Continued from Vol. 12 p. 259)

<i>State</i>	<i>Sig.</i>	<i>Cons.</i>
Indonesia	4 Dec 1997	16 Feb 2007



## DEVELOPMENTS



## HUMAN RIGHTS AND THE CHARTER OF ASEAN (2007)

Li-ann Thio\*

### INTRODUCTION

Forty years after its founding, the Association for South-East Asian States (ASEAN), on 20 November 2007, adopted the Charter of the Association of South-east Asian Nations (“Charter”),<sup>1</sup> after a two-and-a-half-year drafting process. It needs to be ratified by all member countries before coming into effect.<sup>2</sup>

The Charter seeks to formalize the expanded ASEAN grouping which currently consists of 10 Member States, excluding the South-east Asian State of Timor Leste which attained independence from Indonesia in 2002. It signalled a maturation of the grouping into a regional organization and the desire to fortify community identity through a rules-based regime and to collectively secure shared objectives through providing “an efficient structure”, as stated in the Cebu Declaration on the Blueprint of the ASEAN Charter adopted on 13 January 2007.<sup>3</sup>

The Charter codifies ASEAN norms, rules and values and establishes the legal and institutional framework for ASEAN with the intent to reinforce its role as the premier regional inter-governmental organization. Article 3 of the Charter expressly confers legal personality on the sub-regional inter-governmental body. Member States are obliged under Article 5 to adopt “all necessary measures”, including the enactment of domestic legislation, to effectively implement Charter provisions and to comply with the obligations of membership.

While affirming goals such as economic progress and social stability, that precipitated the founding of ASEAN, and underscoring the “shared destiny” of the peoples of ASEAN nations, this formal ASEAN instrument explicitly embraces normative aspirations for the first time, including “democracy” and “respect for and protection of human rights and fundamental freedoms” in its Preamble. This had been identified as one of the principles to be embodied in the ASEAN Charter in the

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<sup>1</sup> Text of the ASEAN Charter available at <http://www.aseansec.org/21069.pdf>

<sup>2</sup> As of 18 April 2008, the ASEAN members who have ratified the Charter are Singapore (7 January 2008, date of deposit); Brunei Darussalam (15 February 2008); Malaysia (20 February 2008); Lao PDR (20 February 2008); Vietnam (18 March 2008) and Cambodia (18 April 2008): <http://www.aseansec.org/AC-update.pdf>

<sup>3</sup> Available at <http://www.aseansec.org/19257.htm>

Kuala Lumpur Declaration on the Establishment of the ASEAN Charter of 12 December 2005, that is, the “promotion of democracy, human rights and obligations, transparency and good governance and strengthening democratic institutions”.<sup>4</sup>

#### THE FORMER MARGINALIZATION OF HUMAN RIGHTS WITHIN ASEAN

This is significant given the reticence towards the language and agenda of “human rights” which is woven into the fabric of other regional organizations such as the Council of Europe,<sup>5</sup> Organization of American States<sup>6</sup> and African Union.<sup>7</sup> While securing social justice against the broader imperatives of regional peace and security has always been an avowed objective of ASEAN, whose preferred working methods are mediated through informal interaction and loose structures rather than formalized proceedings, ASEAN has only warmed up gradually to the prospect of explicitly incorporating “human rights” as a facet of its institutional agenda.

As the Singapore foreign minister stated before parliament on 9 April 2007 (Singapore Parliament Reports, 9 May 2007, Vol. 83, ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (Establishment)), there was within ASEAN “a growing consensus of the need to protect and promote human rights as we step up our community building efforts”. He expressed Singapore’s support for the movement within ASEAN to raise “the general level of awareness of human rights” which he noted was inter-related with “the rule of law and good governance”.

Indeed, the promotion and protection of human rights did not feature in the founding document of the Bangkok Declaration of 8 August 1967,<sup>8</sup> issued by the original five Member States: Indonesia, the Philippines, Malaysia, Singapore and Thailand. Central to the organization of this sub-regional grouping, whose population today numbers about 567.5 million, was the cardinal principle of non-intervention in the internal affairs of Member States as declared in Article 2(c) of the Treaty of Cooperation and Amity in South-east Asia of 24 February 1976.<sup>9</sup> On occasion, this gave way to the operation of a “flexible engagement” approach

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<sup>4</sup> Available at <http://www.aseansec.org/18030.htm>

<sup>5</sup> The members of the Council of Europe adopted the European Convention on Human Rights and Fundamental Freedoms 13 UNTS 222, *entered into force* 3 September 1953, in the belief that this was one method of achieving greater unity amongst its members.

<sup>6</sup> The Charter for the Organization of American States 119 UNTS 3, *entered into force* 13 December 1951 provides for the establishment of the Inter-American Commission on Human Rights as well as an Inter-American Convention on Human Rights, which was to be adopted.

<sup>7</sup> See Arts. 3(e), (h) and 4(m), Constitutive Act of the African Union, OAU Doc. CAB/LEG/23.15, *entered into force* 26 May 2001.

<sup>8</sup> Available at <http://www.aseansec.org/1212.htm>

<sup>9</sup> Available at <http://www.aseansec.org/1217.htm>

towards addressing human rights issues. This called for the robust and frank discussion of domestic issues affecting other ASEAN countries.<sup>10</sup>

While not explicitly mentioning human rights as an institutional goal, ASEAN States frequently referred to social justice matters pertaining to the interests and concerns of vulnerable groups such as women, children and migrant workers. For example, the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers<sup>11</sup> adopted in January 2007, while recognizing State sovereignty in the formulation of migration policy, acknowledged the need for States to take measures to protect the welfare of migrant workers. It recalled in its preamble the Universal Declaration of Human Rights,<sup>12</sup> the Convention for the Elimination of All Forms of Discrimination against Women (CEDAW)<sup>13</sup> and the Convention on the Rights of the Child (CRC),<sup>14</sup> which treaties all ASEAN members had acceded to.

The aim of human rights is to secure human welfare, motivated by the principle of human dignity. ASEAN shares this goal, though it has hitherto avoided the mechanism of rights, preferring a “human development” approach by pursuing programmes to meet these objectives, phrased in terms of State obligations rather than individual entitlement. This maximizes State discretion and rejects any formal mode of external accountability to monitor and evaluate the progress of each ASEAN State in this respect. This is consonant with ASEAN’s preference for a conciliatory working ethos and for “constructive engagement” with egregious human rights violators like Myanmar, which was admitted to membership on 23 July 1997 and remains a perennial thorn in the flesh for ASEAN, particularly where influential trading blocs like the European Union refuse to invite/attend meetings where Myanmar is present.<sup>15</sup>

The 1967 Bangkok Declaration States that the aims and purposes of ASEAN include securing “the economic growth, social progress and cultural development in the region”. Thirty years after its inception, when ASEAN had increased its members to nine, it issued on 15 December 1997 the ASEAN Vision 2020<sup>16</sup> which reaffirmed its commitment to the objectives of the Bangkok Declaration. This

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<sup>10</sup> See, e.g. K. Chongkittavorn, “Asean needs ‘flexible engagement’”, *The Nation* (Thailand), Editorial & Opinion, 20 July 1998. See generally J. Haacke, *ASEAN’s Diplomatic and Security Culture: Origins, Development and Prospects* (Routledge, 2002) at 165–190.

<sup>11</sup> Available at <http://www.aseansec.org/19264.htm>

<sup>12</sup> G.A. res. 217A (III), UN Doc A/810 at 71 (1948).

<sup>13</sup> A. res. 34/180, 34 UN GAOR Supp. (No. 46) at 193, UN Doc. A/34/46, entered into force 3 September 1981.

<sup>14</sup> G.A. res. 44/25, annex, 44 UN GAOR Supp. (No. 49) at 167, UN Doc. A/44/49 (1989), entered into force 2 September 1990.

<sup>15</sup> See, e.g. M. Abramowitz and B. Joseph, “An unwelcome guest : Will Europe sit down with Myanmar?”, *International Herald Tribune*, 3 September 2004, at [http://www.ihf.com/articles/2004/09/03/edmort\\_ed3\\_.php](http://www.ihf.com/articles/2004/09/03/edmort_ed3_.php); and see generally “The EU’s relations with Myanmar” at [http://ec.europa.eu/external\\_relations/myanmar/intro/index.htm](http://ec.europa.eu/external_relations/myanmar/intro/index.htm)

<sup>16</sup> Available at <http://www.aseansec.org/1814.htm>

instrument noted the economic achievements of the region of 500 million people with a gross domestic product of US\$600 billion, such as “high economic growth, stability and significant poverty alleviation”. The Vision referred to ASEAN “as a concert of South-east Asian nations” which co-existed “in peace, stability and prosperity”, partnering in a process of “dynamic development” as “a community of caring societies”. Express reference was made to a group of nations which manifested “abiding respect for justice and the rule of law” and, consonant with the goals of the United Nations Declaration on the Right to Development,<sup>17</sup> which sought to achieve “sustainable development” and government “with the consent and greater participation of the people”. A vision of situated rather than autonomous man, consonant with a more communitarian outlook, was articulated in urging a focus “on the welfare and dignity of the human person and the good of the community”.

A continuing goal was to sustain ASEAN’s “high economic performance”, to create a highly competitive ASEAN Economic Region through promoting economic integration and a regime supportive of free trade and investment, to achieve in solidarity the goal of narrowing the gap between the differing levels of development among the Member States. In order to achieve a “caring” community, the aim was to achieve “total human development” regardless of “gender, race, religion, language or social and cultural background”. It envisaged the empowerment of civil society which would then give “special attention to the disadvantaged, disabled and marginalized”, which means no welfare State is envisaged; rather, compassion is privatized. Other specific problems which human rights instruments also address include environmental pollution, trafficking in women and children.

## SHIFTS IN ASEAN’S POLICY TOWARDS HUMAN RIGHTS

It was not until the convening in 1993 of the Vienna World Conference on Human Rights, preceded by the regional Bangkok Conference of Asian States, that “human rights” was formerly placed on the agenda of ASEAN. In paragraphs 16–18 of its joint communiqué of 23–24 July 1993 issued after the 26th ASEAN ministerial meeting,<sup>18</sup> the foreign ministers welcomed the international consensus achieved at the Vienna Conference, stressing the indivisibility of human rights whose promotion and protection should not be politicized, and which should be addressed in a “balanced and integrated manner” which paid “due regard for specific cultural, social, economic and political circumstances”. In support of the Vienna Declaration and Programme of Action,<sup>19</sup> they agreed “ASEAN should also consider the establishment of an appropriate regional mechanism on human rights”. Furthermore,

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<sup>17</sup> Adopted by General Assembly resolution 41/128 of 4 December 1986.

<sup>18</sup> Available at <http://www.aseansec.org/2009.htm>

<sup>19</sup> A/CONF.157/23 (12 July 1993).

ASEAN members like Indonesia, Malaysia, Thailand and the Philippines also have established national human rights institutions since the late 1980s.<sup>20</sup>

Proposals to establish an ASEAN Commission on the Promotion and Protection of the Rights of Women and Children, agreed to during the 10th ASEAN Summit in November 2004 as mentioned in the Joint Communiqué issued at the 26th ASEAN ministerial meeting, to be elaborated as noted under the Vientiane Action Programme (2004–2010),<sup>21</sup> have thus far produced nothing.

Nonetheless, the 2007 ASEAN Charter states in Article 14(1) that ASEAN “shall establish an ASEAN human rights body”, which signals the intention to create a formal institutional supranational structure dedicated to human rights promotion and protection. This is significant in a region where human rights, primarily civil-political rights, have been subject to qualification to serve the interests of securing public order, thought to be conducive to attracting foreign trade and investment, a crucial aspect of economic development which many States consider key to nation-building efforts. Indeed, the importance of narrowing the development gap “through mutual assistance and cooperation” is a pervasive ASEAN priority and an express purpose stipulated under Chapter 1, Article 1(6) of the Charter. This resonates with the consistent assertion by ASEAN States that the right to development is a fundamental and inalienable human right to be secured through international cooperation – certainly this is evident in paragraph 17 of the Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights.<sup>22</sup>

## HUMAN RIGHTS AND THE ASEAN CHARTER

The term “human rights” appears five times in the Charter, in the preamble, as an articulated purpose (Article 1(7)), principle (Article 2(i)) and twice in relation to a proposed ASEAN Human Rights Body. Notably, too, Article 2(e) affirms as an ASEAN principle the “non-interference in the internal affairs of ASEAN Member States” and the right of Member States to lead their national existence “free from

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<sup>20</sup> See, e.g. P. Eldridge, “Emerging Roles of National Human Rights Institutions in Southeast Asia”, *Pacifica Review: Peace, Security & Global Change*, Vol. 14, No. 3, 1 October 2002, pp. 209–226(18).

<sup>21</sup> Available at <http://www.aseansec.org/VAP-10th%20ASEAN%20Summit.pdf>

<sup>22</sup> A/CONF.157/PC/59. Notably the Vienna Declaration A/CONF.157/23 affirms at para. 8: that “Democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing. Democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives. In the context of the above, the promotion and protection of human rights and fundamental freedoms at the national and international levels should be universal and conducted without conditions attached. The international community should support the strengthening and promoting of democracy, development and respect for human rights and fundamental freedoms in the entire world.”

external interference, subversion and coercion” (Article 2(2)(f)); however, by characterizing human rights as a purpose of the international organization, it can no longer be taken to a matter for the exclusive determination of a particular State. The Charter makes no reference to the Universal Declaration of Human Rights, despite Thai proposals that it should do so.

Human rights are now explicitly considered an integral aspect of civilized and humane government, it being a stated principle in Article 2(h) of the Charter to act in accordance with “adherence to the rule of law, good governance, the principles of democracy and constitutional government”. Article 1(7) states that a purpose of a people-oriented ASEAN is: “To strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms, with due regard to the rights and responsibilities of the Member States of ASEAN.” It is thus an express ASEAN principle for States to show “respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice” (Article 2(2)(i)).

How are the obligations in the ASEAN Charter to be enforced? In past practice, the pacific settlement of disputes has been a key principle although no permanent body was established in this respect. Articles 14 and 15 of the 1976 Treaty of Amity and Cooperation provides for the constitution of a High Council staffed by ministerial representatives to take cognizance of disputes likely to threaten regional peace and harmony and, where direct negotiations fail, to lend its good offices or to constitute a committee of inquiry, mediation or conciliation and, where necessary, to recommend appropriate measures. Article 24(2) reaffirms that disputes not concerning the interpretation of any ASEAN instrument are to be peacefully resolved in accordance with the treaty procedures laid out in the 1976 Treaty.

In relation to decision making, Article 20 of the ASEAN Charter provides that as a “basic principle”, this is to be “based on consultation and consensus” and in the absence of consensus, the ASEAN Summit, the supreme policy-making body of ASEAN (Article 7(2)(a)), comprising the heads of State or government, was to decide how a specific decision can be made (Article 20(2)). The Secretary-General is responsible for monitoring the compliance with the recommendations and decisions of an ASEAN dispute settlement mechanism and is to submit a report to the ASEAN Summit. Clearly, political rather than legal mechanisms remain the preferred method of approach towards dispute settlement. The Charter does not create any quasi-judicial dispute-handling mechanisms.

Where the common interests of ASEAN are seriously implicated, Article 2(2)(g) provides for “enhanced consultations”. This demonstrates a realization that a blanket “hands-off” approach towards the domestic affairs of a Member State is undesirable. Article 23(2) provides for a new initiative in relation to peaceful dispute settlement as the ASEAN Chairman and Secretary-General can now be requested to lend good offices, conciliation or mediation in relation to a dispute.

In relation to the proposed human rights body, Article 14(1) simply states that “ASEAN shall establish an ASEAN human rights body” in conformity with the purposes and principles of the ASEAN Charter relating to the promotion and protection of human rights and fundamental freedoms. The Charter does not suggest

the form or nature of this proposed body, only that the body is to operate according to the terms of reference which the ASEAN Foreign Ministers Meeting is to determine. It does not even identify which human rights norms will inform the terms of reference.

In short, while deeply symbolic, the ASEAN Charter at best demonstrates that human rights concerns are a formal institutional purpose and that respect for human rights now is clearly one of the principles of ASEAN. Being “constitutional” in nature, the Charter itself does not provide details or stipulate an action plan for actualizing the legal commitment to establishment of a human rights body but defers this matter for future political decision, without a set time limit. It is unlikely that muscular human rights protective enforcement mechanisms will be adopted; earlier recommendations to consider sanctions, such as possible expulsion from ASEAN, were dropped.<sup>23</sup> Any institution is likely to be more oriented towards promoting rather than protecting human rights, and certainly punitive sanctions are extremely unlikely at this stage. Indeed, the Singapore foreign minister noted that: “I’m not sure if it will have teeth but it will certainly have a tongue . . . It will certainly have moral influence if nothing else.”<sup>24</sup>

Notably, paragraph 26 of the 1993 Bangkok Declaration reiterated “the need to explore the possibilities of establishing regional arrangements for the promotion and protection of human rights in Asia”. Similarly, paragraph 37 of the Vienna Declaration and Programme of Action<sup>25</sup> reaffirmed the “fundamental role” played by regional arrangements in “promoting and protecting human rights” which should reinforce rather than dilute universal human rights standards. Certainly, the ASEAN Charter and its human rights clauses indicate the intent of South-east Asian States to institutionalize human rights issues by creating a human rights body. It is unlikely to be judicial in nature, given that ASEAN prefers informal methods of dispute settlement, even in relation to institutional priorities relating to trade and regional peace. Indeed, it has been hinted at by the Singapore government that the powers of the body, which will evolve over time, “are more likely to be consultative than prescriptive”, and that the chief focus would be to establish “something that is practical, meaningful and has everyone’s support”.<sup>26</sup> Subsequently, the second Singapore foreign minister in June 2008 suggested three criteria that should be borne in mind in considering the form an ASEAN human rights mechanism might take: first, any proposed institution had to have the support of all 10 ASEAN members, which

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<sup>23</sup> “ASEAN summit opens amid contention over Myanmar, snubbed UN address”, *Jakarta Post.com*, 21 November 2007.

<sup>24</sup> “Myanmar crisis to dominate ASEAN summit, but free trade, climate also high on agenda”, *International Herald Tribune*, 17 November 2007 at <http://www.ihf.com/articles/ap/2007/11/18/asia/AS-GEN-ASEAN.php>

<sup>25</sup> A.CONF.157.23 (1993).

<sup>26</sup> Second Minister for Foreign Affairs, Mr Raymond Lim Siang Keat, *Singapore Parliament Reports* (Setting Up of ASEAN Human Rights Commission: Implications for Singapore), Vol. 83, 27 August 2007.

necessitated a recognition of “the complex history of our region, the diversity of political systems in ASEAN and the realities that this imposes on ASEAN in all fields”, taking full cognisance of “ASEAN’s established traditions and procedures”. Second, advancing the human rights agenda in ASEAN was best achieved “through an evolutionary approach”, noting that while human rights were a universal ideal, “the interpretation of most rights are still essentially contested concepts”. Thus, a gradualist approach was advocated as “too much ambition can as easily scuttle this important project as too little”. Last, the need to avoid setting “artificial deadlines” for creating the institution for the sake of having a final product to point to; however, being realistic in appreciating the need to establish consensus “should not be an excuse for inaction”.<sup>27</sup>

Work on drafting the Terms of Reference of the ASEAN human rights body was due to commence in July 2008, at the sidelines of the ASEAN Ministerial Meeting to be held in Singapore. This marks the beginning of a process and it is anticipated that this will proceed with deliberate caution.

It is hoped that the proposal for an ASEAN human rights mechanism will not merely duplicate the existing State reporting obligations ASEAN States owe towards various UN human rights treaty bodies, or that the mechanism be merely consultative or promotional in orientation. This would be cause for cynicism in the face of egregious human rights violations.

Given the dislike of many ASEAN States for external monitoring and adversarial modalities of scrutiny and critique, it is open to speculation as to whether an inter-State or individual complaints mechanism for rights violations will be built into the eventual ASEAN human rights regime,<sup>28</sup> perhaps not in its first, but subsequent incarnations. It is possible that ASEAN may create something entirely novel in line with its preference for conciliation and other methods of inducing compliance with accepted norms, in lieu of a public quasi-judicial procedure, but it is hoped that a meaningful accountability mechanism will be established; consonant with the declared desire to shift from a more State-centric to a more “people-oriented” conception of the ASEAN community,<sup>29</sup> non-government sectors of society should be involved and participate in this process. The mechanism is unlikely to be suited to addressing the problem of systemic human rights violations, such as those extant in Myanmar, given the desire of the military junta to maintain political and military control of the country. For this problem, political and diplomatic solutions will continue to be sought, although ASEAN’s method of “constructive engagement” with the military junta appears to have borne little fruit since Myanmar was accorded ASEAN membership in 1997 in a highly criticized move. Indeed, despite

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<sup>27</sup> Speech, Mr Raymond Lim, 7th Workshop on the ASEAN Regional Mechanism on Human Rights, 12 June 2008, available at <http://app.sprinter.gov.sg/data/pr/20080612996.htm>

<sup>28</sup> See L. Thio, “Implementing Human Rights in ASEAN countries: ‘Promises to keep and miles to go before I sleep’” (1999) 2 *Yale Human Rights and Development Law Journal* 1–99.

<sup>29</sup> ASEAN Media Release, “ASEAN Leaders Sign ASEAN Charter”, Singapore, 20 November 2007, available at <http://www.aseansec.org/21085.htm>

the increasing acceptance of Myanmar as a diplomatic embarrassment,<sup>30</sup> ASEAN's meek attitude towards the military junta's brutal crackdown on monk-led demonstrations in September 2007 has been criticized as shameless kowtowing to the military dictatorship,<sup>31</sup> hiding behind the skirts of the principle of non-intervention in internal affairs. This posture of seeking to keep Myanmar matters within the ASEAN family, in the name of keeping its moral influence over Myanmar intact,<sup>32</sup> renders ASEAN's espoused human rights commitment somewhat suspect at best, or reveals its weakened hand in dealing with an intransigent undemocratic military dictatorship.

It is hoped that the human rights norms the eventual ASEAN human rights body will espouse and implement will reflect and not dilute accepted human rights standards; at minimum, it should be pegged at the level of the Universal Declaration on Human Rights and treaties like the CRC and CEDAW, which all ASEAN members are party to. The Charter itself made no reference to any UN human rights instrument. It is likely that some concession will be given to regional particularities as the drafters of the terms of reference of the human rights body will be instructed by their political leadership "to take into account the history and diversity of political systems in ASEAN".<sup>33</sup>

Given the focus on the right to development by many ASEAN States, which has been criticized as a statist rather than a human right, it is possible that a future human rights body may well give concrete expression to a rights-based approach towards development which appreciates that development goes beyond raising the national GDP and contains elements of focus on individual welfare, political participation in the decision-making process and equitable distribution of wealth. Notably, the Singapore Declaration on the ASEAN Charter<sup>34</sup> issued on the same day as the Charter was adopted states that an abiding concern of ASEAN governments is "to narrow the development gap and to advance ASEAN integration through the creation of an ASEAN Community in furtherance of peace, progress and prosperity

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<sup>30</sup> W. Arnold, "Historic ASEAN charter shows division", *International Herald Tribune*, 20 November 2007, at <http://www.iht.com/articles/2007/11/20/asia/asean.php>. Philippines President Gloria Arroyo has warned that her legislature would be unlikely to ratify the Charter if Myanmar did not demonstrate real human rights improvement, including a commitment to genuine democracy and releasing opposition leader Aung San Suu Kyi from house arrest: "Burma warned over Asean charter", *BBC News*, 19 November 2007, at <http://news.bbc.co.uk/2/hi/asia-pacific/7101239.stm>. Subsequently in June 2008, Arroyo urged Congress to ratify the Charter: "Arroyo acts to get Asean Charter ratified", *Straits Times* (Singapore), 7 July 2008, at 15.

<sup>31</sup> "ASEAN dances to junta's tune", *Bangkok Post*, 22 November 2007, archived at <http://www.burmanet.org/news/2007/11/22/bangkok-post-asean-dances-to-juntas-tune-editorial/>

<sup>32</sup> Foreign Affairs Minister George Yeo, *Singapore Parliament Reports* (Myanmar), Vol. 83, 22 October 2007.

<sup>33</sup> Second Minister for Foreign Affairs, Mr Raymond Lim Siang Keat, *Singapore Parliament Reports* (Setting Up of ASEAN Human Rights Commission: Implications for Singapore), Vol. 83, 27 August 2007.

<sup>34</sup> Available at <http://www.aseansec.org/21233.htm>

of its peoples". This is phrased more in terms of "human development" than "human rights" and it is hoped that consonant with the developing jurisprudence on socio-economic rights, concrete and "measurable" methods of determining whether socio-economic rights have been violated or whether these have been realized will be developed, whether through indicators or a "violations" approach, to ensure that the ASEAN human rights body transcends the symbolic and rhetorical, and accomplishes something substantive.

*REPUBLIC OF THE PHILIPPINES V. MALER FOUNDATION  
AND OTHERS: STATE IMMUNITY AND INTANGIBLE  
PROPERTY*

Davinia Aziz\*

On 24 March 2008, the Singapore Court of Appeal delivered judgment in the case of *Republic of the Philippines v. Maler Foundation and Others*.<sup>1</sup> This appeal arose from an application by the Republic of the Philippines (“the Republic”) to stay interpleader proceedings concerning certain moneys held in the account of the Philippine National Bank (“PNB”) at WestLB AG in Singapore (“the Funds”). The Republic sought a stay of the interpleader, invoking State immunity in respect of the Funds. The Singapore High Court dismissed the stay application, ruling that the Republic had submitted to jurisdiction. The Court of Appeal dismissed the Republic’s appeal, but disagreed with the High Court on the basis for denying the stay. The Court of Appeal ruled that a foreign sovereign State is not entitled to invoke the doctrine of State immunity in a case involving claims to debts or choses in action in the hands of a third party which is not an agent or a trustee of the State. This is the first time that a common law court has given a definitive ruling on this point.<sup>2</sup>

FACTUAL BACKGROUND

The larger context to the Singapore Court of Appeal decision is a series of court actions in multiple jurisdictions involving the Republic and various creditors of the Estate of the former Philippine President Ferdinand E. Marcos. The tussle is over assets described as “ill-gotten wealth” accumulated by Marcos, his family and his associates during his Presidency.<sup>3</sup> On 28 February 1986, President Corazon Aquino

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<sup>1</sup> [2008] SGCA 14 (“*ROP v. Maler Foundation*”). As is usual in appeals from interlocutory orders, the Court of Appeal sat as a two-judge coram consisting of Chan Sek Keong CJ and Andrew Phang JA. The judgment of the Court of Appeal was delivered by Chan Sek Keong CJ.

<sup>2</sup> *ROP v. Maler Foundation* at [33]. There are, however, *obiter dicta* in a number of UK House of Lords cases. These cases are considered at some length in the judgment of the Court of Appeal.

<sup>3</sup> *ROP v. Maler Foundation* at [4], citing Executive Order No. 1 (28 February 1986), online: Supreme Court of the Philippines E-Library, <http://elibrary.supremecourt.gov.ph>.

issued an Executive Order establishing the Presidential Commission on Good government (“the PCGG”) to recover these assets, “whether located in the Philippines or abroad”.<sup>4</sup>

The Funds that were the specific subject matter of the Singapore interpleader proceedings were originally part of a larger pool of assets held in the Swiss bank accounts of the Maler Foundation, the Avertina Foundation, the Palmy Foundation, the Vibur Foundation and the Aguamina Corporation (collectively referred to in the judgment of the Court of Appeal as “the Foundations”). The PCGG sought and obtained remittance of the assets.

However, the Swiss authorities conditioned the remittance on the assets being held on escrow pending a final and binding decision by a competent Philippine court on their restitution or forfeiture. Under an escrow agreement concluded earlier between the Republic and PNB, the Republic designated PNB as the escrow agent. Once the assets were received from the Swiss authorities, PNB deposited the assets in various banks in Singapore, including WestLB AG. One of the conditions of the escrow agreement was that PNB undertook “not to dispose of the [assets] other than in accordance with a final and enforceable judgment of the Sandiganbayan or any final and enforceable judgment of any competent court in the Philippines”.<sup>5</sup> This condition is referred to in the judgment of the Court of Appeal as “the Escrow Condition”.<sup>6</sup>

In 2003, the Philippine Supreme Court made a final order for the assets to be forfeited to the Republic (“the Philippine forfeiture order”). PNB secured the repayment of all of the assets deposited in Singapore, except for the Funds. WestLB AG was unable to release the Funds to PNB because several other parties had notified WestLB AG of their claims. These parties included the Foundations, and a group of claimants who had obtained a 1996 judgment for damages in a human rights class action against the Marcos estate in a United States District Court (“the human rights claimants”).

## PROCEDURAL HISTORY

WestLB AG filed an application for interpleader relief in the Singapore High Court, naming PNB, the Foundations and the human rights claimants as defendants.<sup>7</sup> By an

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<sup>4</sup> *Supra*, n. 4.

<sup>5</sup> *ROP v. Maler Foundation* at [7]. The Sandiganbayan is a special court with jurisdiction over “criminal and civil cases involving graft and corrupt practices and such other offenses committed by public officers and employees, including those in government-owned or controlled corporations, in relation to their office as may be determined by law”: online at Sandiganbayan, <http://sandigan.supremecourt.gov.ph/>

<sup>6</sup> *Ibid.*

<sup>7</sup> WestLB AG originally named two other defendants. However, these other defendants had withdrawn from the proceedings by the time the Republic’s stay application came to be heard in the High Court.

order of the High Court, the Funds were transferred to an escrow account held by PNB's solicitors, to be released only to the claimant found to be entitled to the Funds.<sup>8</sup> PNB made an unsuccessful interlocutory application for the interpleader proceedings to be stayed on the ground of *forum non conveniens*. Then, about two years after WestLB AG had first filed its application, the Republic successfully applied to be added as a defendant to the interpleader proceedings.

About two months after it was added as a defendant, the Republic applied to stay the interpleader proceedings pursuant to section 3 of the Singapore State Immunity Act ("the SIA").<sup>9</sup> Section 3 reads:

**General immunity from jurisdiction**

3.—(1) A State is immune from the jurisdiction of the courts of Singapore except as provided in the following provisions of this Part [*i.e.* Part II of the SIA].

(2) A court shall give effect to the immunity conferred by this section even though the State does not appear in the proceedings in question.

In the High Court, the human rights claimants and the Foundations (collectively, "the other claimants") opposed the stay, arguing that: (1) the Philippine forfeiture order did not give the Republic a sufficient interest in the Funds to assert State immunity;<sup>10</sup> and (2) the Republic had submitted to jurisdiction.<sup>11</sup>

On the first issue, the High Court held that it was not necessary to decide whether the Philippine forfeiture order had the effect of vesting the beneficial interest in the Funds in the Republic. Under the test set out by Earl Jowitt in the Privy Council decision of *Juan Ysmael & Co. Inc. v. government of the Republic of Indonesia* [1955] AC 72 ("the *Juan Ysmael* test"), all that the court had to consider was whether the Republic's claim to the funds was "not merely illusory, nor founded on a title manifestly defective".<sup>12</sup> The High Court found that the Philippine forfeiture order was sufficient evidence to meet this standard of proof.<sup>13</sup> However, the High

<sup>8</sup> *ROP v. Maler Foundation* at [81].

<sup>9</sup> Cap. 313, 1985 Rev. Ed.

<sup>10</sup> *WestLB AG v. Philippine National Bank and Others* [2007] 1 SLR 967 ("*WestLB AG v. PNB*") at 972.

<sup>11</sup> Section 4(1) of the SIA states: "A State is not immune as respects proceedings in respect of which it has submitted to the jurisdiction of the courts of Singapore."

<sup>12</sup> *Juan Ysmael* at 89–90. See *WestLB AG v. Philippine National Bank and Others* [2007] 1 SLR 967 at 973–4.

<sup>13</sup> As the Court of Appeal observed (see *ROP v. Maler Foundation* at [25]), it is not clear whether the High Court meant that the Republic was *entitled* to the stay on the ground of State immunity, or whether the Republic only had standing to *apply* for the stay on the strength of the *Juan Ysmael* test: see *WestLB AG v. PNB* at [7]–[13]. For its part, the Court of Appeal thought that there ought not to be a difference between the interest which is sufficient to apply for a stay, and the interest which is sufficient to grant a stay, for "[p]roof of an interest in property in the nature of a debt or chose in action which is sufficient to apply for a stay is, in our view, sufficient to stay the proceedings": *ROP v. Maler* at [25].

Court held against the Republic on the second issue and dismissed its application, finding that the Republic had submitted to jurisdiction by its agent, PNB, as well as by its own conduct. The Republic appealed.

#### THE COURT OF APPEAL DECISION

In the Court of Appeal, the Republic took the position that it had “possession or control” of the Funds through PNB. Specifically, the argument was that the Philippine forfeiture order had fulfilled the Escrow Condition, so that PNB now held the Funds for the Republic’s account, or on trust for the Republic. In short, the Republic maintained that it was beneficially entitled to the Funds.

The Court of Appeal began its analysis by restating the well-established common law principle that “a foreign sovereign State is immune to the jurisdiction of [the Singapore] courts and may not be impleaded directly or indirectly in any action before [the Singapore] courts without its consent. The court will stay any such action if State immunity is invoked”. This principle is encapsulated in section 3 of the SIA. Like the UK State Immunity Act 1978,<sup>14</sup> the SIA does not substitute the common law of State immunity. As the Court of Appeal noted, “the common law continues to apply to determine when a court will recognize sovereign immunity in any particular case”.

The Court of Appeal’s examination of English precedent<sup>15</sup> showed that the foreign sovereign States seeking to assert immunity in those cases could prove that the properties to which they claimed title were in the possession or control of their agents or bailees. This case raised an entirely different question, which was whether a foreign sovereign State with an *arguable* claim to an interest in property – but without possession or control over the relevant property through an agent or trustee – is entitled to assert State immunity to stay proceedings in which an adverse claim is made against that property.

The Court then turned to consider whether the *Juan Ysmael* test should be applied in this case. The Court concluded that the *Juan Ysmael* test was “so vague outside the context of claims to title to tangible property that Earl Jowitt could not have intended it to apply to intangible property, such as debts or trust funds or moneys held in escrow”.<sup>16</sup>

According to the Court, the inadequacy of the *Juan Ysmael* test in the present case was “quite evident”. The Republic had staked its claim to ownership of the Funds on the premise that the Philippine forfeiture order had fulfilled the Escrow

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<sup>14</sup> Hazel Fox QC, *The Law of State Immunity* (New York: Oxford University Press, 2002) (“Fox”) at 136–7.

<sup>15</sup> *Compania Naviera Vascongado v. Steamship Cristina* [1938] AC 485; *United States of America and Republic of France v. Dollfus Mieg et Cie SA and Bank of England* [1952] AC 582 (“*Dollfus Mieg*”); and *Rahimtoola v. Nizam of Hyderabad* [1958] AC 379 (“*Rahimtoola*”).

<sup>16</sup> *ROP v. Maler Foundation* at [40].

Condition, thereby terminating the escrow agreement. This was, in the Court's view, "certainly an arguable claim". However, the other claimants had challenged the legal effect of the Philippine forfeiture order under Singapore law. Applying the *Juan Ysmael* test to stay the interpleader proceedings without determining whether the Escrow Condition was indeed fulfilled would "merely put the cart before the horse", leaving the Republic's claim to the Funds "undetermined and indeterminable" so long as the Republic did not submit to the jurisdiction of the Singapore courts to prove its claim. The net result of all this would be to "leave the disposal of the Funds hanging in the air".<sup>17</sup>

Having regard to the circumstances of the case, the Court opined that the *Juan Ysmael* test should not be applied. The Court of Appeal held that the issue of whether the Escrow Condition had been satisfied, so that the Republic was now the beneficial owner of the funds under Singapore law, was a threshold issue that should have been decided by the High Court. It was not a substantive issue to be left to the interpleader proceedings.

However, the Court of Appeal did not remit the case to the High Court for the threshold issue to be decided. The main reason for this was the Court of Appeal's view that the doctrine of State immunity "should not be extended to a case like the present at all".<sup>18</sup> On this point, the other claimants argued that immunity did not apply to property in the hands of a third party against whom conflicting claims had been made, and that the Republic did not have a recognizable interest in the funds.

After considering the English authorities at length,<sup>19</sup> the Court distinguished *Dollfus Mieg* and *Rahimtoola* on the basis that the foreign sovereign States in those cases either had possession or an immediate right to possession of the disputed property. Here, the competing claims to the Funds had already been interpleaded. The Funds were not in the possession of an agent or trustee of the Republic, but in the hands of PNB's solicitors, and under the control of the Court.

The Court pointed out that the only way in which the Republic could have been indirectly impleaded as regards the Funds was if the Funds had vested in it by virtue of the Philippine forfeiture order, with the result that PNB was holding the Funds for the Republic's account or in trust for the Republic. Indeed, this was the very basis of the Republic's case. Yet, the Republic had not instructed PNB to object to the interpleader. Nor did the Republic intervene at the appropriate stage of the proceedings to ask for WestLB's interpleader application to be dismissed. In the Court's view, this was consistent with the position that either the Republic or PNB did not then consider that the Funds had vested in the Republic. The Republic could not take this position now without also accepting that it had submitted to jurisdiction through PNB.

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<sup>17</sup> *Ibid.*

<sup>18</sup> *ROP v. Maler Foundation* at [45].

<sup>19</sup> *ROP v. Maler Foundation* at [46]-[51].

The Court was of the view that in the circumstances of this case, the doctrine of State immunity should not be extended to a case involving debts or choses in action in the possession or control of a third party, and in respect of which the foreign sovereign State had yet to prove its ownership.

The Court then turned to the issue of whether the Philippine forfeiture order conferred a recognizable interest in the Funds on the Republic insofar as that order was evidence that the Republic's claim to the Funds was "not merely illusory". In line with its earlier holding that the *Juan Ysmael* test for standing was not appropriate in this case, the Court held that the interpleader proceedings ought not to be stayed on the basis that the Republic's claim premised on the Philippine forfeiture order was "not merely illusory". If the proceedings were stayed, and the Republic decided not to proceed further to prove its claim, the Funds would remain in the possession of PNB's solicitors and under the control of the court indefinitely. This "stalemate" was "not a result that any court [would] accept with equanimity, even taking into account the doctrine of State immunity". The Court held that it was "only just and in conformity with the public policy of Singapore that [the Republic] should submit to the jurisdiction of [the Singapore] courts if it wishe[d] to claim the Funds on the basis that it [had] a beneficial interest in them".<sup>20</sup> On this ground, too, the Court of Appeal thought that the Republic's stay application ought to be dismissed.

Although this was sufficient to dispose of the appeal, the Court went on to consider the other issues raised by the Republic in the oral arguments. The Court of Appeal reversed the High Court's finding that PNB had acted as the Republic's agent in the interpleader proceedings. Consequently, the Court also reversed the finding that the Republic had submitted to jurisdiction through PNB. However, the Court of Appeal found that the Republic had intended to invoke the jurisdiction of the Singapore courts by applying for the Funds to be released to the Republic. The Republic had therefore taken a step in the proceedings for the purpose of section 4(3)(b) of the SIA,<sup>21</sup> and was deemed to have submitted to jurisdiction.

## CONCLUSION

Clearly, the Court's decision in *ROP v. Maler Foundation* is significant for its holding on the novel issue of whether the doctrine of State immunity extends to a case involving claims to debts or choses in action in the hands of a third party which is not an agent or trustee of the foreign sovereign State seeking to invoke immunity. In Singapore, at least, the Court's holding makes it plain that the doctrine is not to be extended to such cases. Given the lack of precedent on point, *ROP v. Maler Founda-*

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<sup>20</sup> *ROP v. Maler Foundation* at [59].

<sup>21</sup> The material portions of s. 4(3)(b) of the SIA provide: "A State is deemed to have submitted . . . if it has intervened or taken any step in the proceedings."

tion is likely to be considered in other Commonwealth jurisdictions where a legislatively enacted restrictive rule of immunity prevails.<sup>22</sup>

The typical rigour of the Court's judgment provides plenty of fertile ground for further academic comment, but two particular aspects of the decision may be briefly highlighted here.

First, the Court's holding on the *Juan Ysmael* test (at [40]–[43] of the judgment), as well as the Court's subsequent comments on whether the Republic had a "recognizable interest" in the Funds, raise some interesting questions about the relevance – or otherwise – of section 8(4) of the SIA. Section 8(4), which is not referred to at all in the judgment, provides that "[a] court may entertain proceedings against a person other than a State notwithstanding that the proceedings relate to property . . . (b) in which a State claims an *interest* . . . if the claim is neither admitted nor supported by *prima facie* evidence [emphasis mine]." Conversely, then, a court may *not* entertain such proceedings if *prima facie* evidence is admitted in support of the foreign sovereign State's claim. Section 8(4) is based on section 6(4) of the UK State Immunity Act, which, in turn, incorporates the *Juan Ysmael* test.<sup>23</sup>

On the face of it, the Court's observation that "Earl Jowitt could not have intended [the *Juan Ysmael* test] to apply to intangible property, such as debts or trust funds or moneys held in escrow"<sup>24</sup> may be taken to mean that the *Juan Ysmael* test ought not apply in any case where a foreign sovereign State claims an interest in

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<sup>22</sup> The SIA is itself modelled on the UK State Immunity Act, which has influenced legislation in Pakistan, South Africa, Canada, Malawi and Australia. Fox notes that the ILC Draft Articles on Jurisdictional Immunities of States and Their Property (which in turn served as the basis for the *United Nations Convention on Jurisdictional Immunities of States and Their Property*, G.A. Res. A/59/38, UN GAOR, 2004, UN Doc. A/59/508 [not yet in force]), "borrow extensively" from the provisions of the UK Act: Fox at 137. Outside the Commonwealth, the recent US Supreme Court decision of *Philippines v. Pimentel*, Opinion of the Court, 12 June 2008, Case No. 06–1204, available online at Supreme Court of the United States <http://www.supremecourtus.gov/opinions/07pdf/06–1204.pdf> ("*Pimentel*"), which was decided on very similar facts, provides an interesting basis for comparison. By the time the litigation reached the Supreme Court, sovereign immunity was no longer a live issue. However, Justice Kennedy, writing for the majority of the Supreme Court, appeared to treat immunity as a given. In fact, as Justice Kennedy noted, immunity in that case was "uncontested."<sup>22</sup> Only Justice Souter – who concurred in part and dissented in part – was of the view that the Supreme Court ought not to have given "near-dispositive effect" to the Republic's status as a sovereign entity. Expressing concerns similar to those that informed the judgment of the Singapore Court of Appeal, Justice Souter noted: "I would conclude that several facts specific to this case suggest that the Republic and the Commission's sovereign interests should be given less weight than in the ordinary case . . . [T]he Republic and the [PCGG] must take affirmative steps in United States courts (or possibly invoke the assistance of the Attorney General to do so . . .) at some point in order to recover the assets held in the United States. Thus, the sovereign interest implicated here is not of the same magnitude as when a sovereign faces liability; the Republic's interest is in choosing the most convenient venue and time for the suit to proceed."

<sup>23</sup> Fox at 112.

<sup>24</sup> *ROP v. Maler Foundation* at [40].

intangible property. If that is the correct reading, then the next question is whether section 8(4) should, correspondingly, be limited only to cases involving tangible property.

However, it is submitted that the context of the holding militates in favour of the conclusion that the Court's observation on the *Juan Ysmael* test ought not to be read so widely. The Court's decision was premised on the proposition that the Republic had not, on the facts of this case, been directly or indirectly impleaded by WestLB's interpleader application. That being so, the general rule that the proceedings should be stayed on the basis of State immunity did not apply. *A fortiori*, section 8(4), which states an exception to the general rule, was not relevant to the Court's reasoning on *Juan Ysmael*.

Second, the Court identified two features in this case that took it outside the parameters of the doctrine of State immunity. The first feature was that the property in question was a debt or chose in action in the hands of a third party which was not an agent or trustee of the foreign sovereign State. The second feature was that the property had already been interpleaded. It is interesting to speculate on what the outcome might have been if the Republic had indeed asserted immunity in respect of the Funds before the Funds had been interpleaded.<sup>25</sup> The Court did not specifically address this in the judgment – indeed, it had no need to – and stated merely that the Republic ought to have either intervened itself, or instructed PNB to object on its behalf, if it considered that it had been impleaded by WestLB's application. An authoritative answer to this question will have to be left for another day.

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<sup>25</sup> *ROP v. Maler Foundation* at [52].

# MALAYSIA'S FIRST REPORT TO THE CEDAW COMMITTEE: A LANDMARK EVENT FOR WOMEN'S RIGHTS IN MALAYSIA

Jaclyn Ling-Chien Neo\*

## INTRODUCTION

Almost 10 years after its accession to the Convention on the Elimination of Discrimination against Women (CEDAW) in 1995, Malaysia submitted its first periodic report<sup>1</sup> to the Committee on the Elimination of Discrimination against Women (CEDAW Committee) in April 2004. This report was a combined initial and second report; the reports were due in 1999 and 2003. Under Article 18 of CEDAW, parties are to submit reports on the “legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of [CEDAW] and on the progress made” within one year of accession and thereafter at least every four years. The CEDAW Committee considered Malaysia’s report at its 35th session in May 2006, and provided its concluding comments on 31 May 2006. Twenty-eight non-governmental organizations submitted a joint report (NGO Shadow Report) to the CEDAW Committee, critiquing the government’s report, identifying continuing problems concerning gender equality in Malaysia and providing specific recommendations for the Committee’s consideration.<sup>2</sup>

## BACKGROUND

CEDAW is one of only two major human rights instruments that Malaysia has ratified to date, the other being the Convention on the Rights of the Child (CRC). Malaysia acceded to both conventions in 1995,<sup>3</sup> and made declarations and reservations to both instruments on the basis of religious and national or cultural

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<sup>1</sup> Combined initial and second periodic reports of State parties, Committee on the Elimination of Discrimination Against Women, 12 April 2004, CEDAW/C/MYS/1–2 (hereinafter Malaysia’s CEDAW Report).

<sup>2</sup> NGO Shadow Report Group, “NGO Shadow Report on the Initial and Second Periodic Report of the government of Malaysia”, 2005, available at [http://www.iwraw-ap.org/resources/pdf/Malaysia\\_SR.pdf](http://www.iwraw-ap.org/resources/pdf/Malaysia_SR.pdf)

relativism. In relation to CEDAW, Malaysia declared that its accession is subject to the understanding that Convention provisions do not conflict with the provisions of Islamic Syariah law and the Federal Constitution. Muslims in multiracial and multireligious Malaysia<sup>4</sup> practise a limited scope of Islamic family, personal and criminal laws administered by statutorily created Syariah courts. These religious courts exist with the parallel common law system inherited from the British.

Malaysia considers that strictly egalitarian norms in universal human rights are in tension with Syariah laws. Its reservations to Articles 2(f) (on the abolishment of discriminatory laws, customs and practices), 5(a) (modification of social and cultural prejudices and stereotype), 7(b) (equal participation in public policy-making and public office), 9 (equal nationality rights and to the nationality of their children) and 16 (elimination of discrimination in marriage and family relations) of CEDAW were presumably made on that basis.<sup>5</sup> Although Malaysia also appealed to the Constitution as justification for its declaration and reservations, it has not provided specific details as to how the Federal Constitution, apart from its accommodation of Syariah laws, is inconsistent with CEDAW. Notably, Malaysia's CEDAW report focuses only on Syariah laws as the basis for its reservations. Fortunately, the perceived inconsistency is not a fixed view. In 1998, Malaysia withdrew its reservations to Articles 2(f), 9(1), 16(1)(b), (d), (e) and (h). In its report, Malaysia explained that the withdrawal was inspired by the 1995 Beijing Platform for Action, adopted at the Fourth World Conference on Women.<sup>6</sup> Besides Articles 5(a) and 7(b), reservations still apply in relation to the following articles: Article 9(2) providing for equal rights to the nationality of their children, Article 16(1)(a) providing for the same right to enter into marriage, Article 16(1)(c) on the same rights and responsibilities during marriage and its dissolution, Article 16(1)(f) on same rights to guardianship,

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<sup>3</sup> Malaysia acceded to the CRC in the same year as it acceded to CEDAW, that is on 17 February 1995. Malaysia acceded to CEDAW on 5 July 1995.

<sup>4</sup> Of the three major ethnic groups in Malaysia, Malays form the majority at 54% of the population. The two largest minorities are the Chinese and the Indians, which constitute 25% and 8% of the population respectively. Other non-Malay indigenous groups constitute 12% the population. See A. Badawi, "The Challenges of Multireligious, Multiethnic and Multicultural Societies", Asia Media Summit, 19 April 2004, available at <http://www.pmo.gov.my>. Note, however, that official statistics typically combine Malays and non-Malay indigenous groups under an umbrella definition – *bumiputera* (literally meaning "son of the soil"). Results of a 2000 census, for example, state that the *bumiputera* population comprised 65.1% of the total population, whereas the ethnic Chinese comprised 26% and ethnic Indians 7.7% of the population. See Department of Statistics Malaysia, "Press Statement: Population Distribution and Basic Demographic Characteristics Report: Population and Housing Census 2000", 6 November 2001, available at [http://www.statistics.gov.my/English/frameset\\_pressdemo.php](http://www.statistics.gov.my/English/frameset_pressdemo.php)

<sup>5</sup> Various countries, including France and Germany, criticised Malaysia's declaration and reservations as being inconsistent with the object and purpose of CEDAW. See Declarations, Reservations and Objections to CEDAW, United Nations Division for the Advancement of Women, available at <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm#N41>

<sup>6</sup> Malaysia's CEDAW Report, *supra* n. 1, at 68–9.

wardship, trusteeship and adoption of children, Article 16(1)(g) on same personal rights as husband and wife, and Article 16(2) on nullification of child marriages (and provision for a minimum age for marriage).

## LEGISLATIVE AND EXECUTIVE PROGRESS AND SHORTFALLS

On the whole, Malaysia reports significant improvements to the status and rights of women in Malaysia. Several laws were revised or enacted to eliminate discriminatory provisions in conformity with Article 2 of CEDAW (prohibiting discrimination against women in general)<sup>7</sup> and to enhance the protection of women. These statutes cover a broad spectrum of issues, ranging from immigration,<sup>8</sup> to pension,<sup>9</sup> guardianship<sup>10</sup> and intestate distribution.<sup>11</sup> For example, the Distribution Act was amended in 1997 to repeal the distinction between wives and husbands in terms of the distribution of the estate of an intestate to the surviving spouse. Previously, a wife who survives her husband is entitled to only one-third of her husband's estate but the surviving husband is entitled to his wife's whole estate.<sup>12</sup> These revisions are supplemented by other amendments and enactments that serve to enhance the protection of women. For instance, the Penal Code was amended to enhance penalties for rape and offences relating to prostitution. Malaysia also enacted the Domestic

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<sup>7</sup> Article 2 of CEDAW contains a general statement requiring State Parties to "condemn discrimination against women in all its forms" and "agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women".

<sup>8</sup> Since 1 September 2001, pursuant to an administrative order, foreign men married to Malaysian women are allowed to stay in the country longer (one year as opposed to the previous three months) and their social visit pass can be renewed on a year-to-year basis until they gain employment. Also, foreign women who are divorced or separated from their Malaysian husbands after settling in Malaysia can apply for a social visit pass on a year-to-year basis, subject to approval by the government. Previously, they had to return to their countries once their social visit pass expired, and apply for a new one from there. Malaysia's CEDAW Report, *supra* n. 1, 73.

<sup>9</sup> The Pensions Act 1980 was amended in January 2002 to allow widows to continue to receive pensions even after they remarried. Malaysia's CEDAW Report, *supra* n. 1, 73.

<sup>10</sup> The Guardianship of Infants Act was amended in 1999 to give legal recognition to the parental rights of mothers. Previously, only the father of an infant was recognized as the guardian of his/her infant's person and property. Malaysia's CEDAW Report, *supra* n. 1, 73.

<sup>11</sup> The Report also cites a 1975 amendment to the 1967 Income Tax Act to allow wives to elect for separate assessment of their income for tax purposes. Previously, a wife had to be taxed jointly with her husband. See Malaysia's CEDAW Report, *supra* n. 1, 73. This amendment predates Malaysia's accession to CEDAW and strictly speaking does not constitute a measure giving effect to CEDAW.

<sup>12</sup> The Distribution Act however applies only to non-Muslims. As discussed below, intestate distribution for Muslims still discriminates against women, in that the woman receives only half of what the man receives.

Violence Act in 1994 to provide protection for battered wives and other victims of domestic violence.<sup>13</sup>

However, Malaysia's implementation efforts before 2001 lacked an overarching framework and direction; the measures adopted, while commendable, were tentative and piecemeal in fashion. A more comprehensive policy towards gender equality started to emerge after 2001, when Malaysia amended the Federal Constitution to include gender as one of the prohibited bases of discrimination,<sup>14</sup> and created the Ministry of Women and Family Development to address issues of gender equality.<sup>15</sup> Pursuant to the 2001 landmark amendment, Article 8(2) of the Federal Constitution now reads: "Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground of religion, race, descent, place of birth and gender in any law or in the appointment to any office or employment under a public authority or in administration of any law relating to the acquisition, holding or disposition of any property or the establishing or carrying on any trade business, profession, vocation or employment."<sup>16</sup>

The Ministry of Women and Family Development was established "to educate, create awareness, monitor and formulate policies and programmes, which are women friendly".<sup>17</sup> The establishment of the ministry also meant that gender equality is gradually becoming a focal point in governmental policy whereby the ministry has started to work with other ministries such as the Ministry of Education and the Ministry of Human Resources to mainstream gender issues, specifically to create programmes to improve the status of women as well as to incorporate gender equality considerations in their policies.<sup>18</sup> Furthermore, since 2005, a policy has been in place where senior officers in each ministry and relevant government agencies have been appointed as gender focal points with the primary function of overseeing gender-related matters at the respective ministries including collection of data, information and feedback on gender issues.<sup>19</sup>

Despite this move towards a more comprehensive approach, the success of CEDAW implementation remains limited. The CEDAW Committee identified two

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<sup>13</sup> Malaysia's CEDAW Report, *supra* n. 1, at 455–7.

<sup>14</sup> The amendment was passed on 1 August 2001. *See* Malaysia's CEDAW Report, *supra* n. 1, at 63.

<sup>15</sup> The Ministry was established in January 2001. *See* Malaysia's CEDAW Report, *supra* n. 1, at 67.

<sup>16</sup> Malaysia placed heavy reliance on this amendment to show that there has been a significant improvement in the rights and status of women in the country and that it has satisfied its CEDAW obligations: *see* Malaysia's CEDAW Report, *supra* n. 1, at 63–4 (in relation to Art. 1 of CEDAW), 73 (Art. 2), 83 (Art. 3), 84 (Art. 4), 91 (Art. 5), 355 (Art. 15).

<sup>17</sup> *Ibid.*

<sup>18</sup> Malaysia's Responses to the list of issues and questions for consideration of the combined initial and second periodic report, CEDAW/C/MYS/Q/2/Add.1, 27 March 2006 (hereinafter "Malaysia's Responses"), at 12–3.

<sup>19</sup> Malaysia's Responses, *ibid.*, at 12.

main obstacles to full implementation of CEDAW provisions in Malaysia. First, the non-domestication of CEDAW provisions into Malaysian law and, second, the failure (or reluctance) to reconcile existing Syariah practices with CEDAW norms. Other areas identified as requiring further attention include some residual discriminatory laws such as citizenship laws whereby the children of a Malaysian woman do not obtain citizenships automatically by operation of law whereas children of a Malaysian man do.<sup>20</sup> Some aspects of Malaysian laws still fall short of fully recognizing and protecting women as a vulnerable group. For example, marital rape is still not a crime in Malaysia.<sup>21</sup> Furthermore, Malaysia has focused on internal matters in the implementation of CEDAW and less (if any) on cross-jurisdictional issues involving non-residents/citizens such as trafficking of women and girls,<sup>22</sup> protection of the rights of migrant workers, particularly migrant domestic workers who are mostly women,<sup>23</sup> as well as for asylum-seekers and refugees which include women.<sup>24</sup>

#### JUDICIAL MEASURES: NON-DOMESTICATION OF CEDAW AND THE LACK OF DIRECT ENFORCEABILITY

The specific areas of concerns that the Committee identified may be said to stem from one overarching problem – that is the fact that CEDAW provisions are not directly enforceable in domestic courts as part of Malaysian law.<sup>25</sup> Malaysia's dualistic system follows the British practice where a legislative act is required to

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<sup>20</sup> This is in clear contravention of Art. 9(2) of CEDAW which requires State Parties to “grant women equal rights with men with respect to the nationality of their children”. Malaysia has however entered a reservation on this Article. See Malaysia's Responses, at 21.

<sup>21</sup> According to the Malaysian delegation, there are only three limited instances in which a man who has sex with his wife can be charged for rape in Malaysia: (1) where the wife is living separately from her husband under a decree of judicial separation or a decree nisi not made absolute; (2) where the wife has obtained an injunction restraining her husband from having sexual intercourse with her; and (3) in the case of a Muslim woman living separately from her husband during the period of 'iddah which is approximately a period of three months: Malaysia's CEDAW Report, *supra* n. 1, at 453. See the Committee's comments and criticisms in Summary record of the 731st meeting, Committee on the Elimination of Discrimination against Women, Thirty-fifth session, CEDAW/C/SR.731 (20 June 2006), (“Summary of First Session”) at 17, 24 and 28–30. See also the Concluding comments of the Committee on the Elimination of Discrimination against Women: Malaysia, 31 May 2006, CEDAW/C/MYS/CO/2 (hereinafter “Concluding Comments”), at 21–2.

<sup>22</sup> There is no specialised legislation addressing trafficking of women and girls. The Committee was especially concerned that the women and girls may instead “be punished for violation of immigration laws and are thus revictimized.” See Concluding Comments, *supra* n. 21, at 23–4.

<sup>23</sup> Concluding Comments, *supra* n. 21, at 25–6.

<sup>24</sup> There is no legislation protecting the rights and status of asylum seekers and refugees. Concluding Comments, *supra* n. 21, at 28–9.

<sup>25</sup> Concluding Comments, *supra* n. 21, at 7.

incorporate treaty provisions (such as CEDAW) as part of national law. Unlike other countries such as Peru where the constitution provides for direct incorporation of treaties into domestic law,<sup>26</sup> the Federal Constitution does not regulate the internal reception of treaty law in Malaysia at all. The amendment to Article 8 of the Federal Constitution ameliorates this by providing a justiciable right against gender discrimination but this horizontalization of rights is limited by the lack of a broad definition on gender discrimination and the fact that the constitutional provision applies only to public law or actions by public agencies. In contrast, CEDAW provisions cut through this public-private divide, allowing State intervention and public rights in matters that are conventionally considered to be within the private realm.<sup>27</sup>

The Committee highlighted the 2005 case of *Beatrice alp At Fernandez v. Sistem Penerbangan Malaysia and Another*<sup>28</sup> (hereafter *Beatrice Fernandez*) as part of its critique on the non-domestication of CEDAW into Malaysian law.<sup>29</sup> *Beatrice Fernandez* is the first reported case addressing the scope of gender discrimination under Article 8. It is also the first reported case where CEDAW was cited before the Malaysian courts.<sup>30</sup> The courts, however, did not take cognizance, much less consider, the potential impact of CEDAW on domestic litigation, preferring instead to

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<sup>26</sup> Article 55 of the Peruvian constitution states: “los tratados celebrados por el Estado y en vigor forman parte del derecho nacional”. (translated as “treaties signed by the State and currently in effect form part of the national law”). Resolución Legislativa N° 27517, 13 September 2001. In contrast, the Cambodian constitution provides for the primacy of Cambodian sovereignty; Art. 55 of the Cambodian constitution states: “Any treaty and agreement incompatible with the independence, sovereignty, territorial integrity, neutrality and national unity of the Kingdom of Cambodia shall be annulled.”

<sup>27</sup> E.g. Art. 2 of CEDAW does not only require compliance in terms of non-discrimination against women by public authorities and public institutions, but sub-provision (e) also require State parties to ensure non-compliance by any person, organization or enterprise. It should be noted that Malaysia has never entered a reservation to this Art. 2(e) of CEDAW. Thio argues that the basic assumptions of public-private dichotomy is unsuited for a women’s rights framework since “[m]uch of women’s oppression takes place within the ‘domestic’ sphere – the homes and local communities”, which are usually considered to be part of the private domain. T. Li-ann, “The Impact of Internationalisation on Domestic Governance: Gender Egalitarianism & the Transformative Potential of CEDAW”, (1997) 1 *Sing. J. Int’l & Comp. L.* 278, at 288. See also generally, H. Charlsworth, C. Chinkin and S. Wright, “Feminist Approaches to International Law” (1991) 85 *Am JIL* 613.

<sup>28</sup> [2005] 3 MLJ 681 (“Federal Court decision”); see also *Beatrice alp At Fernandez v. Sistem Penerbangan Malaysia & Anor* [2004] 4 MLJ 466 (“Court of Appeal decision”).

<sup>29</sup> J. K. Bhatt, “Gender Discrimination in Employment – How far Does Article 8 of the Federal Constitution guarantee gender equality?” (2006) 6 *MLJ* xlv.

<sup>30</sup> One of the questions of law that the applicant stated that she intended to raise in her appeal to the Federal Court was whether CEDAW is applicable to the terms and conditions of a collective agreement. In refusing leave to appeal, the Federal Court only addressed the viability of the questions raised under domestic law and did not address CEDAW at all. Federal Court decision, *ibid.*, at 11.

focus on the interpretation of domestic law. *Beatrice Fernandez* involved a flight attendant who was dismissed by her employer after she became pregnant, pursuant to the terms of her employment contained in a collective agreement giving the company the right to terminate her services in the event that she does not resign from her position upon becoming pregnant. The Court of Appeal dismissed her application for a declaration that the provisions in the collective agreement discriminated on gender grounds and were void for contravening Article 8 of the Federal Constitution. The Federal Court affirmed the Court of Appeal's decision, holding that Article 8 "does not extend its substantive or procedural provisions to infringements of an individual's legal right by another individual",<sup>31</sup> thus limiting the scope of Article 8's prohibition against gender discrimination to matters involving State action. Thus the Malaysian courts reaffirmed a public-private dichotomous approach to Article 8's constitutional right against gender discrimination. Neither Court took cognizance of the fact that the collective agreement clearly conflicts with CEDAW, specifically Article 11(2)(a) which requires State parties to "prohibit . . . dismissal on the grounds of pregnancy or of maternity leave".<sup>32</sup>

The *Beatrice Fernandez* case highlights the related issue of judicial receptivity towards treaty obligations and appreciation of Malaysia's CEDAW obligations. Neither the Court of Appeal nor the Federal Court (the highest court of the land) took CEDAW into consideration in its deliberations. It is perhaps no surprise therefore that the CEDAW Committee, in its concluding comments, recommended Malaysia "to take immediate measures to ensure that the Convention and its provisions are incorporated into national law and become fully applicable in the domestic legal system",<sup>33</sup> as well as "to ensure that the Convention and related domestic legislation are made an integral part of legal education and the training of judicial officers, including judges, lawyers and prosecutors, so as to establish firmly in the country a legal culture supportive of women's equality and non-discrimination".<sup>34</sup>

## SYARIAH EXCEPTIONALISM

One major gap remains in the move towards promoting and realizing gender equality in Malaysia: the status and rights of Islamic women in Malaysia. There has been no similar impetus (as in general law) to reform Islamic family, inheritance and

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<sup>31</sup> Federal Court decision, *ibid.*, at 13.

<sup>32</sup> Relevant parts of Art. 11(2) reads: "In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures: (a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status; (b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances; . . . (d) To provide special protection to women during pregnancy in types of work proved to be harmful to them."

<sup>33</sup> Concluding Comments, *supra* n. 21, at 8.

<sup>34</sup> Concluding Comments, *supra* n. 21, at 12.

marriage laws. Instead, Malaysia continues to pursue a policy of limited exceptionalism on the basis of Syariah laws. Remaining reservations to CEDAW are justified primarily on the basis of Syariah laws which apply to Muslims in the area of family relations, marriage and inheritance. These laws are administered by a parallel system of statutorily created religious courts (Syariah courts) that exist parallel to civil courts which apply general law. There are several inconsistencies between Syariah laws practised in Malaysia with CEDAW. Polygamy, for example, is still practised in Malaysia and clearly contrary to Article 16(1)(a), which provides that men and women have the same rights relating to entry into marriage.<sup>35</sup> Also, Syariah inheritance law on estate distribution discriminates against women; a woman inherits one half of the man's share.<sup>36</sup> Muslim women in Malaysia also cannot hold positions as Syariah Court judges and religious offices like that of the Imam, Bilal and Kadi.<sup>37</sup>

In fact, the Committee noted that recent reforms to Islamic family law in Malaysia threaten to discriminate against women further.<sup>38</sup> The 2005 amendments to the 1984 Islamic Family (Federal Territories) Act (hereinafter IFLA) purports to create gender equality (in a perverse manner) by granting the husband matrimonial property rights to a wife's assets, the right to stop a wife from disposing of her assets and the right to *fasakh* divorce (dissolution of the marriage on limited grounds without spousal consent).<sup>39</sup> At the same time, the IFLA amendments potentially make it easier for Muslim men to enter into polygamous marriages, by replacing the plain stricter requirement of "just *and* necessary" to "just *or* necessary".<sup>40</sup> Further-

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<sup>35</sup> The delegation also justified polygamy under Syariah law as acceptable because of the safeguards ensuring that wives will be treated justly. Malaysia's Responses, *supra* n. 18, at 5.

<sup>36</sup> Malaysia's Responses, *ibid.*, at 5.

<sup>37</sup> Malaysia's Responses, *ibid.*, at 6–7.

<sup>38</sup> "List of issues and questions with regard to the consideration of an initial and periodic report", Pre-session working group for the 35th session, CEDAW/C/MYS/Q/2, 10 February 2006 (hereinafter "Issues and Questions"), at 29.

<sup>39</sup> Malaysia's Responses, *supra* n. 18, at Annex IX. For example, amended s. 107A provides that "[t]he Court may, on the application of any party to a marriage . . . make an order prohibiting the wife or husband . . . from disposing of any assets acquired by them, joint or solely". As Sisters in Islam, a Islamic women's group in Malaysia, pointed out, the amendments purportedly made to deal with changing circumstances has tended to benefit men more than women "through the use of selective gender neutral language". *Husbands May Misuse Amendments to Islamic Family Law Bill, Federal Territories, 2005*, Sisters in Islam, 8 December 2005, available at <http://www.sistersinislam.org.my/pressstatement/08122005.htm>

<sup>40</sup> The Malaysian delegation however sought to explain that the amendment in fact sought to enhance protection of women but that the resulting discrimination was due to poor drafting. The delegation said: "With regard to courts granting permission for a polygamous marriage if they were satisfied that the proposed marriage was 'just and necessary', the word 'and' had been removed because 'just' was considered more stringent than 'just and necessary' and was therefore more difficult to prove." Committee on the Elimination of Discrimination against Women, 35th session, Summary record of the 732nd meeting, CEDAW/C/SR.732, 13 July 2006, at 45. *Cf. Husbands May Misuse Amendments to Islamic Family Law Bill, Federal Territories, 2005*,

more, the amendments do not extend to women the same rights as men to talaq divorce.<sup>41</sup> Currently, the amendments to IFLA have been suspended, following protests from women's groups.<sup>42</sup> However, this suspension only applies to the Federal Territories, and not to similar amendments to Islamic family law in other States.<sup>43</sup> Jurisdiction over those laws falls within State powers. The federal government only has jurisdiction over Islamic matters in the three Federal Territories, and not to Islamic matters within the remaining 13 States, some of which made similar amendments to the Islamic family law of their States. In any case, even in relation to the Federal Territories, as long as these laws remain on the books, it will continue to be a symbolic discrimination against women that can be revived into law in future.<sup>44</sup>

The inconsistencies between Syariah law in Malaysia and CEDAW is symptomatic of the clash of premises between universal human rights and Islamic laws. CEDAW, as part of the universal human rights movement, proceeds from the assumption of equal rights and dignity for all persons regardless of race, religion and gender, thus taking a blanket approach to equality, whereas Islamic apologists tend to emphasize greater male responsibilities as a basis for seemingly discriminatory aspects of Islamic law. Thus, Article 6 of the Cairo Declaration on Human Rights in Islam, while emphasizing that women are equal in human dignity to men, stops short of declaring that they have equal rights, stating instead that women have "rights to enjoy as well as duties to perform" and that the "husband is responsible for the support and welfare of the family".<sup>45</sup> It is this premise that the Malaysian delegation appealed to in justifying to the CEDAW Committee why Muslim women cannot become Syariah Court judges, Imam, Bilal and Kadi; according to the delegation, persons in those positions have to solemnize marriages which is a function that women cannot perform.<sup>46</sup> Syariah law designates the man as protector and provider of the family, and thus it is a religious requirement that only a man can solemnize a marriage.<sup>47</sup> Furthermore, women are not appointed as muftis because

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Sisters in Islam, 8 December 2005, available at <http://www.sistersinislam.org.my/presstatement/08122005.htm> and Women Living Under Muslim Law, "Update: Malaysia: Family law bill unjust to Malaysian Muslim women", available at <http://www.wluml.org/english/actionsfulltxt.shtml?cmd%5B156%5D=i-156-507410>

<sup>41</sup> Issues and Questions, *supra* n. 38, at 29.

<sup>42</sup> Z. Anwar and J.S. Rumminger, "Justice and Equality in Muslim Family Laws: Challenges, Possibilities, and Strategies for Reform", (2007) 64 *Wash. & Lee L. Rev.* 1529, at n. 15.

<sup>43</sup> Anwar and Rumminger, *ibid.*

<sup>44</sup> For a fuller exposition on discrimination against women in Malaysia's Islamic family laws, see generally Anwar and Rumminger, *ibid.*

<sup>45</sup> The Cairo Declaration on Human Rights in Islam, 19th Islamic Conference of Foreign Ministers in Cairo, 5 August 1990, available at <http://www.religlaw.org/interdocs/docs/cairohrislam1990.htm>

<sup>46</sup> Malaysia's Responses, *supra* n. 18, at 6–7.

<sup>47</sup> *Ibid.*

they would not be able to discharge their duties properly during menstruation.<sup>48</sup> Islam prohibits a woman from reciting or leading prayers during her menstruation.<sup>49</sup>

Malaysia's withdrawal of some reservations in relation to Articles 7(b)<sup>50</sup> and 9(2),<sup>51</sup> in particular to certain sub-provisions of Article 16, nevertheless show willingness to attempt reconciliation between Syariah laws and CEDAW. At the very least, it shows that the federal government does not view Syariah law as being permanently incompatible with CEDAW norms. The CEDAW Committee's benign characterization of remaining discriminatory aspects in Malaysia's Syariah laws as resulting from restrictive interpretations of Syariah laws<sup>52</sup> leaves the door open for reform through reinterpretation of Islamic laws. Thus, the Committee appropriately encouraged Malaysia to resort to comparative jurisprudence and legislation that takes more progressive interpretations of Islamic law in reforming its Syariah laws.<sup>53</sup>

## CONCLUSION

Malaysia's first report to the CEDAW Committee must be recognized as a landmark event in the women's rights movement in the country. It is not only the contents and promises made in the report that are significant, but the very fact that it represents Malaysia's engagement with the international community on women's rights issues. The report highlights many significant and wide-ranging improvements in the status and rights of women in Malaysia. The 2001 constitutional amendment and the establishment of the Ministry of Women and Family Development (renamed the Ministry of Women, Family and Community Development in March 2004 after its jurisdiction was expanded to include community development)<sup>54</sup> signify a shift towards a more comprehensive implementation of CEDAW and shows great potential in further advancing the CEDAW agenda of gender equality in Malaysia. Furthermore, the involvement of civil society in the drafting and review of Malaysia's report to the CEDAW Committee should not be overlooked. It marks an increasing governmental openness (in line with CEDAW) to involve women in the political

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<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

<sup>50</sup> The Malaysian delegation agreed that the reservation could possibly be lifted. Summary of First Session, *supra* n. 21, at 56.

<sup>51</sup> The Malaysian delegation agreed with the Committee that there was "no religious hindrance to acceptance of the clause" and that the reservation should be reviewed. Ms Belmihoub-Zerdani, a member of the CEDAW Committee, had called the reservation to Art. 9(2) "a case of glaring discrimination": Summary of First Session, *supra* n. 21, at 60–1.

<sup>52</sup> Concluding Comments, *supra* n. 21, at 13.

<sup>53</sup> Concluding Comments, *supra* n. 21, at 13–4.

<sup>54</sup> Malaysia's Responses, *supra* n. 18, at 12.

process,<sup>55</sup> and highlights the critical role of private actors of international civil society in promoting and protecting human rights. The Women's Aid Organization, for example, played an important role in disseminating information and educating Malaysian society about Malaysia's report to the CEDAW Committee as well as the Committee's comments and recommendations.<sup>56</sup>

Much remains to be done to change societal, cultural and religious norms to improve gender equality.<sup>57</sup> However, practical realities and ideological differences often require human rights compliance in international law to rely on the progressive rather than immediate realization of treaty obligations. The Malaysian example shows why it is sometimes more desirable to allow countries to place reservations and make declarations to their ratification or accession to human rights treaties, than insist on immediate and complete accession. On its part, the CEDAW Committee has shown sensitivity to each country's cultural and religious conditions in making recommendations on compliance measures. This "velvet glove" approach is important to ensure that countries do not see their sovereignty as being threatened after ratifying or acceding to human rights treaties, but are given room to comply with treaty obligations over time, thus setting an assuring example to countries that have not, but aspire to, ratify human rights treaties.

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<sup>55</sup> Women's groups participated in the drafting process under the auspices of the National Council of Women's Organizations (NCWO) and also submitted a shadow report to the CEDAW Committee: NGO Shadow Report on the Initial and Second Periodic Report of the government of Malaysia, available at [http://www.iwraw-ap.org/resources/pdf/Malaysia\\_SR.pdf](http://www.iwraw-ap.org/resources/pdf/Malaysia_SR.pdf)

<sup>56</sup> "The government of Malaysia to be reviewed by the CEDAW Committee during the 35th CEDAW session, 24 May 2006", Press Statement by NGO Shadow Report Group, 5 May 2006, available at <http://www.wao.org.my/news/20060105CEDAW.htm>; and "Malaysia needs new laws aimed specifically at ending discrimination on basis of sex, gender, say committee's expert members", Committee on Elimination of Discrimination against Women, 731st and 732nd and Meetings, 24 May 2006, available at <http://www.un.org/News/Press/docs//2006/wom1562.doc.htm>

<sup>57</sup> Sexism continues to be a problem in public and private lives in Malaysia. For example, a woman MP was told not to be too emotional in a debate on the Immigrations Act 1963 and the Income Tax Act 1967: see Women's Aid Organization, Press Statement, "End All Sexism and Gender Discrimination in parliament: JAG Demands Public Apology from Members of parliament", 15 May 2007, available at <http://www.wao.org.my/news/20070104JAGStatementSexistMP.htm>



# LITERATURE



## BOOK REVIEWS

Nao Seoka, Fred Grünfeld and Anke Huijboom, *The Failure to Prevent Genocide in Rwanda: The Role of Bystanders*, Transnational Publishers, 2007, pp xxix + 299

This book addresses the genocide in Rwanda from the perspective of whether it could have been prevented or halted by the bystanders. In Chapter 1 the authors present “Perpetrator – Victim – Bystander approach” and emphasize the role of the bystanders, particularly at the macro level (the States and the international political system), because after the end of the cold war the possibility to prevent or stop gross human rights violations is increasingly dependent on the behaviour of the bystander rather than the perpetrator and the victim.

According to the authors, the main aim of this book is to address the fundamental problem that early warnings do not automatically lead to early or any actions of the bystanders and to fill the gap between early warnings and early actions by scrutinizing the decision-making process of the bystanders at the international level. In so doing, the authors define the bystander as the third party that will not act or that will not attempt to act in solidarity with the victims of gross human rights violations. In the definition, there is no room for another category, such as the indifferent bystander and the ignorant outsider, which means that the bystanders will be evaluated afterwards either as collaborators with the perpetrators or rescuers of the victims. In Chapter 2 the authors examine the judgments of the International Criminal Tribunal for Rwanda in which the persons who broadcasted the hate propaganda prior to the genocide were convicted of genocide. Here, the authors confirm the broad definition of genocide to support the views that no bystanders should have ignored early warnings of this kind which would amount to genocide.

After outlining colonial history of Rwanda in Chapter 3, the authors scrutinize the early

warnings from 1991 to the time just before the outbreak of genocide in Chapter 4 through Chapter 12. In Chapters 4 and 5 the authors review the Arusha Peace Accords between the Rwandan government and the Rwandan Patriotic Front as well as the mandate of the United Nations Assistance Mission in Rwanda (UNAMIR) established by the Security Council in 1993. The authors point out that an important factor in the failure to prevent genocide in Rwanda was already made in the making of a weak mandate of the UNAMIR, which lacked the authority to instruct the use of force that had been requested by the Rwandan parties of the peace agreement. It is also stated that the installed 2,500 UNAMIR peacekeepers, which mainly consisted of Belgian troops, were in all aspects too weak.

Chapters 6 and 7 examine very carefully the early warnings of the atrocities from 1991 to January 1994, based on divergent sources, such as the foreign diplomats, the human rights organizations, the UN special rapporteur and so on. As a result, the authors state that despite the deteriorating situation in Rwanda no one reacted to these outspoken warnings. In Chapters 8, 9, 10, 11 and 12 the authors focus attention on the so-called genocide fax in January 1994 and then examine the negative responses of the United Nations and Western States. In particular, the authors note the very clear and concrete requests from General R. Dallaire (Canadian Force Commander of UNAMIR) and from Belgium to New York for a stronger and firmer broadened mandate for UNAMIR. In this regard, the authors strongly criticize that since the top officials in the UN bureaucracy like K. Annan (UN Under Secretary-General) had refused to approve any early action to prevent the atrocities, the Security Council was not even informed of these early warnings. On the other hand, the authors also indicate that even if the Security Council had been informed, we do not know whether it

would have taken effective decisions before the outbreak of genocide.

Next, the authors explore the incidents just after the outbreak of genocide in April 1994. Describing the plane crash which was the trigger for the following dramatic events, major Western powers' evacuation operations, and the Belgian decision to withdraw its troops in Chapters 13, 14 and 15, the authors point out that the Western evacuation force illustrates the role of the bystander who afterwards is criticized as a collaborator, because the possible outcome of a combination of the evacuation force with the UNAMIR peacekeepers, which could have been able to stop the chaotic killings, was not considered in any Western capital or the UN.

The authors draw full attention to the response of the Security Council in Chapter 16. Discussing the various options on the future of UNAMIR in several informal meetings, the Security Council adopted a unanimous Resolution 912 on 21 April, which stated that the majority of peace-keepers would withdraw and only 270 would stay to mediate between the parties and facilitate human relief. However, since the UN Secretary-General B. Boutros-Ghali asked the Security Council to reconsider its decision, it unanimously adopted a Resolution 918, which established UNAMIR II, a mission of 5,500 troops in May. But the authors strongly criticize that no troops would become available soon and that it would take up to October 1994, more than three months after the genocide ended, before UNAMIR II could be fully employed.

After referring to the role of the Netherlands as an example of a bystander State in Chapter 17, the authors argue in Chapter 18, which is entitled "Apologies from Bystanders Ten Years Later", that given the apologies from Western States and the UN, it is now almost unanimously accepted that States and international organizations failed tremendously by not acting to prevent or stop the Rwandan genocide. Finally, the authors conclude that the bystanders at the State level and the international level did not act in solidarity with the victims and did not attempt to rescue them by preventing or halting the genocide, and therefore the bystanders turned into collaborators who facilitated the *genocidaires* by not acting against continuing atrocities.

One notable feature of this work is its strictly empirical approach in studying the role of the bystanders regarding genocide in Rwanda. The authors scrutinize the relevant communications and the decision-making processes throughout the book, *i.e.* who received what message at what time, to whom the message was forwarded and which decisions were or were not taken in response to the early warnings. Consequently, the well-documented analysis makes the conclusion of this book very convincing that the genocide in Rwanda could have been prevented or halted by the bystanders. At the same time, it also makes clear that the bystanders, especially Western States, lacked the political will to react to the repeated early warnings on Rwanda, which resulted in setting a double standard between the case of Rwanda and other cases such as Kosovo.

While this book makes the important and useful contribution to the problems of the bystanders faced with the Rwandan genocide, there are nonetheless some problems in the work. Above all, it seems that the research tends to focus on the Western States so much that it is not always clear how the remaining bystanders, especially permanent members with veto powers – Russia and China – reacted or not to the early warnings and genocide in Rwanda. One of the reasons is probably that the authors do not always explore some of the important documents in which the positions of the remaining bystanders are recorded: the Security Council Official Records (SCOR, S/PV) and General Assembly Official Records (GAOR, A/PV). Given the several formal meetings of these UN organs before and after the genocide, this book could have given us more convincing overall insights into the role of the bystanders if the authors had analyzed not only the informal meetings as in Chapter 16, but also these *verbatim* records.

Despite these minor shortcomings, however, this book is one of the most significant contributions not only to the lessons of Rwandan genocide from the perspective of the bystanders, but also to the study of "the responsibility to protect" of the international community.

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Joshua Castellino and Elvira Doninguez Redondo, *Minority Rights in Asia: A Comparative Legal Analysis*, Oxford University Press, 2006, pp 286

This book identifies and seeks to address a “gap” in the human rights literature in relation to the region of “Asia”, which lacks a regional human rights mechanism. Quite rightly, the authors do not purport to present an exhaustive regional study which would be a Herculean task, given both the difficulty of classifying disparate Asian legal systems under a common umbrella and the breadth of material that would need to be covered to do justice to the topic. Indeed, the authors draw a caveat to the effect that the linguistic barriers in relation to source materials commenting on minority issues in Asia makes research on the subject difficult.

Hence, they have chosen to examine in detail the minority rights situation within four specific country studies: that of India, China, Malaysia and Singapore. The authors set four objectives for themselves. First, to establish the parameters within which human and minority rights have developed in Asia. Second, to examine the applicability of international standards relating to minority rights protection to certain Asian countries. Third, to identify any conceptual and practical particularities necessary to understanding the context of minority issues in Asia. Lastly, to provide a “useful comparative model” (p. 3) by examining in detail how minority interests are promoted and protected within specific Asian domestic regimes. The view is taken that international standards can provide no more than “guiding principles” to the domestic out-working of State-minorities relations.

More modestly, the aim is to provide a starting point for the comparative study of the situation of minorities, and indeed, indigenous peoples groups, in Asia, applying the analytical framework of human and minority rights. The authors aspire towards presenting a theoretical and practical of the issues. Their goal is to set out evolving principles of minority protection, rather than to present a “definitive insight” into a “unifying theory” (p. 3) for minority rights protection in Asia.

Chapter 1, which is entitled “Asian States,

International Human Rights Law and Minority Rights”, covers familiar territory. It identifies the major international human rights instruments relevant to minority protection, mentioning in passing the 1648 Treaty of Westphalia and the League of Nations minorities regime. It notes that the United Nations has failed to “frame a specific regime” for protecting the rights of minorities and indigenous peoples. Indeed, all it has managed to produce was the 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. In 2007, after almost a quarter-century of protracted negotiations, the UN General Assembly adopted a landmark Declaration on Rights of Indigenous Peoples.

The chapter raises the issue of how some Asian States have challenged the universalist pretensions of human rights and its Western liberal origins, considering human rights a neo-colonial form of discourse. The authors point out that the “Asian values” school, of which they identify three strains (Malaysian, Singapore and Chinese), are statist in nature, not emanating from civil society groups. Aside from the “Asian values” school and Asian critiques towards human rights standards based on “Western values stressing civil liberties” (p. 24), the chapter in seeking to ascertain “possible Asian distinctiveness” (p. 22) in relation to human rights provides a useful empirical analysis of Asian State engagement with UN human rights regimes based on key treaties and the UN Charter. It then provides an overview of Asian minorities, including their situations in countries not subject to case study. Specific reference is made to submissions made under Articles 18 and 27 of the International Covenant on Civil and Political Rights (ICCPR) (on religious freedoms and rights of persons belonging to ethnic, religious and linguistic minorities) and the Convention for the Elimination of Racial Discrimination (CERD). Notably, Singapore and Malaysia have not signed either the ICCPR or CERD.

Chapters 2–5 deal with India, China, Malaysia and Singapore respectively before the book offers its conclusions.

The four country studies draw from South Asia, South-east Asia and East Asia. India is selected owing to the complex politics of identity characterizing its political environment as

well as an activist Supreme Court engaged in developing the domestic law on minority rights within the Indian constitutional structure. The complex issue of protecting minorities in China given the obstacles posed by its political structure commended itself as a candidate to the authors for study. A little more surprising is the choice of Malaysia and Singapore as objects of study for minority protection. The authors note that these countries were selected given their “vehement opposition” towards general human rights and their vigorous espousal of an “Asian Way” or approach towards human rights issues, and indeed, that of human rights within developmentalist States. The “Asian values” debate of the 1990s conducted in the rarefied circles of diplomacy and academia did not focus on protecting minorities. Rather, it addressed matters of cultural relativism and the prioritization of the imperative of economic development. This was invoked as the basis for restricting civil-political rights in order to secure political stability thought integral to attracting foreign investment and trade. The authors correctly identify the fear of inter-ethnic disharmony which informs public order considerations which are valorized in both South-east Asian countries. Minority rights are but one facet of the politics of a developmentalist State in relation to human rights concerns. Nevertheless, it is true that the position of minorities did play “an important role in their division into separate States” (p. 2) as the Singapore State government championed the principle of equal rights and meritocracy while the political leaders of the Federation of Malaysia championed the special rights of the majority Malays stemming from the principle of indigeneity. Malays, together with smaller groups like the Orang Asli, were considered “bumiputera” or sons of the soil. In this sense, Malaysia is a more apt case study for how a politically dominant majority “indigenous” group constitutionally preserves preferential treatment and thus discriminates against the Chinese and Indian minorities.

Drawing from international standards on minority rights in relation to norms found in United Nations human rights treaties as well as OSCE standards, the authors identify six key indicators they consider to be characteristic of a minority protection system. These indicators

provide a template of issues by which to ground the analysis of the case studies. These are (1) equality legislation; (2) hate speech legislation; (3) affirmative action measures; (4) linguistic protection measures; (5) effective political participation, and (6) education and civil participation.

The authors then proceed upon a detailed inquiry into the constitutional and legal framework relevant to minority groups, as well as other vulnerable groups. Each case study is first organized around a discussion of a history of the relevant country, contextualizing the enquiry and attempting to identify specific features which explain the practice of human rights in general in that country, as well as the treatment of minorities in particular. Relevant features include the histories of India, Malaysia and Singapore as former British colonies as well as the especial concerns for maintaining State stability to promote economic development and social control, particularly in China and Singapore. The “Asian values” challenge against the universalist pretensions of human rights is also raised to underscore the paramouncy accorded to public order considerations in these Asian States. Second, the authors delve into the issue of identifying minorities and the problem of definitional issues, making references to authoritative international formulations like that of Francisco Capotorti’s. The authors go beyond a narrow definition of minorities in discussing related problems like the status of groups not officially identified as minorities such as the Dalits in India (insofar as they are Hindu, they are considered part of the majority) or groups which do not number amongst the 56 national minorities which China officially recognizes. Third, the authors discuss the legal framework including institutions dedicated to protecting minorities such as the National Commission of Minorities in India or the Group Representation Constituency scheme in Singapore which guarantees minority representation in parliament. Relevant constitutional provisions and case law are also analyzed, particularly in relation to educational rights in India. Last, the authors consider the issue of remedies.

There is heavy reliance on secondary literature in this book and the comparative analysis is minimal. Some chapters read more

like general case studies on the human rights situation in that country rather than a focused analysis on minority rights. This is particularly apparent in the lengthy treatment of *bumiputra* rights in Malaysia, which by the authors' own admission is "as much about 'majority rights' as 'minority rights'". One cannot help but think that the position of the Mindanao Muslims in the Philippines or the Pattanis in South Thailand would have been more fruitful to minority rights-oriented studies.

As the authors do go into the definitional issue of minorities at some length in relation to the Indian case study, their treatment of the definitional issue in relation to "Malay" in Singapore, by way of contrast with Malaysia, is somewhat disappointing. For example, while Article 153 of the Federation of Malaysia Constitution defines "Malay" in terms of ethnicity, religion, language and custom and thereby "imputes" a fixed identity to Malays (a study of the recent spate of apostasy cases where a High Court in Malaysia stated that Malays were Muslims until their dying day would have enriched the discussion), Singapore adopted a pragmatic definition of "Malay" in relation to Article 39A of the Republic of Singapore Constitution. This contains both subjective and objective elements, in relation to identifying a minority for purposes of contesting general parliamentary elections as a relevant minority. The authors' over-reliance on secondary sources is apparent in some patent inaccuracies. For example, the assertion at p. 245 that the government controls religion to prevent it from destabilizing the multi-racial polity by "the frequent use of the Maintenance of Religious Harmony Act" is wrong. This Act allows the government to issue restraining orders which may "gag" a religious leader from preaching to his congregation where religion is being stirred for politically subversive purposes. Enacted in 1990, the government has never in the history of the Act issued a single restraining order. What is glaringly absent from the analysis of the Singapore situation at least are the important parliamentary debates over minority rights policy conducted in 1966 when the Constitutional Commission was considering whether to incorporate specific minority group rights into the Constitution.

Nevertheless, the book provides a useful

synthesis of the existing literature and overview of the minority situation in four Asian countries although it probably has more utility as a general discussion of the human rights situations in the four selected case studies.

THIO LI-ANN

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Elsa Stamatopoulou, *Cultural Rights in International Law: Article 27 of the Universal Declaration of Human Rights and Beyond*, Martinus Nijhoff Publishers, Leiden/Boston, 2007, pp i-xvi + 1-332

*Cultural Rights in International Law* comes at a timely moment. It is the second volume in Martinus Nijhoff Publishers' *Universal Declaration of Human Rights Series*, edited by Professor Hurst Hannum. As the publishers put it, "[i]nspired by the fiftieth anniversary of the Declaration, the *Universal Declaration of Human Rights Series* analyzes the development of the Declaration's norms and their status in contemporary international law." Indeed, it has been almost 60 years now since the right to participate in the cultural life of the community was first articulated in Article 27 of the Universal Declaration of Human Rights ("the UDHR"), and just over 40 years since the concept of cultural rights was crystallized further in Article 27 of the International Covenant on Civil and Political Rights and Article 15 of the International Covenant on Economic, Social and Cultural Rights ("the ICESCR").

Today, cultural rights appear, in one form or another, in a slew of other multilateral instruments, including the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of the Child, and the Declaration on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities. Yet, the category of cultural rights has not gained equivalent traction in the international human rights literature. As Mary Robinson notes in the Foreword to this book, "[w]hile contemporary literature on culture has been abundant in the humanities, the coverage of culture in the

literature of human rights law has been largely limited to a discussion of how culture does (or does not) clash with international human rights standards.” In other words, discussions of cultural rights have been wrongly conflated and confused with difficult issues of culture *versus* human rights. One familiar example is the way in which the “Asian values” debate culminated in the 1993 Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights, A/CONF.157/ASRM/8 (1993) (“the Bangkok Declaration”). For the first time in a plurilateral international instrument, the Bangkok Declaration asserted that “while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds”.

More than ever, attenuating the fear of “the other” and celebrating diversity have become global imperatives in the world after 11 September. In the Introduction, Stamatopoulou explains that the aim of her book is twofold. The first is to explore the concept of cultural rights by reviewing international and national legal instruments, international practice and the role of UN bodies and entities in the promotion and implementation of those rights. The second is to demonstrate that cultural rights are of profound moral, political and economic significance to individuals and groups, and that they are concepts on the basis of which moral and material claims can be made, and solutions given to long-term problems in societies, thus addressing past injustices and contributing to human development in peace. She writes: “I will situate this primarily legal analysis within the political context of current international debates on cultural relativism, racism, dialogue among civilizations and the post-11 September era.” These are lofty commitments, but Stamatopoulou delivers on all of them.

Excluding the Introduction, the book is divided into four chapters, and ends with a section entitled Conclusion and Recommendations. In the first chapter, Stamatopoulou deals with the legal history of cultural rights, and sets the contemporary context for the legal analysis to follow. Drawing on Johannes Morink’s

account in *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (University of Pennsylvania Press, 1999), she traces the tumultuous drafting history of Article 27, and the relatively less troubled genesis of Article 15 of the ICESCR. Next, Stamatopoulou turns her attention to the thorny issues of cultural relativism and identity politics. She confronts the question of culture versus human rights head on, arguing that “culture is the context within which cultural rights can be understood and implemented”. The chapter concludes with a brief examination of Iran’s 2001 UN General Assembly agenda item entitled “Dialogue Among Civilizations”, which, in turn, gave rise to General Assembly Resolution 56/6, “Global Agenda for Dialogue Among Civilizations”. Stamatopoulou’s assessment is that this resolution became “a site of positive ideological exchange, where implicitly the universality element of human rights was on the table and it survived”.

In the second chapter, Stamatopoulou embarks on a wide-ranging survey of relevant provisions in international legal instruments and the practice of relevant international bodies and mechanisms regarding cultural rights, thereby setting the stage for her legal analysis of the normative elements of cultural rights in the third and fourth chapters. Stamatopoulou’s survey divides into five sections, covering international instruments, the role of UN human rights treaty bodies, the role of UN bodies other than human rights treaty bodies, the role of the UN High Commissioner for Human Rights, the role of UNESCO, as well as UN operations impacting on cultural rights in the field.

The third and fourth chapters are the substantive heart of the book. Stamatopoulou opens Chapter 3 with the explanation that the purpose of this chapter is “to State what cultural rights are, *i.e.* to analyze the normative content of the right to participate in cultural life from an international law point of view”. In Chapter 4, Stamatopoulou turns to consider cultural rights as they relate to special groups. In particular, she examines what she argues are the special characteristics of cultural rights pertaining to minorities and indigenous peoples. Stamatopoulou devotes the final part of this chapter to other groups in society on whom the

human rights agenda regularly focuses. Among these are women, children, persons with disabilities and the poor. The analysis in both chapters is always firmly anchored to a close review of international human rights texts, general comments of human rights treaty bodies, international and regional jurisprudence, including the jurisprudence of the Human Rights Committee, the practice of international human rights bodies and mechanisms, State practice and the relevant academic literature.

For human rights practitioners and policy-makers, the real value of *Cultural Rights in International Law* lies in its final section: Conclusion and Recommendations. Here, Stamatopoulou draws together the various threads of her study to list concrete recommendations for States, the Office of the UN High Commissioner for Human Rights, UN human rights treaty bodies, UNESCO, UN development programmes, funds and agencies, other intergovernmental and non-governmental organizations, as well as the media.

*Cultural Rights in International Law* is a work of impressive reach and depth. The close attention to legal analysis securely based in the canon of international legal texts, jurisprudence and practice makes this an invaluable reference for students of international law researching the

issue of cultural rights. The practical aspects of the book, which arise, of course, from Stamatopoulou's long experience within the UN system, are useful for those working in the field, whether within UN institutions, international organizations or elsewhere. At a universal level, Stamatopoulou's greatest contribution with this book is captured in her closing lines, in which she observes that although "cultural rights are issues different from those that emerge from the very familiar issue of *culture vs human rights* . . . it might be worth asking whether in any sense the protection of cultural rights could indeed be seen as a partial solution to the culture vs human rights problem".

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Tullio Scovazzi and Gabriella Citroni, *The Struggle against Enforced Disappearance and the 2007 United Nations Convention*, Martinus Nijhoff Publishers, Leiden/Boston, 2007, pp xviii + 432

Enforced or involuntary disappearance by State agents, which unfortunately exists virtually worldwide and has acquired global dimension,<sup>1</sup>

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<sup>1</sup> On 3 October 2006, the Chairperson of the United Nations Working Group on Enforced or Involuntary Disappearances, while presenting the 2005 Report to the newly created Human Rights Council, observed: "Enforced disappearance had become a global problem not restricted to a specific region. Once largely the product of military dictatorship, disappearances were now perpetrated in complex situations of internal conflict, in regimes undergoing radical political changes and as a means of political repression of opponents." (United Nations, Human Rights Council, *Summary Records of the 3rd Meeting*, A/HRC/2/SR.3, 3 October 2006, para. 3).

For an account of enforced disappearance in Latin America, Europe, Asia and Africa, see T. Scovazzi and G. Citroni, *The Struggle against Enforced Disappearance and the 2007 United Nations Convention* (Martinus Nijhoff, Leiden-Boston, 2007), at 14–72.

It is reported that during the period between 1970 and 2000 the total number of involuntarily disappeared persons was between 300,000 and 500,000. (See T. Scovazzi and G. Citroni, *The Struggle against Enforced Disappearance and the 2007 United Nations Convention*, *ibid.*, at 2.)

It is reported that at the end of 2006 the total number of cases of enforced disappearance transmitted by the UN Working Group on Enforced or Involuntary Disappearances to governments stood at 51,236 and concerned more than 90 countries. And the total number of cases under its active consideration stood at 41,232 and concerned 79 States. During 2006 the Working Group transmitted 335 new cases of disappearances to the governments of Algeria, Bangladesh, China, Colombia, Guatemala, Honduras, India, the Libyan Arab Jamahiriyah, Nepal, Pakistan,

leads to one of the most serious violations of human rights not only of those who have been “enforced” to “disappear” but also of their relatives. Enforced disappearance constitutes “an arbitrary deprivation of freedom” and causes “serious danger to the personal integrity, safety and life of the victim”. It “leaves the victim completely defenceless” and denies him the right to liberty (even in some cases the right to life), the right not to be subjected to torture or inhuman treatment, the right to association, and “the right to a fair trial, to protection against arbitrary arrest, to due process”.<sup>2</sup> It also denies his family members the right to associate with him. A prolonged isolation and deprivation of communication are in themselves cruel and inhuman to, and harmful to the psychological integrity of, both the disappeared and his relatives. Further, a systematic widespread enforced disappearance creates a situation of insecurity and terror.

The book under review,<sup>3</sup> as reflected in its title, deals with the struggle against enforced disappearance that ultimately culminated in the adoption on 20 December 2006 by the UN General Assembly of the International Convention for the Protection of All Persons from Enforced Disappearance (hereinafter referred to as the 2007 UN Convention).<sup>4</sup>

The book outlines the pre-2007 UN Convention international legal framework on enforced disappearance<sup>5</sup> and delves into pertin-

ent legal issues arising from the 2007 UN Convention.<sup>6</sup> With a view to echoing the sufferings of the victims of enforced disappearance and of their relatives, it also exhaustively reports the events of involuntary disappearance handled by the Human Rights Committee, the Inter-American Court of Human Rights, the European Court of Human Rights and the Human Rights Chamber for Bosnia and Herzegovina.<sup>7</sup>

Through their penetrating analysis of the hitherto incidents of enforced disappearance by State agents in different regions of the world, the authors have delved deep into the so-called purposes, rather justifications, of enforced disappearance and highlighted the fallacy and perversity of the logic behind such disappearances. Enforced disappearance, according to the authors, is carried out as: a measure against civilian population to produce a deterrent effect; a means to dismantle the movement of “insurgency” or to eliminate the so-called “internal enemies, opponents, terrorists or subversive elements” for preserving “national security”; a means to prevent the opposition from growing, and a means to extract information relevant for anti-terrorism purposes and thereby to avert terrorism. The authors, in the backdrop of violations of human rights of the victims of enforced disappearance as well as of their relatives, fail, with convincing reasons, to see any justification for, or logic in, the ongoing practice of enforced disappearance. Referring

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the Philippines, the Russian Federation, Sri Lanka, the Sudan, the Syrian Arab Republic and Thailand. Of these, 79 cases were alleged to have occurred in 2006. See T. Scovazzi and G. Citroni, *The Struggle against Enforced Disappearance and the 2007 United Nations Convention*, *ibid.*, at 62, and Report of the Working Group on Enforced or Involuntary Disappearances, 25 January 2007, A/HRC/4/41.

<sup>2</sup> Inter-American Commission on Human Rights, *Report on the Human Rights Situation in Chile*, OEA/Ser.L/V/II.40 doc.10, 11 February 1977.

<sup>3</sup> T. Scovazzi and G. Citroni, *The Struggle against Enforced Disappearance and the 2007 United Nations Convention*, *supra* n. 1.

<sup>4</sup> The Convention has three parts. Part I sets out the main requirements that need to be addressed in the domestic law of acceding States. Part II deals with the establishment of a Committee on Enforced Disappearances, while Part III provides for formalities required for ratification or accession and entry into force of the Convention. On 6 February 2007, the General Assembly, through its Resolution A/RES/61/177 of 12 January 2007, opened it for signature.

<sup>5</sup> Ch. III.

<sup>6</sup> Ch. IV.

<sup>7</sup> Ch. II.

to the justification for enforced disappearance premised on the “War on Terror”, they observed:

The fight against terrorism is an urgent need. The committing of serious common crimes by terrorist organizations, including the indiscriminate slaughter of people, can never be considered as a form of political expression. States are called upon to act against political or paramilitary violence to safeguard the right to life of their citizens and, more generally, to ensure the enjoyment of rights and democracy. Today terrorism has become a specialized form of criminality which presents various peculiarities, such as its covert and transnational organization, its capacity to intimidate and its sophistication. It is fully justifiable for States to defend their existence and their values, even if this defence involves some limitations of rights.

They, however, argued:

That said, the question to be addressed is the following: can States, in the name of “national security” and in the accomplishment of their duties to take protective action against activities which seriously threaten citizens and democracy, resort to enforced disappearance and other gross violations of human rights? Or, in other words, can secrete agents and executors encroach upon the competences which are reserved to judiciary power? The response to both questions can be only one: no, never.

One of the main elements of national security itself is that enforced disappearances do not occur.<sup>8</sup>

The authors have referred to apt resolutions of the Security Council and of the UN General Assembly and judicial opinions of the ICJ that assert that the fight against terrorism by States is required to be carried out with due respect for basic human rights and in compliance with their obligations under international law.

The first chapter also gives an account of the dimension of enforced disappearances in Latin America, Europe, Asia and Africa and highlights the initiatives taken by some of the States (by establishing Truth and Reconciliation Commissions after political violence or internal armed conflict)<sup>9</sup> and by international community (by passing resolutions denouncing enforced disappearance and by establishing the United Nations Working Group on Enforced or Involuntary Disappearances)<sup>10</sup> to prevent and suppress the phenomenon of enforced disappearance.

Truth and Reconciliation Commissions, necessitated by the need for reconciliation after internal armed conflict or political violence, however, were merely mandated to establish the truth and to identify the causes of the violence and the perpetrators. However, the authors, without giving any reasons or justifications, have analyzed extensively the Truth and Reconciliation Commissions established in Argentina, El Salvador and Guatemala<sup>11</sup> and concluded that the Truth and Reconciliation Commissions worldwide, through their reports, have stressed the need for appropriate changes in the respective national law and for strengthening the judiciary or creating other new mechanisms for rendering justice to the victims of enforced

<sup>8</sup> *Supra* n. 1, at 59.

<sup>9</sup> During the past more than 25 Truth and Reconciliation Commissions created worldwide. For further details, see P.B. Hayner, “Fifteen True Commissions-1974 to 1994: A Comparative Study”, *Human Rights Quarterly* 597 (1994); and H.J. Steiner and P. Alston, “Massive Human Rights Tragedies: Prosecutions and Truth Commissions”, in H. J. Steiner & P. Alston, *International Human Rights in Context-Law, Politics, Morals* (Oxford, 2000) at 1131 *et seq.*

<sup>10</sup> The Working Group was established in 1980 by the Commission on Human Rights by Resolution 20 (XXX/VI) of 29 February 1980. The UN General Assembly, through its Resolution 35/193 of 15 December 1980, endorsed its creation.

<sup>11</sup> *Supra* n. 1, at 75–93.

disappearance.<sup>12</sup> Initiatives taken at the international level, as mentioned earlier, ultimately culminated in the adoption by the UN General Assembly of the 2007 UN Convention.

The second chapter offers an exhaustive and illuminating analysis of cases on enforced disappearance handled by the Human Rights Committee, the Inter-American Court of Human Rights, the European Court of Human Rights and the Human Rights Chamber for Bosnia and Herzegovina. The authors have undertaken extensive analysis of these cases to show their contribution in the progressive development of international rules to fight enforced disappearance as well as to depict the human tragedy of the victims of involuntary disappearance.<sup>13</sup> However, the authors, in their “conclusive remarks on the international case law”, merely “subscribed” the conclusion earlier reached by Manfred Nowak<sup>14</sup> that the existing international case law “clearly reveals a gap in the protection against enforced disappearance” and his stress for an “independent and non-derogable human right not to disappear”.<sup>15</sup>

A sketch of the pre-2007 UN Convention “international legal framework on enforced disappearance” reflected in the Declaration on the Protection of All Persons from Enforced Disappearance adopted on 18 December 1992 by the UN General Assembly (hereinafter referred to as the 1992 Declaration), the 1998 Rome Statute for the Establishment of an International Criminal Court (hereinafter referred to as the Rome Statute) and the 1994 Inter-American Convention on Enforced Disappearance of Persons (hereinafter referred to as the Inter-American Convention) is outlined in the third chapter.

The 1992 Declaration, although not binding by itself, *inter alia*, offered the first internationally agreed definition of the offence of “enforced disappearance”. It required the States, as their primary obligations, to: (1) not practice, permit or tolerate enforced disappearances;<sup>16</sup> (2) contribute, by all means, to the prevention and eradication of enforced disappearances at national, regional and international level;<sup>17</sup> and (3) take effective legislative, administrative, judicial or other measures to prevent and terminate acts of enforced disappearance in territory under their jurisdiction.<sup>18</sup> It also referred to as the primary responsibility of all the States to provide for prompt and effective remedy and judicial guarantees to the relatives of disappeared persons.<sup>19</sup> Further, it declared that “no circumstances whatsoever can be invoked” by States or State agents to justify enforced disappearance.<sup>20</sup>

These obligations of the States, however, did not merely remain as moral or symbolic obligations. The Working Group, since 1993, started reporting annually on the implementation of the Declaration and obstacles encountered therein. It also regularly transmits to the governments concerned a summary of allegations received from relatives of disappeared persons and NGOs with regard to obstacles encountered in the implementation of the Declaration. It has also frequently invited relatives of disappeared persons, organizations representing them, and human rights NGOs to periodically inform and update it about the steps undertaken by governments for implementing the Declaration.

The Rome Statute added another dimension to enforced disappearance by incorporat-

<sup>12</sup> *Ibid.*, at 93.

<sup>13</sup> *Ibid.*, at 101–263.

<sup>14</sup> United Nations, Commission on Human Rights, *Report submitted by Mr Manfred Nowak, Independent Expert Charged with Examining the Existing International Criminal and Human Rights Framework for the Protection of Persons from Enforced or Involuntary Disappearances*, E/CN.4/2002/71, 8 January 2002, para. 76.

<sup>15</sup> *Supra* n. 1, at 244.

<sup>16</sup> Art. 2.

<sup>17</sup> *Ibid.*

<sup>18</sup> Art. 3.

<sup>19</sup> Arts. 9 and 13.

<sup>20</sup> Art. 7.

ing in it “enforced disappearance of persons” as “crimes against humanity” when it is “committed as part of a widespread or systematic attack directed against any civilian population”.<sup>21</sup>

The Inter-American Convention provides for prevention, punishment and elimination of the phenomenon of enforced disappearance. In fact, it goes a step ahead of the 1992 Declaration by, *inter alia*, incorporating in it, as binding, the internationally agreed definition of enforced disappearance (articulated in the 1992 Declaration) and qualifying the “systematic practice of enforced disappearance” as a “crime against humanity”. However, the present reviewer feels that the reference to, and discussion of, the Inter-American Convention, being a regional instrument, does not thematically fit in the third chapter devoted to “international legal framework on enforced disappearance”. Even its unique features, *namely* incorporation of the internationally agreed definition of enforced disappearance and perceiving a systematic practice of enforced disappearance as a crime against humanity, and its influence in the making of the 2007 UN Convention, do not, in the present submission, justify it a place in the chapter.

However, the absence of a universally legally binding instrument against enforced disappearance and the increased instances of involuntary disappearance across the world made the international community have, after having deliberations and consultations for more than 25 years after the first effort of mootung an international instrument against enforced disappearance,<sup>22</sup> the 2007 UN Convention in the form of a universally legally binding instrument against enforced disappearance.

The fourth chapter offers an anatomy, with comments, of the 2007 UN Convention and delves deep into its main legal issues.<sup>23</sup>

The 2007 UN Convention not only denounces the act of enforced disappearance

but also debars a State from justifying it on “any ground whatsoever”. Article 1 proclaims:

- (1) No one shall be subjected to enforced disappearance.
- (2) No exceptional circumstances whatsoever, whether a State of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance.

While Article 2 defines “enforced disappearance” as:

For the purposes of this Convention, “enforced disappearance” is considered to be 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 places such a person outside the protection of law.

With a view to reflecting different legal issues associated with the definition of “enforced disappearance”, the authors have offered an overview of different suggestions that were forwarded while Article 2 was in the making and concluded that the existing definition is in tune with the definition of “enforced disappearance” found in the most recent international judicial practice.<sup>24</sup> However, it is pertinent to note that “enforced disappearance”, as articulated in Article 2 of the Convention, does not refer to “enforced disappearance” as a “crime against humanity” even though the Rome Statute and judicial pronouncements of the ICTY perceive it as a crime against humanity. In fact, the

<sup>21</sup> Arts. 7 (1)(i) and 7(2)(i).

<sup>22</sup> A sketch of the major steps in the direction can be found in the book under review from pp. 255 *et seq.*

<sup>23</sup> *Supra* n. 1, at 265–400.

<sup>24</sup> *Ibid.*, at 285.

proposal by many of the Latin American and European countries and NGOs for making the notion of crime against humanity explicit in Article 2 was greeted with stiff resistance by a number of other States. The Convention, as an outcome of the conflicting stands taken by the States, merely makes generic mention of “enforced disappearance” as “a crime against humanity” in its Preamble and Article 5.<sup>25</sup>

Other legal issues discussed thoroughly relate to, and/or revolve around:<sup>26</sup> the States’ obligation to codify the offence of enforced disappearance under their respective criminal law;<sup>27</sup> superior orders vis-à-vis enforced disappearance;<sup>28</sup> international jurisdiction and extradition in cases of enforced disappearance;<sup>29</sup> criminal investigation over enforced disappearances;<sup>30</sup> statute of limitation;<sup>31</sup> continuous nature of the offence of enforced disappearance;<sup>32</sup> amnesties and pardons for perpetrators of enforced disappearances;<sup>33</sup> the right to obtain information about persons deprived of their liberty;<sup>34</sup> definition of “victims” of the offence of enforced disappearance;<sup>35</sup> the right to know the truth regarding the circumstances of an enforced disappearance;<sup>36</sup> the respect for human remains;<sup>37</sup> the right to obtain reparation and forms of reparation;<sup>38</sup>

enforced disappearances of children,<sup>39</sup> and the role of the Committee on Enforced Disappearances as a monitoring body.<sup>40</sup>

In spite of a cluster of these pertinent legal issues, the 2007 UN Convention is one of the strongest human rights treaties ever adopted by the United Nations. It aims to prevent enforced disappearances, establish the truth when enforced disappearance occurs, punish the perpetrators and provide reparations to the victims of enforced disappearance and their families. It also recognizes the new human right of a person not to be subjected to enforced disappearance and guarantees the human right to know the truth. No exceptional circumstance whatsoever, not even a state of war, can be invoked as a justification for enforced disappearance.

The Convention, as the authors hoped, would be a useful tool in the struggle against enforced disappearance, provided it receives universal acceptance and the States recognize the competence of the Committee on Enforced Disappearances, established thereunder, to receive individual complaints. Let us, by bringing the Convention into force<sup>41</sup> and implementing it in its letter as well as spirit, convey a strong message to those who want to

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<sup>25</sup> Art. 5 of the Convention, which addresses to the “enforced disappearance” as a “crime against humanity” as defined in “applicable international law”, it is argued, is applicable to situations that fall within the 1998 Rome Statute as well as to other cases of enforced disappearance. See S. McCrory, “The International Convention for the Protection of all Persons from Enforced Disappearance”, 7 *Human Rights L Rev* 545 (2007).

<sup>26</sup> *Supra* n. 1, at 295–396.

<sup>27</sup> Art. 5.

<sup>28</sup> Art. 6 (b).

<sup>29</sup> Art. 9.

<sup>30</sup> Art. 12.

<sup>31</sup> Art. 8.

<sup>32</sup> Art. 35.

<sup>33</sup> Art. 7.

<sup>34</sup> Arts. 17–20.

<sup>35</sup> Art. 24(1).

<sup>36</sup> Art. 24(2).

<sup>37</sup> Art. 24(3).

<sup>38</sup> Art. 24(4) and 24(5).

<sup>39</sup> Art. 25.

<sup>40</sup> Arts. 26–36.

<sup>41</sup> It requires ratification by 20 States to enter it into force. [*vide* Art. 39].

exercise power and to keep it at any cost even by making their political opponents to “involuntarily disappear” and keeping them “silent forever”, that an act of enforced disappearance is not merely a crime against humanity but it also violates the right to life, liberty and security, and the right not to be subjected to torture of the disappeared person and that they are no more allowed to perpetrate, with impunity, the offence of enforced disappearance.

Authors of the book indeed deserve unreserved appreciation and acclaim for their deep insight into the theme of the book as well as for impressive presentation and inimitable penetrating analysis of the cases on enforced disappearance and of the 2007 UN Convention along with its main legal issues. The book makes interesting and rewarding reading. It is indispensable for those who are concerned with, and sensitive to, the act of enforced disappearance and unfortunate victims thereof.

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Erik André Andersen and Birgit Lindsnaes (eds.), *Towards New Global Strategies: Public Goods and Human Rights*, Martinus Nijhoff Publishers, 2007

Building on a series of public seminars on Global Public Goods and Development held in 2004, this interdisciplinary book seeks “to investigate how we can make the world a better place to live in”, offering a Danish contribution to the debate on global public goods. Accessible and broad in scope, with a palpable sense of the authors’ enthusiasm, it presents “an experiment and an invitation to open discussion”, exploring the relationship between the emerging concept of global public goods and more established human rights norms.

The book comprises five main sections, beginning with a discussion of the concepts from their origins in the European history of philosophy to their contemporary relevance on a global scale. The authors then explore the relevance and significance of this conceptual framework under three main themes of peace

and security, State and citizen and access to information. The fifth section of the book considers four examples of implementation: health, fresh water, the international trade system and private companies’ global responsibilities. The concluding chapter considers the problems and potential of global public goods, and suggests possible means of financing initiatives.

Perhaps most promising and fascinating is the first section, which considers the mutually supporting concepts of public goods and human rights, and identifies the central issues and themes in the debate, particularly the underlying social and political dimensions. Andersen and Lindsnaes point out that, to begin with, “it is in no way determined beforehand which goods are defined as public and which are defined as private . . . goods *per se* should be understood as a *social construction* established by peoples and governments through political action, laws and regulations, and through other actions, both collective and private.”

While the identification of both public goods and human rights is a normative exercise, public goods are primarily defined by economic criteria. Taking the definitions proffered by Paul Samuelson in his 1954 article “The Pure Theory of Public Expenditure”, (helpfully included as an appendix) as well as Inge Kaul’s interpretation and transposition of the concept to a global scale, the authors characterize public goods as non-exclusive and non-competitive things we all have a common interest in having available for public consumption, which are not produced by and subject to market mechanisms. Global public goods include products, resources, services, sets of rules and political systems, with great external significance across borders, dependent upon cooperation and unified action among developed and developing countries to be produced in sufficient quantities.

The description of global public goods as “universal and affecting all countries, people and generations” is reminiscent of human rights discourse, but the universal nature of human rights is inherent in all human beings’ equal dignity, whereas the idea of global public goods stems from the increasing economic activity across national borders and the consequent global public “evils”. The specific analyses thus extend the concept of public

goods to measures to combat public evils, for example curbing corruption. Noting that global public goods such as good governance, peace and stability, trade, information technology, the rule of law and freedom from corruption are not concepts “wholly recognized as discrete rights”, Lindholt and Lindsnaes argue that global public goods, not yet being specified in international norms, are “therefore still open to development and definition as to their application”. The following chapters circumscribe this sense of optimistic possibility somewhat, but the book’s considerable contribution is to raise the potential role of private or corporate actors in contributing to the provision of global public goods as well as the advancement of the related human rights.

Kaul and Mendoza distinguish between three types of global public goods based on their different public manifestations. The first is natural, global shared goods such as the atmosphere and oceans to which access is usually free but may be regulated and restricted to protect resources. The second type comprises human-created shared global goods like networks, international standards, norms and knowledge. While access to such goods as non-commercial knowledge is often free, patents for example limit access. Third, the adoption of global areas of policy may take the form of initiatives to make private goods universally accessible (such as basic education, health and a secure food supply).

The substantive chapters discuss particular public goods of the second and third types, examining each good’s regional and cross-border aspects, its procurement and obstacles thereto, and the financing of the good. The analysis includes specific case studies ranging from the conflict in Bosnia and Herzegovina, Local Committee Courts in Uganda, to the privatization of the water supply in Cochabamba, Bolivia. This exploration results in a range of attitudes towards global public goods: the chapters on health, curbing corruption, the internet and the international trade system view global public goods as a functional concept of constructive and tangible use. Where fresh water and good governance are concerned, the value of global public goods depends on certain preconditions, particularly the formation of political communities and water management

institutions across borders. The global public goods-human rights conceptual framework appears least suited to analyzing or ameliorating the preservation of peace and security and access of socially and economically vulnerable groups to global public goods. For example, Moller illustrates how the normative complexities of “peace” and “stability” make it practically impossible to define them as public goods: peacetime could mean absence of violence but gross inequality, while stability does not necessarily entail distributive justice.

It is a pity that this experiment does not include a discussion on the first type of global public goods, particularly environmental protection, given that the top 10 most urgently needed global public goods named in *Providing Global Public Goods: Managing Globalisation* include “concerted management of the natural global commons to promote their sustainable use”. While environmental protection is not directly identified as a human right in conventions such as the International Covenant on Economic, Social and Cultural Rights, there is no question that it is essential to sustainable development, which in turn is the only model for eradicating poverty and “making the world a better place”. Environmental protection, including regulating pollution and monitoring and preventing climate change, is a classic illustration of the concept of public goods, and its global nature makes it a prime area to examine the procurement of precise public goods in relation to human rights. It would have been an interesting experiment indeed to test what mutual support or fresh perspective the human rights and global dimensions would lend to an established public goods debate, particularly with respect to the obvious obstacles of free-riding and the tragedy of the commons, as well as the incentives that would encourage the procurement of such global public goods.

Nevertheless, this book’s significant contribution lies in establishing the link between public goods and human rights by considering the global dimension of public goods. Lindsnaes points out the strength of public goods theory as a primarily strategic tool; given that economic preconditions play an important role in facilitating human rights, global public goods should be defined not just in economic terms. Coupling the normative discourse of human

rights with economic efficiency arguments (Kaul's global public goods theory involves the idea of preventing evils as an economic persuasion – it is cheaper to prevent than to cure evils like pollution, disease, genocide) renders the cause of eradicating poverty and improving human welfare around the world ever more compelling.

Furthermore, to argue that the poor of the world have a *right* to certain global public goods is to elevate the provision of such goods from economic fact to international obligation. This shifts the focus on States' obligations to a broader moral responsibility arising from the ability of private actors and wealthier nations and international organizations to provide particular goods, such as access to information, the privatization of water management in Bolivia, and more currently, even public schools in New York. Identifying this responsibility to eradicate poverty and prevent hunger and disease articulates the humane aspect of globalization, the duty to provide development aid in reciprocity to trade.

The question of how global public goods can be advanced from a human rights perspective might alternatively be framed as to what extent human rights norms inform the provision of global public goods. While Andersen and Lindsnaes identify the connecting point between human rights and global public goods as the democratic decision-making process, the role for non-governmental actors presents the greatest potential: there is a place for civil society and corporations not only in providing and financing public goods, but perhaps also in overcoming international relations politics transposed to a global scale as successful regional institutional frameworks exemplified in some instances by the European Union.

By identifying which global public goods are best suited to analysis from a human rights perspective, and which human rights can be advanced by the concept of global public goods, this book suggests new strategic tools to combat poverty and inequality. It is an invitation to discussion worth accepting in earnest.

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European Centre for Minority Issues and The European Academy Bozen/Bolzano, *European Yearbook of Minority Issues*, Vol. 5, 2005/2006, (ed.), Martinus Nijhoff Publishers, Leiden/Boston, 2007, pp 647

The *European Yearbook of Minority Issues* (hereinafter the *Yearbook*) is a critical and timely review of contemporary developments about majority-minority relations in Europe. Since 2003, five volumes of the *Yearbook* have been published, overpoweringly enriching the knowledge-bank on this issue. The current volume (Vol. 5) is another collection of outstanding articles relating to the subject. The *Yearbook* is divided into two parts; the first part consists of three sections and the first section consists of six articles dealing with general policy and linkages between ethnic relation and conflict in Europe. The articles in the second section expound on the concept of "nation". The five articles in the third section are analyses of inter-ethnic relationship in the Balkans. The second part of the *Yearbook* consists of international (Section A) and national (Section B) development reports. The articles in Section A are mainly focused on issues affecting Europe as a whole. On the other hand, the articles in Section B elaborate on specific national and regional developments in the Slovak Republic, Hungary, Poland, Catalonia and Belgium. The aptness of the *Yearbook* is brilliantly exemplified by its outstanding contents, analyses, explanations and critical insights on the minority-majority issues in Europe.

Conders, Lubbers and Scheepers in the article on "Resistance to Immigrants and Asylum Seekers . . ." analyze the reasons of the resistance to migration, immigrants and asylum seekers as a dimension of ethnic exclusion (p. 23). On one hand, the resistance is closely linked with national demographic and economic conditions, and on the other hand, it is linked with public mood (p. 6). In short, they have found that the lower the GDP per capita, the stronger the resistance to immigrants. Interestingly, the resistance strongly prevails among the underprivileged and self-employed people, especially among distrustful people, and those overestimating the presence of out-groups in their country and people perceiving a threat (p. 5).

David Smallbone's article "Ethnic Minority Entrepreneurship . . ." highlights how entrepreneurship plays a central role in economic development, and supports the proposition that how ethnic diversity as such is a potential source of competitiveness and entrepreneurship. Furthermore, Smallbone argues that the ability of European economies to be entrepreneurial depends upon their ability to encourage and support entrepreneurship in all sections of society, including ethnic minorities (p. 35). He suggests that an ethnically diverse society is potentially stronger economically than a less diverse one, due to opportunity for potential welfare gains for the population as a whole (p. 36). This perspective might aptly suit the condition of the UK and some other European countries; however, if we look at ethnic conflicts in other parts of the world, we can notice that perhaps they deviate from Smallbone's theory. For example, in Nepal there are more than 60 ethnic groups with repute of recognized entrepreneurship; nevertheless, the economy is exceedingly weak. In addition, the ethnic diversity has hardly turned into competitiveness. With some scepticism, Smallbone concludes that ethnic diversity might be a potential asset for competitiveness. However, before any significant public policy resources are committed to seeking enhancements in this matter, his conclusions must be defended with stronger evidence.

The statement, "We are becoming more unequal by ethnicity" in Nick Johnson's article on "Social inclusion and ethnic minorities from the perspective of UK . . ." may startle the readers. He considers issues like increased immigration and changed dynamics of race and culture as challenges (p. 53). According to his article, equality cannot exist in a segregated society due to the fact that people from such societies focus on what divides them, rather than what unites them. Furthermore, the author strongly argues that diversity should lead to equality, and true equality in a diverse society depends on successful integration (p. 54). The author further elaborates on the difficulties of a multicultural society associated with integration. Integration is not a concept of assimilation but a concept of citizenship, based on core values of equality, democracy and freedom. The author emphasizes that when a con-

flict arises between cultural/ethnic values and legally defined core values, the latter values must win for integration of diversity and multiculturalism. The author also explains that in a society of multicultural, integrated and citizenry values gaining access to a service, acquiring a job or achieving educational success is unrelated to an individual's race or other ethnic characteristics; instead, it is related to his/her talent, ambition and desire (p. 55). The concept of multiculturalism, integration and citizenry values is not important only to the UK but equally valid and important to other societies that are grappling with managing multiculturalism. According to the author, the best and the fairest society is the one in which people share experiences and common ambitions, regardless of their racial, religious or cultural backgrounds. In essence, everyone is expected to reassert the need for a society based on solidarity in which everyone's life chances are unaffected by their birth; this is what true integration should mean (p. 66).

Kristin Henrard's article on ethnic policing analyzes the 2006 recommendations of the High Commissioner in National Minorities that was established by the *Organization for Security and Cooperation in Europe* (OSCE) with a view to helping prevent ethnic conflicts largely in reaction to the situation in the former Yugoslavia, which some feared would be repeated elsewhere in Europe. According to the author the policing recommendations were strikingly different from the previous ones, especially about the meaning of the concept of "national minority". The term "national minorities" encompasses a wide range of minority groups, including religious, linguistic and cultural as well as ethnic minorities (p. 85). The author assesses the shift of the focus of the policing recommendations from the earlier ones mainly on integration rather than promotion of a separate identity of the minority (p. 86). A broader social integration of minorities enhancing their feeling of belongingness with opportunity in police service would be one of the tools of integration (p. 88). The idea of "engaging with ethnic communities" takes up the theme of integration again and acknowledges the importance of symbolism attached to having mechanisms in place to ensure communication and cooperation with minorities

(p 89). On the whole, the outstanding merit of the policing recommendations lies in its focus on respect of differences with inclusion of minorities into mainstream society rather than promotion of a minority identity (p. 97).

In another article titled "Complexities of conflict prevention and resolution in the post-soviet space . . ." Olga Kamenchuk analyzes ethnic conflict exposed in different shapes and forms in Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Ukraine, Uzbekistan and Tajikistan. One of the sources of the complexities for prevention of the conflict was associated with the overriding tendency to choosing between "Wider Russia" and "Wider Europe", coupled with Russian initiated reintegration plan versus the Western orientation. For example, Moldova moving towards the path of pro-Western orientation denied autonomy to Transdnestriant, despite an overwhelming decision in frequent referendums to be integrated with Russia (pp. 104–105). Similar to the conflict between Moldova and Transdnestriant, the reasons for conflict between Georgia and South Ossetia were also fraught with language and integration issues. In most of those countries, after getting independence from the former USSR, a surge encapsulated in autonomy resulted in ethnic intolerance, violence and armed conflict further aggravated by the presence of Russia, the EU and the US. Kamenchuk's article analyzes ethnic conflicts in Europe which offer beneficial lessons to other nations that are struggling to manage ethnic relations, in particular identity issues.

Jorgen Kibal's article, "Sustainable Peace and Cooperation in Borderlands: The Danish-German Bonn-Copenhagen Declarations 1955–2005", examines how the German government dealt with Dutch minorities holding German citizenship. It also looks at how Denmark coped with German minorities holding Dutch citizenship and residing in Denmark. Denmark and Germany had entered into a peace agreement (Declarations) in 1955 on managing minorities. The Declarations were derived from a decade of tension, uncertainty and conflict in the Danish-German border regions, characterized by the temporary mass-mobilization and separatist aspirations of the Danish minority in Germany and the process of legal reckoning towards the German minority

in Denmark following disloyalty and collaboration during Germany's occupation of Denmark during the Second World War (p. 119). With a view to resolving the conflict, the Declarations had guaranteed 12 different rights of the minorities. The Declarations were founded on three main principles – civic rights and responsibilities, equality, and non-discrimination between majority and minority (p. 126). Both Denmark and Germany have successfully managed the acute and inflated problems by agreeing on the terms of minority policy that the minorities had no free scope for creating conflict. But the success had no linear process. It has been accompanied by both the positive development and enhancement of the frameworks in one hand, and on the other hand it has come with occasional and temporary setbacks, friction, irritation and even frustrations in the coexistence between minority and majority (p. 125). Nevertheless, it took almost 50 years for the minorities to have a political participation at local and regional level following the revision of the Declarations in 2005 (pp. 133–34). Although the spirit and positive intentions of the Bonn-Copenhagen Declarations were challenged in 2005, the symbolic and actual importance of the Declarations did not suffer harm. Indeed the Declarations served as a term of reference, even a code of conduct, when both minorities and national governments, in spite of the sometimes heated public discourse, underlined the status and equal rights of the national minorities. In this respect, the Declarations of 1955 were strengthened by the public discourse, not because of the national media in both Denmark and Germany, but also because foreign media actually discovered the Declarations and the virtues of sustainable minority regulations. Furthermore, it is clearly known that minority regulations and sustainable regimes should be constantly maintained (p. 140).

The concept of "nation" is topically important in the context of the adoption of Recommendation 1735 by the Parliamentary Assembly of the Council of Europe. Three articles have critically analyzed the debate between the cultural or ethnic nation, on the one hand, and the civic nation on the other.

Professor Joseph Marko in his article on "The Concept of Nation" points out that the

fall of communism in Central and Eastern Europe followed by a revival of the nationality question caused the Constitution to define the terms “nation” and or “national” or “ethnic minorities”. But the definitions did not coincide with each other (p. 143). In this context, Recommendation 1735 provides some normative guidance. First, it observes minority issues in the context of the general trend of the evolution of nation-State from ethnic or ethnocentric State into a civic State, and from a civic State into a multicultural State, where individual rights of each citizen are guaranteed and also both collective and individual rights of ethnic communities and their members are guaranteed. Second, organization of territory and administration of a State on an ethnic basis are denied with an exception of affirmative rights and measures. Third, governments are encouraged to integrate all citizens irrespective of ethnic or cultural backgrounds into a civic and multicultural entity stopping defining and organizing exclusively as ethnic or civic States (p. 144). However, on the question of providing a clear definition of the term (concept) “minority”, according to the author, different stakeholders including High Commissioner on National Minorities have either failed or declined. Nevertheless, in most of the cases, laws have often offered a definition of the term but due to dogmatic approach legal definitions have invariably failed. It is not because of difficulty in defining “object” but because of the difficulty in defining who has legal standing before a court and what sort of claim would be possible. In fact, the foremost character of a right is that it is enforceable, therefore no unenforceable claim can be treated as a right. In this context, according to the author, for the protection of ethnic rights it is very important to deconstruct the dichotomy between individual and collective rights (pp. 145–46).

Bogdan Aurescu has forcefully analyzed the concept of “Cultural Nation versus Civic Nation” in light of the path of development and understanding of the concept “nation” in Europe. According to the author two major approaches have shaped the concept of nation in Europe. One of the dominating approaches is linked with the idea of French Revolution that flourished civic/political nation, which believes that all citizens in a State are equal and form a

single indivisible nation irrespective of culture, religion, origin, language or other primordial identities transforming the idea of nation and nationality into citizen and citizenship (p. 148). On the other hand, the equally influential idea of “nation” resulted from German political doctrine in an attempt of critical reaction to the French Revolution, which explains nation in terms of cultural and or ethnic origins. For this a nation is a collective entity with a specific language, culture and specific traditions (p. 149). In the history of European States these two concepts have heavily influenced the whole nation-building process. According to the author Recommendation 1735 has made an effort to make a compromise between these two concepts. Doing this, the Recommendation has succeeded in clarifying some aspects of the debate on nation but has also caused confusion on some important ideas (p. 153). The Recommendation clarifies that a nation State in its cultural understanding becomes a subject of law only if it organizes itself as a State which is internationally recognized. Further, it reinforces that minorities or ethnic rights are not territorial rights or connected to territory and therefore they cannot be legal subject having authority to enter into contract or covenants (p. 153). The Recommendation has not given any specific definition of the concept of “nation” but the author thinks that the real issue behind the debate about a possible twenty-first century concept of nation is not the definition itself. Besides, to certain extent the Recommendation has recognized the collective rights of minorities that the author considers as one of the problems of the Recommendation (p. 154). Furthermore, subscribing the idea of the Venice Commission the author emphasizes that there is no internationally accepted model of cultural autonomy for national minorities because international standards and principles are somewhat missing in this matter. Based on these propositions, the author comes to the conclusion that territorial autonomy cannot be permitted on an ethnic basis (p. 155). One of the most important innovation of the Recommendation is that it asks all the Member States to bring their Constitutions into contemporary European democratic standards by integrating citizens irrespective of their ethno-cultural backgrounds within a civic and multicultural

entity and to stop defining and organizing themselves as exclusively ethnic or exclusively civic States (p. 157). The author forcefully argues that once the modern theories regarding minority protection appeared, along with the trend of consolidation of the culture of respect and social, ethnic and cultural tolerance for each other, these civic nations naturally become multicultural. Of course, multiculturalism is a positive tendency, because it allows coexistence of identities – the identity of majority with the identity of minority and the identities of minorities amongst themselves. It also allows for the preservation of these identities; it works against their dilution, assimilation or disappearance. In comparison with the pure civism of nation-States, multiculturalism is certainly a progress. But in no way can it constitute the final goal or point of progress. The simple coexistence of various identities cannot be satisfactory in and of itself. The author thinks that the true finality is interculturalism, the result of complex interaction between the culture of the majority and that of the minority, which enrich each other. The separate cultural diversity may be an interesting theoretical concept, but is practically impossible and socially undesirable. Those cultures that isolate themselves cannot progress at all (pp. 157–58). In short, it can be observed that whatever the words – either “multiculturalism” and or “interculturalism” is used – above all the most important issue is to achieve a goal of harmony, coexistence and respect between majority and minority upholding the fundamental values of justice, civic culture and democracy.

Tove H. Malloy, analyzing the historical development of the concept of nation in the article on “Deconstructing the Nation for the 21st Century . . .” describes that in the eighteenth and nineteenth centuries the concept of nation was used as a principle to unite large populations around socio-political goals. In the twentieth century, the concept of nation is metamorphosed into a view of liberal ideology of democratization based on universal values such as human rights. As a result, in this supposedly global view, the concept of nation has become coterminous with the State (p. 162). The author says defining the concept of “nation” is difficult because it is a very dynamic idea like a daily plebiscite. Nevertheless, it is an idea by

which we construct and reconstruct our society, debating and contesting as a process. In this context, PACE studied the legal texts of 35 Member States and heard academic experts in the field before concluding that it was virtually impossible to arrive at a common definition of the concept of “nation”. This was specifically due to varied usages of the word, the problem of translation of the concept, and variation in theoretical and philosophical compositions (p. 164). On the whole, Recommendation 1735 of 2006 analyzes the process of nation building either in terms of civic notion of liberal democracy based on self-determination or in terms of a linguistic notion of patriotic community (p. 165). The author further provides that the civic notion of nation building is a concept of self-determination represented in the American and French revolutions whereas the linguistic notion of nation building is inspired by the idea of German nation building. The German language was thus the cultural force that legitimized statehood, and hence the cultural force that legitimized statehood and what the PACE terms the two traditional definitions of the concept of the nation, the French and the German, or the civic and the cultural, existed side by side for two centuries. Today these two conceptions of the nation are seen as developing from a purely ethnic or ethnocentric State transforming into a civic State which develops into a purely civic State in order to transform eventually into a multicultural State in which specific rights are recognized for individuals and groups. The civic notion of the nation is, furthermore, a legal concept because it is the social basis for the State, and it is given rather than constructed, because the State is given (p. 165). The author further examines that today the German notion of nation is erroneously contributing to the picture of cultural nation as a negative notion, with the notion of culture based on ethnicity rather than civic values (p. 169). The author argues that multiculturalism is not a justice concept because it conflicts with the aspirations of national minorities who claim a right to political autonomy resulting into segregation. In this scenario, the author suggests interculturalism as an alternative for inter-group relations in societies where minority groups live together but do not wish to be integrated (p. 173). In short, Recommendation 1735 provides that

national minorities do not constitute nation because they are not State (p. 174).

Five articles with special focus on the Balkan region analyze minority issues in the region. When Socialist Federal Republic of Yugoslavia (SFRY) dissolved into six different States (Bosnia and Herzegovina, Croatia, Kosovo, Montenegro, Serbia and Slovenia) post-1990, this period was engulfed by violence and instability. For this Dmitriy I. Polyvyanny points out three important factors – the relation between State and minority as a “zero-sum game”, minorities’ disloyalty to their State, and treatment of minorities in terms of national security (p. 192). In the beginning of 1992, Bosnia and Herzegovina got their independence from SFRY. Following independence, ethnic conflict and violence erupted in the region leading to war, crimes against humanity and genocide. In short, the transition progressed into ethnocracy instead of democracy (p. 196). Dino Abazovic, in his article on “Bosnia and Herzegovina . . .” states that the post-war condition closely resembles the pre-war period and is still witnessing the endurance of three key political, administrative, economic and cultural centres that reveal incompatibility of the current framework of institutionalizing ethnic differences. Thus Sarajevo, Banja Luka and Mostar – the three centres – are decidedly active, independent of one another and aspiring in their own specific way to be the paradigm for the potential evolution of the situation towards a final solution of the so-called Bosnian problem (p. 197). The author further states that the 1995 involvement of the international community in Bosnia-Herzegovina with the Dayton Peace Agreement (DPA) is largely coupled with uncritical application and poor understanding of the DPA (p. 206). The author subscribes that incorporation of the European values as the values of Bosnia and Herzegovina might be a solution to the ethnic problems. In other words, broader or holistic values might provide a recipe to local problems including ethnic ones.

Joseph Marko’s article on “Constitutional Reform in Bosnia and Herzegovina (BiH) 2005–06” evaluates the reasons for the failure of ethnocentric constitution of BiH. When the Dayton Peace Agreement (DPA) concluded in 1995, initiated by NATO allied force led by the US, had also provided HiB constitution in its

Annex-IV. There were many important issues regarding the legal system and hierarchy of laws, nevertheless more interesting was the system of governance. HiB itself was divided into 10 cantons (States). The constitution of HiB was a federal constitution and all other cantons were eligible to adopt their own constitutions. Cantons were delineated on the basis of ethnicity. At the federal level, governance decisions had to be taken by consensus of three major ethnic representatives – Serbs, Croats and Bosniaks. Any ethnic group could block the decision by casting a negative vote. In this context, the author says that the entire constitutional framework was written primarily as an instrument to stop the war, and not as a foundation for the creation of a functioning State (p. 208). All State institutions, including the Presidency, the House of People and Council of Ministers plus the Constitutional Court were established on an ethnic basis. Moreover, the Constitutional Court was composed of six ethnically elected judges and three nominated foreign judges. This institutional structure based on an ethnic citadel easily started to disintegrate and, as a result, the BiH stood as a weak and “failing State” in the heart of Europe (p. 213). After 10 years of experimentation, both the domestic stakeholders and experts, and the international community, came to realize that either the DPA had to be revised thoroughly or had to be formed as a Dayton II Agreement (p. 121). Once again, the US-led reform initiative, with the support of the EU, brokered a reform package with the leaders of the six major political parties in the Bosnian parliament. The package was tabled before parliament for voting in April 2006 but it failed by two votes (p. 213). At present, the international agencies are trying for incremental reform but the local experts are in favour of major changes in the existing institutional structure for a centrally more effective State.

In another article on Kosovo, author Joseph Marko analyzes the ethnic conflict between the Kosovo Albanian community and the Kosovo Serb community. Kosovo is one of the prominent examples of ethnic conflict between Serbs and Albanian communities. During SFRY rule Kosovo continuously demanded to be the seventh republic but the demand was suppressed. When SFRY was dissolved into six

different States, Kosovo belonged to Serbia. Kosovo resisted and denied it was a part of Serbia. Two major ethnic communities in Kosovo, the Albanian majority and Serb minority, engaged in an ethnic conflict. The Albanian ethnic majority wanted Kosovo to be a separate State. The conflict between the Albanian and Serb communities plunged into its nadir. Serbs were expelled from Kosovo. But when Milosevic came to power in Serbia, the autonomous status of Kosovo was not only completely denied but his government started ethnic cleansing of the Albanian community. Led by the US, NATO forces bombed Serbia and Kosovo in 1999 for 79 days, and Milosevic was defeated. Consequently, the UN Security Council, by Resolution 1244, established the United Nations Mission in Kosovo (UNMIK) and took interim administration of Kosovo into its hands until the status of Kosovo was determined. When the status talks failed by the end of 2006, Kosovo once again was unilaterally declared as an integral part of Serbia by the Kostunica government. Marko analyzes that the ethnic conflict in Kosovo as an aftermath of a precarious nation-building process in a severely divided society, where the civic concept of nation was almost alien, left the entire economy in a shambles (p. 241).

Florian Bieber explores majority-minority issues in Serbia as a troubled issue, mainly because of an unconsolidated democracy with anti-democratic and anti-reform feelings. The author further discusses that State-building in Serbia from symbolic acts such as adopting a new flag and hymn to the new constitution was imposed from outside, be it the referendum on independence for Montenegro or the status of Kosovo. The author comes to the conclusion that the Serbia that is emerging from this process, without a union with Montenegro and probably without Kosovo, is not Serbia (p. 243).

Along with these thought-provoking articles that provide deep analyses and explanations for the majority-minority issues and ethnic relationship in Europe, Part III of the volume extensively discusses the development of international law in the European context and national developments in the Slovak Republic, Hungary, Poland, Catalonia, Belgium and Ukraine.

In conclusion, this book is precisely linked

with the majority-minority issues of Europe. Regrettably, it does not provide a comparative analysis of the majority-minority issues in Europe in reference to the development of international law and other relevant global experiences. Nevertheless, this volume is an indispensable reference and an enlightening guide, not only to European countries, but also to all countries across the globe grappling with managing ethnic issues in a multicultural society. Additionally, this book is an invaluable knowledge bank and can truly benefit anyone interested in ethnic issues: scholars, political leaders, policy makers, lawyers, judges, civil society organizations, ethnic organizations, researchers and students. In brief, for societies that aspire for efficient management of minority or ethnic issues in today's world rife with cultural and ethnic conflicts, this book is a valuable source of lessons from European experiences, benchmarks and contemporary developments.

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Armin von Bogdandy and Rudiger Wolfrum (eds.), *Max Planck Yearbook of United Nations Law*, Vol. 11, Martinus Nijhoff Publishers, Leiden/Boston, 2007, pp xix + 491

*Max Planck Yearbook of United Nations Law*, with its previous 10 volumes, has secured a well-earned place among the prominent International Law Yearbooks of today. The reviewer is glad to note that the eleventh volume has not disappointed scholars of international law.

The *Yearbook* under review comprises nine essays, four selected papers presented at a Max Planck Expert Seminar on "How to Speed up Implementation of the Right to Adequate Food at the international Level?", an LLM Thesis and two book reviews. The Max Planck Conference Papers on the Right to Adequate Food are extremely important, particularly from the viewpoint of the developing countries, but they deserve not just a brief mention but an elaborate comment, which the reviewer shall not attempt at this juncture.

The nine essays included in the *Yearbook*

are on diverse themes – the NAM and the reform of international relations, the recent sessions of the International Seabed Authority, the “Second” Lebanon War and the rule of proportionality, Standards of review of the acts of the Security Council, the UN and information society, Conference of parties to the Biodiversity Convention, Islam and origins of Hawala, and the Rome Conference on the Rule of Law in Afghanistan. Of these, the reviewer would, in the interests of space, select three for purposes of review – those on the NAM, the “Second” Lebanon war and the review of acts of the Security Council.

## I

Professor Hennie Strydom’s “The Non-Aligned Movement and the Reform of International Relations” is an extensive review of the NAM as it stands today. The relevance of NAM has been the focus of a continuing debate in India, since 1990, reflecting a clash of ideas and ideologies between protagonists and critics of NAM – one finds it rather surprising that Strydom has totally ignored the relevance of this debate taking place in one of the founding “fathers” of the Movement.

To understand and appreciate the undercurrents of any international groupings of States, one needs to have a sociological perception of the international society and the centrifugal and centripetal forces at work at any point in time (as is the case with a pluralistic national society as well). All grouping is issue-based. And so has been the NAM. The NAM has never been a formal “organization”, it has been a common platform shared by States for certain purposes. It is a broad foreign policy stance, and, as a policy stance, it must change in its nuances as it responds to changing international milieu. It is true that the members of the “original” NAM, as a movement in international relations, highlighted non-entanglement with military alliances and power blocs of the cold war era, and a strong advocacy of decolonization (in the context of salt-water colonialism). It is wrong to say that as it has been groping for a rationale for its continued existence past 1990, it has *now* turned towards international economic issues. By the mid-

1960s NAM had already assumed a strident manifestation of confrontation on international economic issues – and hence the call for a New International Economic Order and the Charter of Economic Rights and Duties of 1974, and the Decades of International Development (whereby the developed States initially pledged 2% of their GNP and later 0.7% for international developmental aid). One could argue whether this “trade unionism” was desirable in the long run. But NAM always had an economic agenda, and it did not adopt it only after 1990 – in fact to a hardcore Nehruvian, one is only saddened by the patent lack of unanimity today among the developing countries on many international economic issues such as those stemming from processes of globalization and liberalization that have broadened and strengthened the “sovereignties” of a few economically powerful States and correspondingly weakened those of the many developing countries. In this context, it is meaningless to talk of how much sovereignty a country should have to have a say in international relations.

On the plank of human rights, pray, which country is fully human rights compliant? Have a look at Amnesty International’s Reports.

Relating a country’s foreign policy statements with its performance on the ground and highlighting the hiatus is an old easy technique to discredit it. Professor Strydom has shown technical perfection in this art to discredit NAM countries and NAM’s relevance today. In fact, Judge (then Professor) Sir Kenneth Keith performed a far better, and technically superb, job in his critique of Asian States in *Australian Year Book of International Law 1966* – one does not come across any reference in this essay under review.

The major contribution of NAM to international relations has been chiefly normative – it introduced a new orientation to the perception of international problems and underscored multilateralism – not the “collective unilateralism” of the type we have witnessed since 1990 – as we search for solutions.

## II

Professor Andreas Zimmermann’s comprehensive study of “The Second Lebanon War” is

well researched and quite enlightening. It highlights the international community's concern for respect for International Humanitarian Law, so well underscored in the concluding part of the essay. But one is bewildered by the term "Second Lebanon War." When was the first? What about more than half a dozen wars/crises that intervened? Be that as it may, Professor Zimmermann must be congratulated for his elaborate analysis of a wide variety of issues – justifications for use of force, defining "armed attack", attribution of acts of Hezbollah to Lebanon, and several issues of IHL. There is one area that should invite further study. Given the context of the "Second War", what could Lebanon have possibly done to assert its jurisdiction and control over the strife-torn part of its territory, and perhaps to protect itself from the *Corfu Channel* dictum – that every State shall ensure that its territory shall not be used to the detriment of other States? Would its conduct amount to acquiescence to Hezbollah actions? Or could the principle of self-determination apply in aid of Lebanon's conduct?

### III

Professor Alexander Orakhelashvili's legal analysis of the Acts of the Security Council makes interesting reading. He divides his essay into six parts – the general framework of the Security Council's interface (one is uncomfortable with the word "interference") with international law, the impact of Article 103 of the UN Charter, interpretation of Security Council's resolutions, standards of review of the Security Council's resolutions, remedies and conclusions.

The issue of legality of the Security Council's resolutions has arisen in the past in a wide variety of political contexts. These include the cold war contexts (Admission cases, Korea), the Suez Canal crisis, and the Namibia case. In the context of the Suez Canal crisis, Egypt clearly went on record to the effect that the Security Council decisions would be binding under Article 25 of the Charter, only if they were in accordance with the Charter. However, the issue has come in sharper relief after the cold war ended in 1990. This is understandable, because

during the Cold War the Security Council could rarely be used in furtherance of the interests of a super power, but after the Cold War things changed.

Is the Security Council constitutionally empowered to legislate international law? One would argue that though Article 24 of the UN Charter very broadly refers to the purposes of the Charter, Article 39 clothes the Council with a rather limited competence – evaluation of whether a situation amounts to a threat to peace, breach of peace or act of aggression and taking action in respect of it. None of the ensuing provisions in Chapter VII confers upon the Council legislative or judicial powers. The *travaux préparatoires* of the Charter manifest the intention of the makers of the Charter not to empower any one organ with any clear mandate to make international law. Reading Articles 24, 48 and 103 together, one could cleverly argue that the "law" being made by the Security Council would only be the "internal" law, just to be confined to the members of the organization. If it is "internal" law of the organization, it would still have to be in conformity with the provisions of the treaty, *i.e.* the Charter and the Council's *vires* will be questioned. This reviewer is one of the few who would question the *vires* of the Security Council decision establishing the Yugoslavia Tribunal. If it is "outside" the treaty, the Security Council's "law" should be tested by the rules of *jus cogens*, as Professor Orakhelashvili rightly points out.

The learned professor also discusses the relationship between the Security Council's decisions and the European regional law. While trying to locate *jus cogens* among human rights he rightly suggests that Article 4(2) of ICCPR should hold the key – although one may find divergences in State practice. The Indian Supreme Court has, in a series of trend-setting rulings since 1977, found the right to equality and the right to life and personal liberty to be the bedrocks of most fundamental human rights. Could these two precepts then be deemed *jus cogens* of human rights?

### IV

Volume 11 of the *Max Planck Yearbook of United Nations*, like its predecessors, is indeed a

most welcome addition to the modern literature in International law.

While many of the essays and papers brought together in this tome are erudite and well reasoned, what strikes the reviewer most is the intellectual eclecticism of most authors in selection and analysis of almost exclusively Western source materials, particularly Western writings, *to the exclusion of non-Western*. He would therefore through this review register his strong protest to this growing trend in Western literature to ignore Asian contributions to the jurisprudence of International Law, even when they happen to be in the English language. The assumption that intellectual excellence is the monopoly of the West should not go unchallenged.

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L.G. Louciades, *The European Convention on Human Rights*, Nijhoff, Boston, 2007, pp 273

It is without doubt that the Strasbourg organs, specially the European Court on Human Rights, have trail-blazed human rights discourse and given a strong “*elan*” towards the protection and promotion of human rights not only to the European continent but to the whole world. It is in that context that the author Judge LG Louciade intends to suggest how the European Court can improve to be a better model for the world of human rights. For this purpose, judges have special roles and must be subject to periodic review. He says: “Judges cannot claim to be entitled to special deference that stifles free discussions or strong criticism of their decisions. *They are not infallible* . . . Judges are human and as such have the same shortcomings as everyone else. People should be free to point out what they believe to be mistakes in a judgment and to disagree with the effects, provided they do so in good faith and recognize the binding nature of judicial decisions”.

This emphasis on the fallibility of judges is a commendable perspective upon which to review the performance of the Strasbourg organ. Hence, one must be constantly vigilant

in accepting common European human rights standards set out by the Court.

This book is a collection of essays, and not a thesis or a text book. Hence, while there is a common focus, namely the European Convention on Human Rights and the role of the Court, the selected topics are multifaceted. Thus our review is premised on the disparate nature of the topics. Doubtless, the editor has chosen a practical approach rather than one of a pure speculative abstraction. Each chapter provides a summary of the legal arguments. This is a good pedagogical tool.

Chapter 1 – Rules of Interpretation of the European Convention of Human Rights: The choice of the very topic shows the author’s intent of practicality. The primary function of a court is interpreting the source documents. He dwells on the outlook the Court had and continues to have, namely “to give effective enforcement to protection of individual rights” (p. 5). In the light of this overarching objective, the Court has resorted to the general principle of interpretation as provided in Article 31 of the Vienna Convention on Treaties.

To elucidate the Court’s philosophy, the author has rightly dwelt on the landmark case, *Golder v. UK*. While involving international law principles, the Court has not always adhered strictly to the rules of interpretation, where they conflict with the common European Standard, which essentially link up with “ideals and values of a democratic society” (p. 9). Thus the Court refused to accept the permissible limits of reservations as found in the Vienna Convention. Similarly, to maintain this common European standard, the Court, while looking at the national laws of Member States, stands its own ground while allowing a “margin of appreciation” to the States (p. 12).

One other attitude the Court adopted in interpreting the Convention was to consider it as the “living instrument”. Thus, the Court considers both the relatives balanced by the absolutes (p. 14).

Chapter 2 – Continuing Violation of Human Rights: For the purpose of the Strasbourg organs, an application must be forwarded within six months although this limitation *ratione tempore* does not apply to continuing, as opposed to instantaneous, violations such as causing death, injury or destroying

property. To the first category belongs illegal possession of weapons, illegal detention or retention of stolen property.

Although, superficially, the instantaneous acts are distinguishable from continuing violation, in reality it is not that simple. The complexities were visible in the *De Becker* case (p. 23). The applicant was convicted for treason in 1944 (long before the Convention came into force). His death sentence was commuted to life imprisonment subject to further abridgment of certain Convention rights such as freedom of expression. The Commission found that this is “continuing violation”. This case was distinguished in *X v. Belgium* (p. 24). In the former, the Court found that forfeitures resulting from a judicial decision were discretionary and not systemic and linked up with legislation did not amount to a continuing violation. The Court also found that a wife who is deprived of visiting her husband resulting from expulsion is faced with a continuing violation (*X v. Switzerland* p. 26). Having dealt with *de jure* confiscation of property following a person’s conviction as an instantaneous act, the author traverses the uncertainty surrounding *de facto* expropriation, whether it is a continuing violation or not (pp. 28–29). These uncertainties in interpreting “continuing violation” is smoothed out by the author in concluding: “. . . for a violation to be continuous . . . it is necessary that the interference subsists as a result of continuing operation of the initial act or the maintenance of its effects through relevant involvement or conduct of the State” (p. 30).

Chapter 3 – Dealing with Rule of Law and Human Rights with Special Reference to Jurisprudence of the ECHR: The author wrests with immutable principles of justice and equity as proposed by the great philosophers such as Aristotle and Solon. He discusses the Diceyan model of the Rule of Law and how this principle has been treated in Strasbourg jurisprudence. The author recalls *Golder v. UK* (p. 38) where the courts found that while article 6(1) of the Convention provided for fair trial, this could not be achieved without having “access to lawyers (p. 39). As the rule of law bears a close affinity to democracy, it required the bridling of dictatorial regimes (p. 42). Wire-tapping was identified as an instance of the violation of the rule of law (*Malone v. UK*

p. 43). At all times rule of law is threatened by retrospective criminal legislation and to a certain extent in the case of civil retrospective legislation (*Stran Greek Refineries* case, p. 45). Other violations of the rule of law relate to a wide array of rights, including freedom of speech, the presumption of innocence and freedom from inhumane treatment. The chapter remarkably concludes that the rule of law is not purely procedural (in the Diceyan sense) but substantive as well: “. . . Rule of law . . . is based on the recognition and full acceptance of the supreme value of the human personality.”

Chapter 4 – Prohibition of Discrimination under Protocol 12 of European Convention on Human Rights: Although non-discrimination has received universal acceptance as a human right, the European Convention on Human Rights (ECHR) did not provide for a free-standing right until the adoption 12th Protocol to the ECHR on 26 June 2000. Article 14 of the Convention forbade discrimination only to the extent that such treatment deprived an individual of enjoying rights guaranteed under the Convention. The zest towards this free-standing right was spearheaded by the interest generated in Europe against discrimination of women and people of different races.

The 12th Protocol makes provision for positive discrimination (or reverse discrimination) so that past culpability of discrimination may be obviated by specialized treatment of the marginalized. What is commendable in the 12th Protocol is that positive discrimination applies not only to civil and political rights but to economic and social rights as well (p. 60). This facilitates healthy economic standards across the board of society at large and also improves the enjoyment of welfare benefits. Article 1 of the 12th Protocol provides for protection to the individuals against direct and indirect discriminations and *de jure* (unjustified laws), as well as *de facto* (through circular jurisdiction) violations. Interpreting the 12th Protocol, the Court is guided by the jurisprudence of Article 14 of the Convention as well as of other countries such as the US. The basic principle in non-discrimination is that “likes must be treated likely, dislikes must be treated unlikely”. To do the contrary would require a rational or reasonable justification. For instance in *Canea Catholic Church v. Greece* (p. 64), to treat the

applicant differently from the Orthodox Church or Jewish community was found to be discriminatory since there is no rational or reasonable justification. Discrimination may result in degrading treatment (*Cyprus v. Turkey* – p. 65). The Protocol confined itself to discrimination as set out in the existing international convention, such as that dealing with discrimination based on sex, race, colour and religion and so on, leaving out additional grounds (such as disabilities, sexual orientations and age) within its scope.

The Protocol protects individuals from discrimination by public authorities. Hence discrimination caused by private individuals is not caught up within the new regime. Selective justice does not always violate the Protocol 12. The author sees certain anomalies in these two situations. The chapter concludes in underscoring two primary points: first, under the Protocol, the rule of the Court could grant in the case of a violation only in providing compensation and not suggesting law reforms; second, since non-discrimination is an evolving concept, the number of those who seek relief under this provision is increasing. The court should devise a mechanism to meet the exploding number of applications.

Chapter 5 – Determining the Extra-Territorial Effects of the European Convention: Facts, Jurisprudence and *Bankovic* Case: In the *Bankovic* case (p. 80) the European Court found the NATO forces which bombed Kosovo (then part of Federal Republic of Yugoslavia) were outside the territorial jurisdiction of the European Court, although the NATO forces were manned by Convention States.

This decision drew serious criticisms. The author, who agrees with critics of the *Bankovic* decision, says that in the light of the object and purpose clause in Article 31 of the Vienna Convention on Treaties, the court seems to have forgotten the *raison d'etre* of the European Convention on Human Rights, whose purpose was the prevention of State oppression of individuals (Jews and Gypsies) by Hitler's Germany. Thus what matters in human rights violation is to discern whether the State has violated human rights within or without its territorial jurisdiction. If such violations have taken place, the Court would be seized with competence and jurisdiction, even though the acts

or omissions have taken place outside its/their territory.

The author rightly contends that the Court's view that extra-territorial jurisdiction is exceptional is quite contrary to the spirit of the ECHR and departs from its own previous case law. Lord Sedley, who had to enforce the *Bankovic* case within the UK, observed: "*Bankovic* appears for the present to constitute a road block . . . an obstacle to the solution" (p. 98). The author cites the deficiencies found in the *Bankovic* case and refers to two previous judgments given by the Court itself (*Anandize v. Georgia* and the *Ilascu* case).

In fairness to the author's academic honesty, one finds that he forcefully presents the views of jurists who acknowledged the legitimacy of *Bankovic*, including McGoldrick and Bajele. According to the former, "*Bankovic* was clearly a political case . . . A decision the other way would have raised additional questions . . . and court exercise of review of military actions by individual States or by the NATO . . ."

Chapter 6 – The European Convention on Human Rights and the Rights of Persons with Disabilities: As regards disabled persons, the Convention will take into consideration the special circumstances of such persons to ensure effective enjoyment of their rights. However, whether it would positively discriminate in favour of disabled persons is a moot point.

Since the Convention is a "living instrument" one would observe that *Strasbourg* organs have tended to advance affirmative action or positive discrimination in favour of the disabled. Article 3 (prohibiting torture, inhuman and degrading treatment) benefits were afforded to a severely disabled woman who was detained in a prison. Similarly Article 5 (liberty and security) benefits were construed stringently to protect individuals having psychiatric conditions. In the case of deaf, dumb and/or blind accused, fair trial (Article 6) demands that they be assisted to follow the judicial proceedings.

In very controversial issues relating to euthanasia (mercy killing), the Court, without denying the sanctity and dignity of human life, permitted the husband of a terminally ill wife to disconnect the life support system (*Pretty v. UK*). Under Article 2 of Protocol 1 pertaining to the rights of education, children with dis-

abilities may be taught in regular schools. Those with severe disabilities must be educated in special schools.

Under Article 14 (non-discrimination) a disabled adult, although not a national, was deemed to be eligible for special allowances because of his disability. The Convention contains no free-standing right in favour of disabled persons. However, the *Strasbourg* organs were “particularly sensitive to human problems . . . The Convention cannot . . . solve all problems of disabled persons but it can certainly contribute greatly to their alleviation”.

Chapter 7 – The Judgment of the European Court of Human Rights in the Case of *Cyprus v. Turkey*: The inter-State application by *Cyprus* against *Turkey* in May 2001 is a landmark decision, where the Court for the first time found that a State was liable for grave human rights violations under various Convention provisions to a large number of citizens. The violations amounted to the following: (1) refusing to allow Greek-Cypriots to return to Cyprus as a violation of Article 8 (right to family life); (2) depriving Greek-Cypriots of their right to enjoy their property as a violation of Article 1 of the 1st Protocol; (3) failure on the part of Turkey to investigate the disappearances of Greek-Cypriots in violation of Article 2 (right to life and liberty) and Article 5 (legitimate detention); (4) in respect of item (3) above, the relatives of the remaining persons were denied the right of humane treatment. The first inter-State application of *UK v. Ireland* is only a minor violator when compared with giant *Turkey*.

The background to this application is the continuous political instability that persists in Cyprus. Cypriots of Greek origin and Turkish origin are strange bed-fellows. The UN in Security Council Resolution 541 (1983) ruled that the declaration of independence of *Turkish Republic of Northern Cyprus* (TRNC) was illegal. In 1974, the European Commission on Human Rights found *Turkey* violated Articles 2, 3, 5, 8, 13 and 14 of the Convention and Article 1 of the 1st Protocol. It was only on 22 January 1990 that Turkey acceded to the ECHR and recognized the Court’s competence. It was in this context that the present decision was rendered by the Court in 2001.

The Court’s rulings were directed mainly to Greek-Cypriots living in the Karpas area.

The series of violations of many Convention provisions was found to be administratively master-minded. This violation was found to be directed along ethnic, religious and racial lines. As regards Gypsies in northern Turkey, the Court did not find any systematic grave violations by Turkey, except the legislative practice of authorizing trials of civilians by military tribunals.

On the procedural side, the Court closely followed the 11th Protocol, where the standard of proof is beyond reasonable doubt. At the preliminary stage both the Commission and later the Court found: (1) Turkey is the lawful government and the TRNC is only a domestic entity like any other individual citizen; (2) Turkey *is* responsible if the TRNC or its members violated the Convention rights of other citizens.

Apart from Judge Fuad, who disagreed with all the findings of the majority, there were only a few dissenting voices (Judge Costa, who disagreed that there is a violation on grounds of religious discrimination; and Judge Marcus-Helmons found that there were further violations of Article 2 (right to life), Article 9 and Article 14 (non-discrimination)). Judge Fuad’s dissent went into the heart of Greek-Cypriot politics in asserting that the Court was not the proper forum to address all these issues.

It is our view, while conceding Judge Fuad’s concerns respecting the complexities of long-running historical antipathies, that individuals who are subjected to human rights violations cannot wait until the final resolution of all political disputes. Thus it is our view that the Court has struck a fair balance between politics and law.

Chapter 8 – The Protection of the Right to Property in Occupied Territories: As the author points out in the introduction, the right to property has acquired special importance as a human right, consonant with liberal European human rights theory.

However, the view that people in occupied territories have rights, including the right to property, is a recent development in human rights. The author highlights the “paradoxical” feature that the protection of the right to property in occupied territories is founded in rules of military codes and the principles and laws of war, which restrict the harm the military is

allowed to inflict on civilian property under occupation. The condemnation of destruction and unjustifiable appropriation of property as a war crime has since been accepted as punishable by tribunals including Nuremberg, the International Criminal Tribunal for the former Yugoslavia and now the International Criminal Court. It is interesting that there is no reference to decolonization and withdrawal of occupation from former European territories in Asia, Africa and Latin America in relation to the development of the European jurisprudence.

Protocol 1 of the European Convention on Human Rights provides a legal basis for the protection of a person's right to property along with an effective mechanism for the enforcement of the right. The author highlights that it goes beyond other humanitarian law and international law protections which depend far more upon the political will of States and that it provides a remedy to the victim where international criminal law would provide only for individual criminal responsibility. However, even with this advantage, the actual implementation of the rights continues to be impeded by States in many instances.

In the analysis of the case law under the ECHR, the author focuses on the cases involving Turkey and Cyprus regarding Greek-Cypriots whose property rights were denied by the Turkish occupation of northern Cyprus. Following the Turkish acceptance of the jurisdiction of the ECHR, the Court found that there was and continues to be a breach of the rights under the Convention. In the landmark *Loizidou* case, the Court awarded both pecuniary and non-pecuniary damages to the complainants as well as costs and expenses. But the attitude of Turkey towards the implementation of the decisions of the Court and the non-acceptance of the reports of the Commission are deplored by the author. The author also mentions the continuing rights issues regarding expropriations in the Soviet occupied zone of Germany following the Second World War, which exposes the fact that issues regarding unlawful dispossession may carry on for years, decades, even generations without sufficient redress.

The complication of situations of dispossession due to subsequent possession of these properties by third parties, some of whom are

perhaps also persons displaced due to violence or natural disasters, is also raised, with brief mention of the Pinheiro Principles. This part of the chapter could have been expanded as it raises interesting issues of the balancing of rights of the original property owners and the procedural rights of secondary occupants not to be disposed in violation of their human rights. The position of the ECHR (if any) in this regard is not made clear.

The support provided by principles of international law and the *jus cogens* status of many of these principles, which is supported by many international law jurists, is also discussed by the author, with the chapter ending on a pragmatic yet hopeful note. The author rightly notes that there are "... beautiful rules, excellent judgements, clearly defined human rights, impartial courts ..." but that the actual implementation of rights and effectiveness in facing breaches of the law depends on the attitudes towards international law, justice, rights and dignity of all held by both persons and States.

In the light of continuing violations of the right to property in situations such as the occupied territories of Israel (whose importance is briefly mentioned by the author) and more recently the situation of the US occupation of Iraq, this issue will continue to be a significant one in international law. The jurisprudence of the ECHR will no doubt nourish international law and further strengthen the *jus cogens* standpoint. This article illuminates the main issues in a succinct manner, giving a good understanding of the development of this area of the law. The addition of a discussion of the State response to the ECHR decisions would give the reader a clearer view of the actual (lack of) implementation of the well-developed law with regard to the right to property in occupied territories.

Chapter 9 – Freedom of Expression and the Right to Reputation: Freedom of expression is jealously guarded in democratic societies with both civilian and common law traditions. The US First Amendment guarantees the right. The US case of *New York Times v. Sullivan* (p. 144) held that the common law remedy of libel (defence of truth) is narrowly constructed in favour of the speaker when he is criticizing a public official and more so a political person. It

is malice on the part of the speaker alone that makes him liable for defamation or liable. The media personnel are providing a public service. Hence the common law presumption of defamation does not apply to media personnel. The American case law has adopted a distinction between *facts* and *opinions*. *Truth or falsity of opinions* are not capable of proof and hence enjoy immunity from liability.

There is a tendency to be critical of courts which tend to over-protect the journalist, which was mitigated in *Gertz v. Robert Welch Inc.* (p. 145). The Court was hesitant to allow character assassination. It stated: “*New York Times* undervalues the individual’s interest in reputation. Article 10 of the European Convention protects the individual’s right to expression. Starting from the land mark cases delivered by the European Court” (*Sunday Times* and *Handyside* (p. 150), *Strasbourg* institutions have held that this right may only be abridged if “necessary in a democratic society.”

Chapter 10 – Environmental Protection through the Jurisprudence of the European Convention of Human Rights: In the context of increasing concern with regard to environmental issues, a chapter on the environmental jurisprudence that has emerged from the European Convention on Human Rights is very necessary to this publication. The author points out in the introduction that the environment was not one of the values that were intended to be protected at the time of the drafting of the Convention. This is made clear by the early decisions of the Commission and Court, which had a conservative and narrow view of individual human rights protection and showed an unwillingness to extend existing rights to environmental protection through creative interpretation. But as the interpretation of the Convention evolved according to the changing values and conceptions of European societies, the original reluctance has given way to recognising the importance of the environment and has given birth to decisions where ECHR individual rights afford some protection to the environment, through the legitimate restriction of individual rights in favour of the environment.

The individual rights that have been extended to cover environmental issues include the right to life, the right to respect for private

life and home and the right to property. However, the author points out that complaints under the Convention can be entertained only when a violation has already taken place or when it can be established that there is a real probability or a specific and imminent danger of it taking place. A reference to the precautionary principle in international environmental law could have added value to the discussion at this point.

The author also discusses the approach of the Court with regard to balancing the interests of the individuals and groups affected by environmental damage or pollution and the economic wellbeing of the community as a whole. The outcomes with regard to this balancing are mixed and there have been some steps backwards as well as steps forward. The author notes that there is reluctance on the part of the Court to find “considered governmental policies” and big projects for which the “economic wellbeing of the community” is invoked, incompatible with obligations under the Convention. Yet the author also notes decisions where legislative measures concerning land use that limited private property ownership rights were upheld due to the fact that they were for environmental and ecological protection. A mention of whether the principle of sustainable development has been accepted by the Court would have been helpful for the reader.

The author gives a commendable overview of the environmental jurisprudence under the European Convention on Human Rights, referring to a number of interesting and important cases and analyzing several in some depth. This gives the reader a good understanding of the attitude of the Courts to these issues over a long period as well as enabling the reader to grasp quickly the facts and arguments of the most relevant cases. However, there is no comparative evaluation of developments in international environmental law and in other jurisdictions, so the chapter does not give a reader an understanding of where the European Court is situated internationally in terms of progressive interpretation of individual human rights for the protection of the environment. Furthermore, the connection with principles of international environmental law that have been developed since the

Stockholm Declaration of 1972 and the Rio Declaration of 1992 alongside the case law would have enriched the commentary. Such additional information and analysis would show that the developments in the European context were not happening in isolation and that there is an increasing worldwide interest in the protection of the environment and increasing promotion of the linkage of human rights and environmental issues.

Chapter 11 – Questions of Fair Trial under European Convention on Human Rights: The issues surrounding fair trial being extensive, the author has justifiably treated various aspects of the right to fair trial selectively.

Chapter 12 – The Right of Access to a Court and the Doctrine of Political Acts: In the common law tradition, acts of governments are distinguished as administrative and political. Administrative acts are subjected to judicial review, whereas the latter are not. Unfortunately there is no definition or description of what the political acts are. In almost every country with a written constitution, there is a provision which declares that political acts are not subject to judicial review. The absence of clear definition of political acts endangers the rule of law and a threat to equal protection of citizens under the law. The case is similar in civil law countries. The equivalent of acts of State is *conseil d'état*. The judicial review of *conseil d'état* as distinguished from *actes de gouvernement* is not consistent in the civil law countries.

There was a notable shift of emphasis with the House of Lord's decision in *GCHQ* case (p. 228). Lord Roskill identified certain acts of the government as non justiciable (e.g. treaty making, prerogative of mercy, etc.). Apart from these obvious political acts, others are justiciable.

In the climate of a pattern of governance where more and more in-roads are made into arbitrariness of State activities, there is juristic opinion to the effect that even in foreign relations, there ought to be consistency (p. 232). However, the courts are still wary in making bold decisions to review political acts, as seen in *Ange v. Bush* (in this case the court refrained from challenging the President's decision to deploy forces in the Persian gulf). Dutch courts followed a similar line.

The author rightly contends that political acts of State should not altogether be immune, though a broader leverage could be given to policy matters. But when individuals are affected, for instance by negligent military action, State immunity should cease. The author also contends that immunity should be limited when it concerns "access to justice". Thus the UK decision in *Osman v. UK* is good law.

The European Court had occasion to review the issues surround State immunity in the case of *Markovic v. Italy* (p. 239), where the Court found (10:7) that Article 6 of the Convention (fair trial) was not violated. In this case, the European Court found that the Italian court has justifiably held that the alleged damage emerged from a foreign policy decision which was not justiciable.

The author espousing the minority view, with which we agree, challenges the majority view of the European Court on the premise that conceding absolute immunity to political acts to the extent where individuals' substantial rights are absolutely eroded is dangerous (p. 242).

Chapter 13 – The Right to Return: This chapter deals with the right of refugees and internally displaced persons (IDPs) to return to their homes and properties after their forcible displacement. The author explains the legal provisions applicable to this area and substantiates his arguments using relevant case law authorities and provisions of both international and regional legal instruments. Initially, there were no legal principles formulated in international law on the subject. Therefore, the writer describes some important Resolutions passed by the UN General Assembly and the Security Council calling upon States which were responsible for the displacement of large numbers of people to allow their safe return to home countries and places of habitual residence.

The writer clearly explains several reasons for the delay or for the refusal of some countries to carry out their obligations affirming this right, and describes relevant provisions of some important international and regional instruments, especially the contribution made by the European Convention on Human Rights to the development of the legal principles relating to

the right of return. Significant cases on the theme, *i.e.* those of *Cyprus v. Turkey*, *Dogan and Others v. Turkey*, the *Xenides-Arestis v. Turkey* case are critically examined.

The author devotes much attention to the increase in the efforts for an effective protection of displaced persons and mainly highlights the significance of the Pinheiro Principles in relation to the protection of displaced persons. It would have been better if the writer could have addressed the underlying reasons for the reluctance of the international community to develop any hard law instrument in relation to the right to return of displaced persons. In my opinion, he would have discussed and analyzed the conflict between the sovereignty of States and the significance of the international scrutiny of the status of human rights of people living in those States. However, this is a well-researched work and provides a great amount of information. It includes critical arguments.

### Conclusion

The author, to our knowledge, has accomplished his objective of making those who are interested in promoting a common European standard and making the European Convention on Human Rights a “living instrument” comfortable. His candid criticism of the judgments of the Court are based on sound logic and couched in a sincere tone. This work is a useful guide on European Court standards, which influence the jurisprudence of human rights worldwide.

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SURVEY OF INTERNATIONAL LAW LITERATURE  
PUBLISHED IN 2007  
RELEVANT TO ASIAN AFFAIRS

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Conflict resolution and prevention	International and regional organizations and integration
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Education, research and teaching of international law	Municipal and constitutional law
Environmental, natural resources and development	Religions and law
General	Security and disarmament
	Trade, commerce and investment

**Arbitration**

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