STATE PRACTICE

State Practice of Asian States in the Field of International Law

EDITORIAL NOTE

The Editorial Board has decided to reorganize the format of this section from this issue onwards. Since the Yearbook's inception, state practice has always been reported and written up as country reports. While this format has served us well in the intervening years, we felt that it would make a lot more sense if we reported state practice *thematically*, rather than geographically. This way, readers will have an opportunity to zoom in on a particular topic of interest and get a quick overview of developments within the region. Of course, this reorganization cannot address our lack of coverage in some Asian states. We aim to improve on this in forthcoming volumes and thank the contributors to this section for their tireless and conscientious work.

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Courts and Tribunals

SINGAPORE

FOREIGN JUDGMENT IN PERSONAM – ENFORCEABILITY – RECOGNITION OF FOREIGN JUDGMENT

***Poh Soon Kiat v Desert Palace Inc (trading as Caesars Palace)*; Civil Appeal No 113 of 2008; 8 December 2009; [2010] 1 SLR 1129; [2009] SGCA 60. Chan Sek Keong CJ, Andrew Phang Boon Leong JA and V K Rajah JA**

Facts

The respondent sought to recover a foreign gambling debt of some US\$2 million incurred by the appellant, Poh when gambling at the respondent's Caesars Palace casino in Las Vegas. This was done by a suit filed in the Singapore High Court on the basis of a 2001 judgment of the Superior Court of the State of California for the County of Santa Clara. This judgment set aside a fraudulent transfer of Poh's interest in a piece of property, and ordered that the property be sold to satisfy the judgment debt, and further held Poh liable for any shortfall. The Singapore High Court held that the Californian judgment was enforceable and that Poh had no defence to its enforceability. On appeal, Poh argued that the respondent's claim was time-barred by the Limitation Act (Cap 163, 1996 Rev Ed) and that it was unenforceable as section 5(2) of the Civil Law Act (Cap 43, 1999 Rev Ed) forbade any action to "be brought or maintained in the court for recovering any sum of money or valuable thing alleged to be won upon any wager or which has been deposited in the hands of any person to abide the event on which any wager has been made."

Judgment

THE LAW ON THE ENFORCEABILITY OF FOREIGN JUDGMENTS IN SINGAPORE

We propose to consider, first, ... the question of whether the 2001 California Judgment was a foreign judgment that could be sued upon under Singapore law. The law on the enforceability of foreign judgments in Singapore is not in doubt, and is summarised in, *inter alia*, DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS (Sir Lawrence Collins, ed.), Vol 1, ¶ 14-020

(Sweet & Maxwell, 14th ed., 2006) (hereinafter “DICEY, MORRIS AND COLLINS”) as follows:

For a claim to be brought to enforce a foreign judgment, the judgment must be for a definite sum of money, which expression includes a final order for costs, e.g. in a divorce suit. It must order X, the defendant in the [enforcement] action, to pay to A, the claimant, a definite and actually ascertained sum of money; but if a mere arithmetical calculation is required for the ascertainment of the sum it will be treated as being ascertained; if, however, the judgment orders him to do anything else, e.g. specifically perform a contract, it will not support an action, though it may be *res judicata*. The judgment must further be for a sum other than a sum payable in respect of taxes or the like, or in respect of a fine or other penalty.

An *in personam* final and conclusive foreign judgment rendered by a court of competent jurisdiction, which is also a judgment for a definite sum of money (hereafter called a “foreign money judgment”), is enforceable in Singapore unless:

- (a) it was procured by fraud; or
- (b) its enforcement would be contrary to public policy; or
- (c) the proceedings in which it was obtained were contrary to natural justice.

Thus, in *Hong Pian Tee v Les Placements Germain Gauthier Inc* [2002] 1 SLR(R) 515, this court stated (at [12]):

Quite apart from the arrangements under the RECJA or the [Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed)], it is settled law that a foreign judgment in personam given by a foreign court of competent jurisdiction may be enforced by an action for the amount due under it so long as the foreign judgment is final and conclusive as between the same parties. The foreign judgment is conclusive as to any matter thereby adjudicated upon and cannot be impeached for any error, whether of fact or of law: *Godard v Gray* (1870) LR 6 QB 139. In respect of such an action, an application for summary judgment may be made on the ground that the defendant has no defence to the claim: *Grant v Easton* (1883) 13 QBD 302. The local court will only refrain from enforcing a foreign judgment if it is shown that the plaintiff procured it by fraud, or if its enforcement would be contrary to public policy or if the proceedings in which the judgment was obtained were

opposed to natural justice: see HALSBURY'S LAWS OF ENGLAND vol 8(1) (Butterworths, 4th Ed) (1996 Reissue) paras 1008-1010.

[The Court went on to hold that the Californian judgment of 2001 was not a judgment for a fixed sum of money but was instead intended to set aside a fraudulent transfer in Poh's interest in a property. It did not create a fresh obligation on the part of Poh to pay the balance of his debt to the respondent. As such, an action for the enforcement of the foreign judgment could not be commenced by way of a common law action. Since a common law action to enforce a foreign judgment was in this case an action on an implied debt, it was subject to limitation of six years under section 6(1) (a) of the Limitation Act. The Court further held that that section 5(2) of the Civil Law Act would appear to bar a common law action on a foreign judgment whose underlying cause of action was a gambling debt.]

Criminal Law

PHILIPPINES

OBLIGATIONS RELATING TO CORRUPTION AND TRANSNATIONAL CRIME – INQUIRIES IN AID OF LEGISLATION

***Spouses Pnp Director Eliseo D. Dela Paz (Ret.) Aand Maria Fe C. Dela Paz v. Senate Committee on Foreign Relations and the Senate Sergeant-at-Arms Jose Balajadia, Jr.* [GR No. 184849. 13 February 2009]**

Retired Philippine National Police Director Eliseo D. Dela Paz was found in possession of 150,000 euros in an airport in Moscow. He was apprehended by local authorities at the airport departure area for failure to declare the amount. Together with his delegation, he was detained in Moscow for questioning. They were allowed to return to the Philippines, but the Russian government confiscated the money. Awaiting Dela Paz and his wife were subpoenae issued by the Committee. The authority of the Senate Committee on Foreign Relations to probe the incident was questioned. The Supreme Court held that the Committee has jurisdiction to investigate the matter in aid of legislation.

The Court reasoned, among others, that the matter affects Philippine international obligations. It took judicial notice of the fact that the

Philippines is a state-party to the United Nations Convention Against Corruption and the United Nations Convention Against Transnational Organized Crime. The two conventions contain provisions dealing with the movement of considerable foreign currency across borders.¹ The matter would reflect on the country's compliance with the obligations required under the conventions.

CHILD PORNOGRAPHY

An Act defining and penalizing the crime of Child Pornography, prescribing penalties therefor and for other purposes

Republic Act No. 9775

The Anti-Child Pornography Act was signed into law on 17 November 2009. This penalizes, among others, several unlawful or prohibited acts covered under child pornography, including syndicated child pornography. It declares as policy for the Philippines to comply with international treaties to which the Philippines is a signatory or a state party concerning the rights of children which include, but not limited to, the CRC, the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, the International Labor Organization Convention No. 182 on the Elimination of the Worst Forms of Child Labor and the Convention Against Transnational Organized Crime.

Additionally, it inter alia provides for duties of an internet content host not to host any form of child pornography on its internet address, the authority of local governments to regulate internet cafés or kiosks to prevent violations of the Act, and the confiscation or forfeiture of the proceeds, tools, and instruments used in child pornography.

Pursuant to the Convention Against Transnational Organized Crime, the Act empowers the Department of Justice to request assistance of a foreign state for assistance in the investigation or prosecution of any form of child pornography. The DOJ, in consultation with the Department of

1 The Supreme Court cited Art. 14(2) of the United Nations Convention Against Corruption and Art. 7(1) of the United Nations Convention Against Transnational Organized Crime.

Foreign Affairs (DFA), shall also endeavor to include child pornography among extraditable offenses in future treaties.

Diplomatic & Consular

SINGAPORE

DIPLOMATIC IMMUNITY – HIT & RUN – ROMANIAN CHARGE D’AFFAIRES

The Ionescu Affair: Statement by the Ministry of Foreign Affairs, 16 April 2010

In the early hours of 15 December 2009, three pedestrians were knocked down in a hit-and-run. One person died while the other two were injured. The vehicle, a black Audi A6 with diplomatic plates, had beaten two red lights before knocking down the pedestrians. The car was later identified as that driven by Dr Silviu Ionescu, the *Chargé d’Affaires ad interim* of the Romanian Embassy in Singapore. About 40 minutes after the incident, Ionescu reported the vehicle stolen and the car was found abandoned near some four hours later. Ionescu left Singapore three days after the incident and refused to return to face criminal charges after a Coroner’s inquiry determined that the car had not been stolen and that it was driven by Ionescu at the time of the incident. The fact that Ionescu was allowed to leave Singapore angered members of the public, leading to the Ministry of Foreign Affairs issuing the following statement on 16 April 2010:

We should not confuse the privileges and immunities which diplomats enjoy during their posting in a country to which they are accredited with the privileges and immunities they enjoy after leaving the country of accreditation at the end of their postings.

They are different situations and the Vienna Convention on Diplomatic Relations clearly recognises these differences.

Article 39(1) of the Vienna Convention states that a diplomat’s privileges and immunities begin from the moment he enters the receiving State to take up his post. These privileges and immunities include freedom from detention and arrest (Article 29) and immunity from the jurisdiction of the criminal courts of the receiving State (Article 31(1)).

As long as a diplomat remains accredited to a receiving State, his privileges and immunities in that State would apply to all his actions, whether official or private.

So even if Dr Ionescu did not leave Singapore after the accident, as an accredited diplomat we cannot arrest him unless the Romanian government waives his immunity. His immunity then covered anything he did, whether official or private.

But as you know, Dr Ionescu left Singapore on 18 December 2009, three days after the accident.

At that time he was still a diplomat officially accredited to Singapore and therefore could not be prevented from leaving.

Furthermore, the police had at that time not completed their investigations and it was not yet established that Dr Ionescu was the driver of the vehicle that caused the accident on 15 December.

The situation now is different and a different provision of the Vienna Convention now applies.

Article 39(2) of the Vienna Convention stipulates that, after a diplomat's posting ends and he leaves his country of accreditation, some of his privileges and immunities would also end. To be more specific, while he would still enjoy immunity for official acts, he would no longer enjoy immunity for private acts.

The Romanian government has now officially withdrawn Dr Ionescu from Singapore, thus ending his posting with effect from 5 January 2010. He is no longer an accredited diplomat in Singapore. The Coroner's Inquiry has concluded that Dr Ionescu was the driver of the vehicle that caused the accident and that he was acting in a private capacity and engaged in private and not official activity at that time.

Therefore Dr Ionescu does not now enjoy and cannot now claim immunity for the accident. Diplomatic immunity is no longer a relevant issue.

I can understand how these legal technicalities may be confusing to anyone who is not a lawyer or diplomat. I can understand their frustration about how they seem to be preventing justice being done. And we certainly share the outrage all Singaporeans feel about Dr Ionescu's actions and wild statements.

But Singapore's high international reputation as a country that respects the law is a precious asset and we must always observe the law and due process.

We have stressed to the Romanian government many times that it should persuade Dr Ionescu to return to Singapore to stand trial or, if this is not possible, to expeditiously investigate and prosecute

him under Romanian law. As I have said before, we are ready to assist the Romanian authorities to the fullest extent under our law.

And as I said yesterday, we are waiting for the Romanian authorities to propose specific dates for their relevant officials to visit Singapore so that we can share the evidence we have with them. We hope they will visit Singapore soon.

Let me emphasize that the Romanian authorities have acted entirely properly so far and have repeatedly stressed that they share our interest in seeing that justice is served. It is not in Romania's own interest to allow the actions of one individual to continue to disgrace the entire country.

In Bucharest, Ionescu was arrested and charged by the State Prosecutor on 1 July 2010 for culpable homicide, grievous bodily harm with intent, deserting the place of an accident and providing the police with false evidence. In March 2013, he was sentenced to 3 years' jail.

Economic Law

NEPAL

APPLICABILITY OF UNCITRAL ARBITRATION RULES - CONSISTENCY WITH 1982 ARBITRATION ACT

Damodar Ropeway & Construction Co. v. Nepal Orient Magnesite Pvt. Ltd. and Others. Division Bench of the Supreme Court of Nepal, (Rt. Hon. Chief Justice Ram Prasad Shrestha & Hon. Justice Prem Sharma), decided on July 7, 2010.

Facts

The petitioner, Damodar Ropeway & Construction Co., an Indian company and Nepal Orient Magnesite Pvt. Ltd., a Nepali company entered into an agreement regarding the sale and purchase of goods and services. The agreement stipulated a provision regarding that Nepalese law to be the applicable law and UNCITRAL Arbitration Rules to be the applicable rules in governing the arbitration process. Also, both parties had agreed to decide their disputes by an arbitration tribunal. A dispute ensued between the parties on the payment of the turnkey project. As stipulated in the agreement, the arbitration tribunal was established and the petitioner's claim

was approved by the majority of the arbitration tribunal. The defendant appealed to the Appellate Court asking to annul the arbitration award on two major grounds among others. First, the arbitration tribunal followed the UNCITRAL Arbitration Rules governing procedural matters in contravention to the Arbitration Act of Nepal. Second, without the completion of the project, the arbitration tribunal mistakenly awarded full payment to the petitioner. The Appellate Court revoked the award of the arbitration tribunal. Finally, the petitioner approached the Supreme Court challenging the decision of the Appellate Court asking the Supreme Court to uphold the award of the arbitration tribunal.

Judgment

The Supreme Court of Nepal delivered its decision primarily on two issues. First, it determined the legal validity of the application of the UNCITRAL Arbitration Rules. Second, it decided whether the arbitration tribunal could make its award on the basis of a counter claim. The Supreme Court found the decision of the Appellate Court inconsistent with the 1982 Arbitration Act of Nepal.² The Appellate Court found the decision of the arbitration tribunal unjustifiable because the arbitration tribunal adopted a process under the UNCITRAL Arbitration Rules allowing counter claims, which in the opinion of the Appellate Court was not consistent with the 1982 Arbitration Act. The Supreme Court, however, found that the 1982 Arbitration Act provided no specific provision on the matter of a counter claim process. Nevertheless, the making of a claim; response to the claim; counter claim; and response to the counter claim are established processes in any arbitration that are impliedly covered by the Arbitration Act in the provision regarding claims and responses. The Supreme Court thus found that the acceptance of a counter claim by the arbitration tribunal under the UNCITRAL Arbitration Rules was not inconsistent with the Arbitration Act of Nepal. However, the Supreme Court justified the decision of the Appellate Court to the extent that an arbitration tribunal could not make its award on a counter claim equivalent to a fresh claim consisting of a new claim amounting to additional liabilities.

The Supreme Court further provided that the parties of an agreement retain the autonomy to choose arbitration as a mode of dispute settlement

2 The 1999 Arbitration Act has superseded the 1982 Arbitration Act.

and can fix the procedural aspect of the arbitration. However, the parties exclusively can only exercise this autonomy. Arbitrators cannot assume the role of the parties and enjoy this autonomy. Further, the Supreme Court noted that the UNCITRAL Arbitration Rules do not hold an equivalent status with domestic law. Therefore, the UNCITRAL Arbitration Rules cannot be applied as a substitute for the substantive provisions of domestic law.

The Supreme Court also instructed that arbitrators are not supposed to apply UNCITRAL Arbitration Rules to fill in gaps in domestic law to the detriment of limiting the scope of domestic law. If arbitrators apply UNCITRAL Arbitration Rules to a situation that is not imagined by domestic law, it will ultimately aggravate a situation of judicial anarchy. Arbitrators can apply UNCITRAL Arbitration Rules on procedural matters as agreed to by the parties of an agreement where domestic law is silent.

PHILIPPINES

INFRINGEMENT OF BROADCASTING RIGHTS (INTELLECTUAL PROPERTY) – APPLICATION OF THE 1961 ROME CONVENTION

Abs-Cbn Broadcasting Corporation (Abs-Cbn) v. Philippine Multi-Media System, Inc. (PMSI) [GR No. 175769-70. 19 January 2009]

The Supreme Court resolved, inter alia, the contention that the retransmission of ABS-CBN's signals by PMSI was a violation of the former's broadcasting rights under the Intellectual Property Code of the Philippines (IP Code). In finding no merit in this contention, the Court reasoned in part that the acts of PMSI did not constitute rebroadcasting because the services it rendered fall under cable "retransmission" as described in the Working Paper prepared by the Secretariat of the Standing Committee on Copyright and Related Rights within the context of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961 Rome Convention).³ It was not the

3 WIPO (The Secretariat of the Standing Comm. on Copyright and Related Rights), Protection of Broadcasting Organizations: Terms and Concepts, WIPO Doc. No. SCCR/8/INF/1 (Aug. 16, 2002), available at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_8/sccr_8_inf_1.pdf.

origin nor did it claim to be the origin of the programs broadcasted by ABS-CBN. It did not make and transmit on its own but merely carried the existing signals of ABS-CBN.

As defined in the IP Code, broadcasting is the “the transmission by wireless means for the public reception of sounds or of images or of representations thereof; such transmission by satellite is also ‘broadcasting’ where the means for decrypting are provided to the public by the broadcasting organization or with its consent.”⁴ Under the 1961 Rome Convention,⁵ rebroadcasting refers to “the simultaneous broadcasting by one broadcasting organization of the broadcast of another broadcasting organization.”⁶

The Court held that while the 1961 Rome Convention gives broadcasting organizations the right to authorize or prohibit the rebroadcasting of its broadcast, this protection does not extend to cable retransmission. It added that PMSI is not a broadcasting organization within the meaning of the Working Paper,⁷ and therefore, does not have the responsibilities attached to such organizations.

4 Intellectual Property Code, § 202.7, Rep. Act 8293 (Phil.).

5 Entered into force on September 25, 1984, *available at* http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=17 (last visited Sept. 25, 2012).

6 1961 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations art. 3(g), Oct. 26, 1961, 496 U.N.T.S. 43.

7 The Secretariat of the Standing Comm. on Copyright and Related Rights, *supra* note 1.

Environmental Law

PAKISTAN

ENVIRONMENTAL PROTECTION ACT - PRECAUTIONARY PRINCIPLE OF ENVIRONMENTAL REGULATIONS - RIGHT TO LIFE

Suo Motu Case No. 25 of 2009, 15 September 2011 (Cutting of Trees for Canal Widening Project Lahore)

Facts

In 2005, the Government of Punjab planned to open a 14 km long Canal Bank Road along the Bambawali-Ravi-Bedian Canal, in the section between Dharampura Underpass and Thokar Niaz Baig, in Lahore. This project, known as the Canal Road Project, was challenged by several organizations, not only on the grounds of environmental and ecological concern, but also due to the absence of real urban planning and the project's inadequacy in solving Lahore's traffic congestion. The project would amount to a loss of more than 3.000 kilometres of exceptionally beautiful landscape.

The principle petitioner in this case was the Lahore Bachao Tehrik (Save Lahore Movement), an "umbrella" organization, along with several others. The petitioners claimed a violation of the right to life, as guaranteed under the Pakistani Constitution,⁸ as well as a violation of the Precautionary Principle of environmental regulations⁹, according to which it is imperative "to first consider the welfare and safety of the human beings and the environment and then to pick up a policy and execute the plan which is more suited to obviate the possible dangers or make such alternate precautionary measures which may ensure safety."

More specifically, the petitioners claimed that the Environmental Impact Assessment (EIA) that had approved the Canal Road was flawed, since it did not consider other existing alternatives to alleviate traffic congestion. More specifically, the petitioner claimed that the environmental approval

8 The violation of the right to life was founded on the argument that the trees and plants contribute significantly towards purification, since they make their food from carbon dioxide and release oxygen for us to breathe.

9 Referring to the Supreme Court's jurisprudence in the *Shehla Zia Case*; *Zia v. WAPDA*, PLD (SC) 693 (1994) (Pak.).

granted to the Canal Road Project was illegal, void, and of no legal effect because the Environmental Protection Agency in Punjab ("EPA-Punjab") unlike the Pakistan Environment Protection Agency ("PakEPA") set up under section 5 of the Pakistan Environmental Protection Act, 1997 ("PEPA"), was not independent, but was entirely attached to the government. Finally, the petitioners brought up the concept of "Public Trust," which "enjoins city fathers to maintain guardianship and stewardship of the people's priceless and historic natural resources."

The respondent provincial government, on the other hand, claimed that the Canal Road Project would widen the existing lane by 18 feet and therefore was designed in the public's interest and with a view to improve drastically the traffic conditions on the Canal Road. The government also advanced the argument that the project was useful, in view of the expected growth of Pakistan's population in the following years, and had been conceived specifically in order to accommodate the growing population of Lahore. According to the government, the Canal Road is the main artery and the spine of Lahore, with approximately 100,000 vehicles per day. In their view, the Canal project was necessary to improve the traffic conditions on the Canal Road, especially since other measures taken (public transport, environmentally friendly busses, etc.) had been proved to be useless. Furthermore, the government claimed that the EIA was duly prepared by the National Engineering Services of Pakistan ("NESPAK") and submitted in January 2007, in accordance with the Punjab Environmental Protection Agency ("PEPA") and other relevant regulations.

Given the controversy surrounding the project, a judicial mediation procedure was put in place by the Supreme Court. More specifically, on the 14 February 2011, a Bench of that Court, with the consent of the Government, had nominated Dr. Pervez Hassan, an expert in environmental law,

as a mediator. The Court had ordered him to find a suitable solution, in association with any other person, expert, or government he thought useful.

Hence, Dr. Pervez Hassan formed a Committee, consisting of eight members having “illustrious background of public service in various fields.” This Committee submitted a detailed report of recommendations (the Mediation Committee Report) to the Court three months later on 14 May 2011. After analysing the urban and ecological issues at stake, the Report found that the Canal project had serious flaws, specifically referencing the proposed widening and the commercial growth of each Section of the Canal. The Committee also noted that its recommendations should be applied as a “complete package” and with no “cherry picking.”¹⁰ As noted by the Committee, this widening would, in the absence of other required mitigating measures, serve the traffic needs only for the next 4-5 years. In effect, we would need more lanes in the future. This way, most of the green belt of the Canal Bank Corridor, a valuable part of Lahore’s legacy and heritage, could be lost for future generations.

However, given that the recommendations had been taken by consensus, not all of the members of the committee fully agreed with their own Report. Dr. Pervez himself, already one of the petitioners, objected to the proposed widening. Further, the petitioners claimed that only two members of the Committee were professional experts, while all others had political affiliations with the Provincial Government.

Judgment

The detailed judgment, delivered by Justice Jillani, starts with a quotation from the famous architecture critic and writer, Ada Louise Hustable: “Any

10 Among other things, the Committee recommended to declare the Lahore Canal Area a Heritage Urban Park, to correct the “incorrect underpasses” on the Canal Road and re-engineer the junctions, to construct Service Roads and Implement Traffic Management Programs, and to divert the Through-Traffic on the Canal Road onto New Traffic Corridors. The report included general recommendations, such as “to treat the Lahore Canal in a holistic manner, so that the Canal Road is considered in its entirety from where it begins near the BRB-Link Canal through the Thokar Niaz Beg overpass” or “to restore the communal Life.” The report also included specific and forfeit-like provisions: “For each tree felled in any sector of the Lahore Canal Road, the Punjab Government will plant at least a hundred (100) mature trees in replacement.”

city gets what it admires and what it pays for and ultimately deserves. And we will probably be judged not for the monuments we build but the monuments we destroy.”

However, in the rest of the judgement, the Court fully accepts the Government’s argument that the project would improve Lahore’s traffic congestion, according to the initial study prepared in accordance with the relevant regulations.

The Court referred to all the relevant regulations of the Federal Government, including the Environmental Protection Act (the PEPA, precited), the “EPA-Punjab,” and the PakEPA’s Regulations (“IEE and EIA Regulations”) and found that there was no illegality—or rather that the Government “fully complied” with all the Regulations (para 15).

An examination of the material placed before this Court reveals that the afore-referred provisions of the Act and the Regulations framed thereunder were strictly complied with. Admittedly, the project designed by TEPA was initially approved by the Provincial Government and then was referred to EPA-Punjab which in terms of Sub-section (3) of Section 12 read with Rule 4 of the Regulations carried out public hearing. It also constituted a committee consisting of ten experts in terms of Regulation No. 11 (2) of Review of IEE and EIA Regulations who were consulted before the grant of approval and in terms of Rule 13. The EPA-Punjab also laid down stringent conditions/precautionary measures as also ameliorative steps to minimize the effect of cutting of some trees and damage to the green belt on both sides of the road.

As to the “environmental disaster,” and especially the deforestation, the Court took it as a given that this would constitute a violation of “the Fundamental Right to Life (Article 9 of the Constitution) that could have the effect of degrading human existence (violation of Article 14 of the Constitution, with regard to human dignity).” In its reasoning, the Court largely quoted the *Shehla Zia* (1994) decision, a case related to the hazards of electromagnetic fields from grid stations: “The word ‘life’ is very significant as it covers all facts of human existence [...] any action taken which may create hazards of life will be encroaching upon the personal rights of a citizen to enjoy the life according to law.”¹¹

11 *Zia*, PLD (SC) 693 (Pak.).

However, noted that this jurisprudence was in casu irrelevant (para 17). The Court found no violation of the right to life (Article 9 of the Constitution) or to the right of human dignity (Article 14). The Canal Road Project is neither a plant omitting hazardous gases nor releasing pollutants in the canal water. It aims at widening the road on both sides of the Canal Bank which of necessity would cause some damage to the green belt and thereby affect environment.

Further, it observed that there was no certain proof (no “incontrovertible material”) that the project would seriously affect the “human condition.” It also accepted that the project’s impact was of a “minimum damage to ecology and environment” in comparison to its benefits, noting also that any project of this kind would have some “adverse impact on environment” (para 17).

The apprehended change or damage which has neither been quantified nor ascertained per se may not be violative of Fundamental Right of Right to Life (Article 9 of the Constitution) unless it is shown by placing incontrovertible material before this Court that it would lead to hazardous effects on environment and ecology to an extent; that it would seriously affect human living. A close perusal of Canal Road Project indicates that before its approval, TEPA referred the matter to NESPAK which carried out the requisite studies and after detailed analysis came to the conclusion that the Canal Road Project is environmentally viable [...]

The argument that the widening of roads on both side of the Canal would be devastating and would have irreparable effects on ecology has been attended to, both while granting environmental clearance by the competent authority and also by the report of the Mediation Committee. Every project of this kind would have some adverse impact on environment but that would be negligible as compared to the ameliorative effects it is expected to have on traffic congestion and convenience of commuters and on improvement in traffic safety levels.

As to the petitioner’s argument on Public Trust, after a detailed reference to the Supreme Court of India’s jurisprudence¹², an article by Prof.

12 *Moulvi Iqbal Haider v. Capital Dev. Auth.*, PLD (SC) 394 (2006) (Pak.); *Rural Litig. & Entitlement Kendra v. State of Uttar Pradesh*, A.I.R. 1985 S.C. 652, 656 (India); *In Charan Lal Sahu v. Union of India* (Bhopal Disaster case), A.I.R. 1990 S.C. 1480 (India); *M.I. Builders Pvt. Ltd. v. Radhey Shyam Sahu*, (1999) 6 S.C.C. 464 (India);

Sax entitled, “The Public Trust Doctrine in Natural Resource Law”¹³, as well as its own jurisprudence, the Court found that there was no violation of this “concept.” Likewise, it found no violation of the “concept” of sustainable development.

The Court did, however, suggest some “mitigative measures” and “precautions” to ensure that there was minimum damage to the ecology and environment of the area. These measures (para 18) were in conformity with the measures described in the Mediation Committee Report, in which the Court placed a lot of significance. After referring to an ICJ decision¹⁴ to legitimate the mediation procedure followed, as a procedure in “public interest litigation,” it noted that both the petitioner and the respondent had accepted the report of the Mediation Committee. In this respect, it was recognized that the Canal is a Public Trust and should be treated as Heritage Urban Par.

Consequently, the Court ordered that the widening should be done in conformity with the Committee’s recommendations. Most notably, it ordered the Punjab Government to ensure that minimum damage is caused to the green belt, that every tree cut is replaced by four trees between six and seven feet in height, and that the Registrar of the Court is notified of this process through press releases sent to its Registrar. Also, the Chief Secretary of the Government was directed to prepare a comprehensive action plan and submit it to the Court within six weeks of the receipt of the judgment.

M.C. Mehta v. Kamal Nath, 1 S.C.C. 388 (1997) (India); *Th. Majra Singh v. Indian Oil Co.*, A.I.R. 1999 J. & K. 81 (India).

13 Justified the doctrine by holding that, “some public interests in the environment are intrinsically important, the gifts of nature’s bounty ought not be constrained for private use, and some uses of nature are intrinsically inappropriate.”

14 *The Gabčíkovo-Nagymaros Project Dispute (Hung. v. Slov.)*, 1997 I.C.J. 7 (Sept. 25).

PHILIPPINES

CLIMATE CHANGE – LEGISLATION – AGENDA 21

Republic Act No. 9729

The Climate Change Act of 2009 declares the policy of the state to afford full protection and the advancement of the right of the people to a healthful ecology in accord with the rhythm and harmony of nature. To note, the Philippines has previously adopted the Philippine Agenda 21 framework which espouses sustainable development, to fulfill human needs while maintaining the quality of the natural environment for current and future generations. The state also declares the adoption of the principle of protecting the climate system for the benefit of humankind, on the basis of climate justice or common but differentiated responsibilities and the Precautionary Principle to guide decision-making in climate risk management.

Furthermore, the Act states that as a party to the United Nations Framework Convention on Climate Change, the state adopts the ultimate objective of the Convention. Likewise, as a party to the Hyogo Framework for Action, the state likewise adopts the strategic goals in order to build national and local resilience to climate change-related disasters. Among others, it also states that the state shall cooperate with the global community in the resolution of climate change issues as it recognizes the vulnerability of the Philippine archipelago and its local communities to potential dangerous consequences of climate change. There is recognition in the Act that climate change and disaster risk reduction are closely inter-related and effective disaster risk reduction will enhance climate change adaptive capacity.

The law provides corresponding meanings to terms relating to climate changes, defined under it as “change in climate that can be identified by changes in the mean and/or variability of its properties and that persists for an extended period typically decades or longer, whether due to natural variability or as a result of human activity.”¹⁵ A Climate Change Commission was established to be an independent and autonomous body with the same status as that of a national government agency and attached to the

15 Climate Change Act of 2009, Rep. Act No. 9729, §3(d) (Oct. 23, 2009) (Phil.).

Office of the President. The Commission is the sole policy-making body of the government which shall be tasked to coordinate, monitor and evaluate the programs and action plans of the government relating to climate change pursuant to the provisions of this Act. A Climate Change Office was also created to assist the Commission.

The powers and functions of the Commission *inter alia* include ensuring the mainstreaming of climate change, in synergy with disaster risk reduction, into the national, sectoral and local development plans and programs; coordination and synchronization of climate change programs of national government agencies; and formulation of a Framework Strategy on Climate Change to serve as the basis for a program for climate change planning, research and development, extension, and monitoring of activities on climate change. In order to ensure the effective implementation of the framework strategy and program, different government agencies were entrusted with functions relating to climate change. Additionally, a Joint Congressional Oversight Committee was formed to monitor the implementation of the Act.

DISASTER MANAGEMENT AND EMERGENCY RESPONSE

ASEAN Agreement on Disaster Management and Emergency Response (AADMER), Philippine Senate Resolution No. 202, 14 September 2009

The Philippine Senate concurred with the ASEAN Agreement on Disaster Management and Emergency Response (AADMER) which was signed on 26 July 2005 in Vientiane, Lao PDR. The concurrence with the AADMER is largely seen as an impetus for change in the legal framework in the Philippines that deals with climate change and disaster risk reduction and management.

In the resolution concurring with AADMER, the Senate affirms that the AADMER aims to provide a comprehensive regional framework for substantial reduction of disaster losses in lives and in the social, economic and environmental assets of ASEAN states, and to jointly respond to disaster emergencies through national efforts and intensified regional and international cooperation. The AADMER establishes an ASEAN Coordinating Centre for Humanitarian Assistance on disaster management and an ASEAN Disaster Management and Emergency Relief Fund.

BIODIVERSITY

Host Country Agreement Between the Government of the Republic of the Philippines and the ASEAN Centre for Biodiversity, 14 September 2009

The ASEAN Centre for Biodiversity (ACB) was established to facilitate cooperation and coordination among ASEAN states and with relevant national government, regional and international organizations, on the conservation and sustainable use of biological diversity and the fair and equitable sharing of benefits arising from the use of such biodiversity within the region.¹⁶ The centre was formerly known as the ASEAN Regional Centre for Biodiversity Conservation (ARCBC) which was a European Union-assisted project from 1999 to 2004. It was also hosted by the Philippines.

ASEAN states decided to continue and institutionalize the functions of the ARCBC through the establishment of the ACB which will have a legal personality of its own, under the auspices of the ASEAN. The host agreement was signed on 8 August 2006 in Manila and it was transmitted to the Philippine Senate on 22 August 2007 for concurrence.

Human Rights

BANGLADESH

**CHILDREN'S RIGHTS - CHILD PROTECTION - ADMINISTRATION OF
JUVENILE JUSTICE - IMPLEMENTATION OF CRC AND
OTHER INTERNATIONAL INSTRUMENTS-
CHILD'S BEST INTERESTS IN CUSTODY MATTERS**

***State v. Secretary, Ministry of Law, Justice & Parliamentary Affairs and others*, 30 BLD (HCD) (2010), 369; 38 CLC (HCD) (2009). Supreme Court of Bangladesh, High Court Division (Criminal Appellate Jurisdiction)**

Facts

A television news broadcast on Channel I at about 9.00 p.m. on 10.04.2009 (April 10, 2009) about the rape of minor girl caught the attention of the

16 Host Country Agreement between the Government of the Republic of the Philippines and the ASEAN Centre for Biodiversity, art. III, Aug. 8, 2006.

learned Court. It was reported that a minor girl by the name of “S” (identity withheld) was allegedly raped by her neighbour and distant relative (identity withheld). The parents of the girl, after getting her treated in a local clinic, took her for better treatment to the Osmani Medical College Hospital, Sylhet and, thereafter, took her to the Osmani Nagar Police Station on 27.03.2009 (March 27, 2009) in order to lodge a First Information Report (F.I.R.). The police, after recording the case, sent the girl to the Court of the learned Magistrate, who ordered the girl, 7 years of age, to be kept in safe custody at the Safe Home in Bagbari, Sylhet, managed by the Department of Social Welfare.

It further transpired from the report that the parents were not allowed to visit the girl and the Magistrate would not give the girl to the Jimma (custody) of her father. It was also reported that a well-wisher in the locality spent Tk. 26,500/- for publishing the matter in a newspaper addressing the Prime Minister hoping for some intervention but that initiative too failed.

Finding the course of events rather disturbing, especially as it appeared that the little girl was being held in safe custody without lawful authority while her parents, who were willing and capable of keeping and caring for her, were allegedly denied her custody, the Court issued a *Suo Motu* Rule upon the respondents to show cause as to why “S” shall not be released from the Safe Home of the Department of Social Welfare and be dealt with in accordance with law. Pending hearing of the Rule, “S” was directed to be released from custody forthwith to the Jimma (custody) of her father.

In due course, the Court also sought an explanation from the learned Magistrate who had sent the victim girl to safe custody instead of complying with the parents’ request to place her in their care. The Magistrate maintained that no prayer was made by the parents or nearest relatives of the victim seeking her custody and, as a result, he had no alternative but to send her to the approved home managed and controlled by the Ministry of Social Welfare under section 58(a) of the Children Act, 1974.

Judgment

Recognising the seriousness of the issues pertaining to the incident, the Court deemed it fitting and necessary to deal with the matter in considerable detail. The Court referred to existing case law that underscored the significance of conforming to relevant international legal instruments and rectifying prevalent anomalies in national laws. The Court observed:

Having considered the submissions of the learned advocates and keeping in mind the various recommendations and directions issued by this Court with regard to the provisions of the Children Act and international instruments containing beneficial provisions in the best interests of the child, we are somewhat perturbed to note that the authorities concerned and the agencies involved in dealing with children are still unfortunately unaware of the relevant provisions of the law and international instruments which are in a way binding upon us. Whether or not provisions of international instruments are binding was discussed in the case of *State v. Metropolitan Police Commissioner*, 60 DLR 660. In this regard we may again refer to the decision in the case of *Hussain Muhammad Ershad v. Bangladesh and Others*, 21 BLD (AD) 69, where his lordship B.B. Roy Chowdhury, J. pointed out that although the provisions of international instruments are not binding unless they are incorporated in the domestic law, they should not be ignored. His Lordship went further to say that beneficial provisions of the international instruments should be implemented as is the obligation of a signatory State. We note that in the same vein we mentioned in the case of *State v. Metropolitan Police Commissioner*, 60 DLR 660 that as signatory Bangladesh is obliged to implement the provisions of the CRC. We also stated in that case that if the beneficial provisions of the international instruments do not exist in our law and are not in conflict with our law, then they ought to be implemented for the benefit and in the greater interests of our children. But sadly the provisions of the International Instruments are rarely, if at all, implemented. Moreover, proper implementation of the provisions of our existing law is sadly lacking and often ignored.

We find that the neglect of the Bangladesh Government to implement the provisions of the CRC has led to numerous anomalies in our judicial system when dealing with cases where an offender and/or the victim are children. A glaring example can be found in the Railways Act, 1890 where in section 130 (1) the provisions of sections 82 and 83 of the Penal Code have been overridden, thus making children below the age of 9 years liable to be prosecuted and punished for offences under the Railways Act. Quite clearly this is patently contrary to the intent and purpose of the provisions relating to children both in the Children Act and the international instruments. Had there been a proper assimilation of our laws then such a glaring discrepancy or incongruity would not have arisen. Another glaring anomaly is found in the Children Rules, 1976 where the punishment that can be awarded to a child who attempts to run away in violation of the Code of Conduct of the

Detention Centre, is caning. This is in stark contradiction with the UN Instrument relating to punishment for children and the prohibition of corporal punishment.

A number of the anomalies and inconsistencies have already been highlighted in the case of Roushan Mondal, cited above, and hence it was suggested and recommended that our law should be amended or a new law formulated in conformity with the provisions of the CRC. However, many years have passed and still we appear to be far away from implementing the provisions of the CRC.

We would, therefore, strongly recommend that immediate steps must be taken by the Government to enact laws or amend the existing law in order to ensure implementation of all the provisions of the CRC, which are beneficial to children and also to minimise the anomalous situations which arise when dealing with children. In particular, in order to avoid further complications in the proper application of the existing laws, prompt action must be taken to ensure that the definition of 'child' is uniformly fixed in all statutes as anyone below the age of 18 years [Art.1 CRC]; the date relevant for considering the age of the accused is the date of commission of the offence, which is fundamental to the concept of protection of children who are not fully mature and do not appreciate the consequence of their actions [explained in detail in the Roushan Mondal case]; in all matters where a child is an accused, victim or witness, the best interests of the child shall be a primary consideration [Art.3 CRC]; that a child's views shall be considered by the Court [Art.12 CRC]; in ALL cases where a child is accused of commission of any offence under the Penal Code or under any special law he is to be tried by a Juvenile Court or any other appropriate Court or Tribunal in accordance with the provisions of the Children Act and Children Rules [discussed in Roushan Mondal]; the use of children for the purpose of carrying drugs or arms or in any other activity which exposes them to physical and moral danger or any harm must be made a criminal offence to be tried under the Children Act [Art.33 CRC].

We are of the view that for proper administration of justice for children, until such time as Juvenile Courts are set up in each district, there must be a Court designated as being dedicated to hear cases involving children, otherwise the requirement of the law to have expeditious hearings will be frustrated. Reference may be made to Rule 3 which requires hearing of children's cases at least once a week. This is not possible since the Courts are otherwise busy hearing the regular criminal cases, which are given priority. Hence, one Court in each district must be designated as being a

Court dedicated to hear cases involving child offenders so that children's cases can be heard and disposed of on priority basis [Art.37 (d) CRC]. Legal Aid must be made available in all matters involving children so that no child remains unrepresented [Art.40 (2) (b) (ii) CRC]. Make Probation Officers available on call round the clock in all parts of the country to enable proper and effective implementation of section 50 of the Children Act. Similarly, places of safety must be set up, at least one in every district and local health clinics must be empowered for the purpose of medical examination of victims so that the need to detain victims in custody will be considerably reduced.

The Court also drew upon the comments of the UN CRC Committee on Bangladesh State Reports on the CRC of 1997 and 2003 respectively and quoted verbatim relevant portions from the Committee's observations and recommendations:

Incidentally, we may mention that various reports produced by the Bangladesh Government to the Committee of the UN CRC have come to our notice from browsing the internet. In their first available report in the year 1997 the Committee commented as follows:

The Committee is concerned about the unclear status of the Convention in the domestic legal framework and the insufficient steps taken to bring existing legislation into full conformity with the Convention, including in light of the general principles of non-discrimination (art.2), the best interests of the child (art.3), the right to life, survival and development (art.6) and respect for the views of the child (art.12). It is deeply concerned at the lack of conformity between existing legislative provisions and the Convention with respect to the various age limits set by law, the lack of a definition of the child, the age of criminal responsibility, which is set at too young an age, the possibility of imposing the death penalty, and/or imprisonment of children 16-18 in ordinary prisons. The Committee also notes that, as recognized in the State party's supplementary report, many laws are inadequately enforced and that most children's lives are governed by family customs and religious law rather than by State law.

The Committee recommended as follows:

The Committee recommends that the State party pursue its efforts to ensure full compatibility of its national legislation with the Convention, taking due account of the general principles as contained in articles 2, 3, 6 and 12 and the concerns expressed by the

Committee. Furthermore, the State party should develop a national policy on children and an integrated legal approach to child rights.

In response to the second periodic report of Bangladesh Government, the Committee in October, 2003 in its concluding observations dated 27th October, 2003 stated as follows:

The Committee regrets that some of the concerns it expressed and the recommendations it made (CRC/C/15/Add.74) after its consideration of the State party's initial report (CRC/C/3/Add.38), particularly those contained in paragraphs 28-47, regarding the withdrawal of the reservations (para.28), violence against children (para.39), the review of legislation (para.29), data collection (para.14), birth registration (para.37), child labour (para.44) and the juvenile justice system (para.46) have been insufficiently addressed (emphasis added). Those concerns and recommendation are reiterated in the present document.

The Committee recommended as follows:

The Committee recommends that the State party take all effective measures to harmonize its domestic legislation fully with the provisions and principles of the Convention, in particular with regard to existing minimum ages of criminal responsibility and of marriage, child labour and harmful traditional practices affecting children.

It appears that there have been assurances given by the Bangladesh Government that a Directorate of Children Affairs would be established, but in spite of recommendation to take all necessary measures to expedite the establishment of the Directorate no such Directorate has been established. The Committee further recommended that the State party take all appropriate measures to ensure that the principle of the best interests of the child is integrated into all legislation, as well as in judicial and administrative decisions and in projects, programmes and services which have an impact on children. The Committee also encouraged the State party to take all necessary measures to ensure that traditional practices and customary law do not impede the implementation of this general principle, notably through raising awareness among community leaders and within society at large.

The Committee further recommended as follows:

The Committee strongly recommends that the State party take immediate steps to ensure that the imposition of the death pen-

alty for crimes committed by persons while under 18 is explicitly prohibited by law.

The Committee made further recommendation as follows:

The Committee recommends that the State party:

- (a) Promote and facilitate respect for the views of children and their participation in all matters affecting them in all spheres of society, particularly at the local levels and in traditional communities, in accordance with article 12 of the Convention;
- (b) Provide educational information to, inter alia, parents, teachers, government and local administrative officials, the judiciary, traditional and religious leaders and society at large on children's right to participate and to have their views taken into account;
- (c) Amend national legislation so that the principle of respect for the views of the child is recognized and respected, inter alia, in custody disputes and other legal matters affecting children.

Recently in June 2009 the Committee in its concluding observations upon considering the 3rd and 4th periodic reports of the People's Republic of Bangladesh made, inter alia, the following comments and recommendations:

The Committee welcomes the establishment of the National Council for Women and Child Development in February 2009, headed by the Prime Minister. The Committee again urged the State party to take all necessary measures to address the previous recommendations that have not been fully implemented and to provide adequate follow-up to the recommendations contained in the present concluding observations on the combined third and fourth periodic report.

The Committee observed as follows:

However, the Committee remains concerned that some aspects of domestic legislation continue to be in conflict with the principles and provisions of the Convention and regrets that there is no comprehensive law to incorporate the Convention into domestic legislation. In particular, the Committee is also concerned that the 1974 Children's Act has not been revised in line with the Convention.

The Committee recommends that the State party continue to harmonize its legislation with the principles and provisions of the Convention and incorporate the Convention into domestic legislation, ensuring that the Convention can be invoked as a legal basis by individuals and judges at all levels of administrative and

judicial proceedings. The Committee also recommends that the 1974 Children's Act be revised to cover comprehensively the rights of the child. Finally, the Committee encourages the State party to carry out an impact assessment of how new laws affect children.

The Committee welcomes the strong political will to address children's issues and notes the information shared by the delegation on the newly established National Council for Women and Child Development (NCWCD) as an oversight mechanism. Nevertheless, the Committee remains concerned that effective coordination and monitoring have not been fully developed, in particular due to the relatively low empowerment of the coordinating body (Ministry of Women and Children's Affairs (MoWCA)) vis-à-vis other ministries, sectors, and levels of administration involved in the implementation of the rights of the child. Furthermore, the Committee notes with concern the risk of overlapping and duplication between the NCWCD, MoWCA and Department for Children, expected to be established under the MoWCA."

The Court emphasised State obligation in ensuring the best interests of the child in all actions affecting them and expressed dissatisfaction at the ignorance of legal functionaries about the minimum standards for treatment of children in contact with the law. The Court observed:

The plight of children across the globe over the last 100 years had been considered in the decision of Roushan Mondal, cited above. Sadly, it appears that only lip service is paid by many countries, including the so-called developed countries, to 'the best interests of the child.' We note that when it comes to children committing more serious crimes, they are tried effectively as adults and the best interests of child takes back-stage as a mere slogan. This is in spite of the clear mandate in Article 3 of the CRC for State Parties to ensure that in all actions concerning children taken by institutions, including courts of law, the best interests of the child shall be a primary consideration. The age-old attitude of demonising children who commit serious crimes is to be deplored. Courts should at all times consider the reasons behind the deviant behaviour of the child and after taking into account all the attending facts and circumstances decide what treatment would be in the best interests of the child.

We are dismayed that till today Bangladesh is still lagging far behind in caring for its children. Because of our failure to implement the beneficial provisions of the CRC, the plight of our children has not improved to any measurable extent. The fact that we are lagging behind is only too apparent from the persistent recom-

mendation of the Committee of CRC for Bangladesh to incorporate and implement the provisions of the international instrument.

In the facts of the instant case, had the best interests of the child been considered then the learned Senior Judicial Magistrate, Sylhet should have realised that the best interests of a seven year old girl demands (emphasis added) that she be allowed to remain with her parents. The learned Magistrate, if he had any sense of common humanity in his dealings with a child and if he had applied a humane attitude, then he would have searched out the girl's parents in order to ascertain that they are fit and capable of retaining her custody. Moreover, had the learned Magistrate properly appreciated the law, then he could not have torn the girl away from her parents and sent her to safe custody in the safe home. Clearly the option that he had applied is a subservient provision of the law, the proviso being the dominant provision, that is to say, if the parent/guardian of a child is fit and capable of providing proper care, control and protection, then the custody of the child should have been given to the said parent or guardian. To say that the girl was sent to safe custody because there was no application by the parents for the custody of the girl is not proper interpretation of the law. ... Quite clearly, the learned Magistrate acted in total violation of the provisions of law. When it is apparent that the girl was crying to be with her mother, that clearly is an expression of the view of the child to be with her mother and in compliance with Article 12 of the CRC the learned Magistrate should have given effect to it. A crying child is itself a patent application before any right-thinking person that s/he wants to be with her/his mother. We feel that the learned Judge is bound to take into account the child's view. There is nothing on record to suggest that the learned Magistrate at all considered the views of the child which shows abject ignorance of the international provisions, which are meant to be for the welfare and wellbeing of children. Moreover, the tearing away of a seven year old female child from the bosom of her mother can be nothing other than cruel and inhuman treatment which is contrary to Article 27 of the CRC as well as Article 35(5) of our Constitution. The learned Magistrate has clearly acted in contravention of the provisions of law, the Constitution and the CRC, to which Bangladesh is a signatory. He has caused immeasurable human suffering to the victim girl and her parents. It is abundantly clear that the lower judiciary is not sensitised enough nor indeed sufficiently aware of relevant provisions of law to cope with a situation of this nature. It does not take a lot of intelligence to realize that a seven year old girl, who had been raped and severely traumatised, needs the company and

succour of her mother and yet the learned Magistrate caused even more trauma by wrenching the girl apart from her mother and putting her in a safe home totally isolated from her family at the time of her greatest need. Such a decision of the learned Magistrate clearly shows his lack of appreciation of the severity and gravity of the situation and the feelings of the victim girl. Moreover, his interpretation of the law shows his callous disregard for both our domestic law as well as international instruments. We would only remind all members of the judiciary that according to the decision in the case of *Hussain Muhammad Ershad v. Bangladesh and others*, 21 BLD (AD) 69, unless the provisions of the international instrument conflict with our domestic law, as signatories to those instruments, we are obliged to implement and apply the provisions of those instruments.

When we consider the repeated exhortation of the Committee of the CRC aimed at the Bangladesh Government to implement the provisions of the Convention, we find that the government has been very slow to react, particularly in the field of justice for children. As a result we find anomalous situations and decisions emanating from the sub-ordinate judiciary.

We can only reiterate the comment of the Committee of the CRC which welcomed “the strong political will to address the children issues”. We would suggest that for proper implementation of the provisions of the CRC as well as other international instruments, it is necessary to have sensitised personnel dealing with children at the various stages of the justice process. We, therefore, need dedicated and sensitised personnel in the various departments, ministries, judiciary, police, probation and other relevant agencies. Most of all, we need awareness in all those who deal with children as to their rights and needs and a benevolent attitude towards children and their plight.

The Court provided a number of directions and recommendations, which included:

1. All persons concerned with children, including the concerned Government officials of the relevant Ministries and officials of the concerned Government Departments, law enforcing agencies, the judiciary, personnel in the detention and penitentiary system, as well as community leaders and local government officials must be aware and sensitised to the needs of children in contact with the law.

2. Child-specific courts should be established in every district, which will be dedicated to cases relating to children. These courts will deal with cases involving children on a priority basis; other cases will be dealt with only if there is no outstanding case involving a child.
3. There is a patent need for a child-sensitive, specifically trained police force. Each police station shall have at least two officers, one of whom shall be a female, to deal with cases involving children in contact with the law.
4. Guidelines should be developed for members of the police and other law enforcing agencies with respect to the treatment of children in contact/conflict with the law, a summary of which should be displayed in prominent places of police stations.
5. In the police station, children shall be kept separately from adult accused persons.
6. A child shall not be separated from his/her parent or guardian save in exceptional cases. In the absence of a parent or guardian, a relative or other fit person may be entrusted to keep the child in safety. While separating the child from its parent or guardian, the police officer, the probation officer, or the Court must record the reasons thereof. When it is necessary to separate a child from its parent or guardian, in exceptional cases and where the situation demands, the guidelines under sections 55 and 58 of the Children Act should be strictly followed.
7. Informal atmosphere should be ensured in Juvenile Courts in order to protect child/youthful offenders, child victims, and witnesses. Presence of police should be avoided, unless it is felt necessary for the protection of the child offender, victim, or witness.
8. It is therefore imperative that the Government take immediate steps to amend the existing laws or formulate new laws in order to overcome the anomalies and procedural knots as highlighted above, as well as to enable implementation of the provisions of the international instruments, which will undoubtedly be beneficial to the children of this nation and will thus fulfill our obligations under international treaties and covenants.

**JUVENILE JUSTICE ADMINISTRATION - AGE OF CRIMINAL
RESPONSIBILITY - DEPRIVATION OF THE LIBERTY OF THE CHILD -
BEST INTERESTS OF THE CHILD - RIGHTS OF THE CHILD AS
PROTECTED BY THE CONSTITUTION AND THE CHILDREN ACT
1974 - IMPLEMENTATION OF THE CRC, ICCPR**

***Fahima Nasrin v. Bangladesh and Others*, 61 DLR (HCD) (2009), 232; 38 CLC (HCD) (2009). Supreme Court of Bangladesh, High Court Division (Special Original Jurisdiction)**

Facts

Md. Zahidul Hasan, alias Rony, was accused of taking gold jewellery from a young girl and thereafter killing her. He was charged under section 302 of the Penal Code and tried in a Sessions Case. Having been established that Rony was below the age of 16 years at the time of trial, the trial took place in the Court of Sessions Judge and Juvenile Court, Kushtia. At the conclusion of the trial, the learned Judge came to a finding that an offence under section 302 of the Penal Code was proved beyond doubt and, in view of his youth, by Judgement and order dated 14.08.2006, Rony was sentenced in accordance with the provisions of sections 51 and 52 of the Children Act, 1974 to imprisonment for 10 years. He was ordered to be detained in an institute for youthful offenders until he reached the age of 18 years. On 17.08.2006, Rony was sent from Kushtia District Jail to the Kishore Unnayan Kendra (KUK) (Youth Development Centre) at Jessore. His date of birth was recorded as 09.05.89 and, therefore, he would be 18 years of age on 09.05.2007. On 03.05.2007, the Assistant Director of the KUK, Social Welfare Department, Pulerhat, Jessore reported to the Secretary of the Ministry of Social Welfare that Rony was sufficiently rehabilitated and his behaviour was satisfactory. The Secretary was requested to order his final release under the provisions of section 67 of the Act. On 30.05.2007, Save the Children UK made representation to the Secretary of the Ministry of Social Welfare, reiterating the request from the KUK. However, it was decided by the Ministry of Social Welfare that, as Rony was sentenced to 10 years' imprisonment and there was no direction from the Court that he was to be released upon attaining the age of 18 years, he would be returned to the District Jail. The petitioner filed a PIL under 102(2)(a)(i) of the Constitution challenging the detention of Rony and calling upon

the respondents to show cause as to why the detenu shall not be released and discharged after attaining the age of 18 years in accordance with law.

Judgment

We are of the view that the children who resort to offending or who deviate from the acceptable behaviour or norms, do so not through their own fault but through the neglect or fault of their parents and their immediate surroundings as well as the failure of society to provide for their basic needs. It is a fact that we are frequently finding children engaging in more and more serious offences. That is a sad reflection of the lack of provision which the State makes available to these children and their parents or guardians. We note more and more that the more notorious criminals are engaging children in criminal activities and that the children are becoming easy targets as potential accomplices due to their impoverished background. We have come across some cases where even the parents push their own children into criminal activity in order that they may earn and sustain the family members. That again is a sad reflection of our impoverished society and lack of facilities provided by the State. Nevertheless, we feel that the children may not be blamed and castigated for their wrong-doing and that it is our duty as part of the society to ensure that the children are protected from such criminal activities. It is very easy to say that a child has committed a serious offence and must be severely dealt with and sent to prison for the protection of the public, but under the laws of our country as well as international instruments covenants and norms, it is also our duty to ensure that we act with equanimity when dealing with cases of children. Efforts must be made to explore the root causes of the children's deviant behaviour and to remedy that. They are to be given all the benefit that our Constitution and the law of the land provide for them. We are also obliged to implement various beneficial provisions of international conventions, covenants and treaties, such as the UN Convention on the Rights of the Child (UNCRC) and International Covenant on Civil and Political Rights (ICCPR), of which Bangladesh is a signatory. We note also that our Constitution allows for special laws to be enacted in favour of children as well as other specified communities as detailed in Article 28(4) of the Constitution. Therefore, the rights of the child are not only protected by the Children Act, 1974, but are mandated by the UNCRC. Above all, the favourable provision of the law and of the covenants and conventions

are to be applied to the benefit of the child as provided by Article 28(4) of the Constitution. In this regard we take support from the observation of B.B. Roy Chowdhury, J. in the decision in *Hussain Mohammad Ershad v. Bangladesh & ors*, 21 BLD (AD) 69 and also *State v. Metropolitan Police Commissioner*, 60 DLR 660.

The development of the children's laws, international treaties, covenants and conventions has been considered in some detail in *State v. Md. Roushan Mondal Hashem*, 59 DLR 72. We can only reiterate that the laws have been developed over the years in a purposive way upon realisation of the need to protect children for their acts of indiscretion committed due to immaturity and impetuosity. To even consider any form of retributive or deterrent punishment in the guise of protection of society would be a regressive step shutting our eyes to our obligation to provide a congenial environment in which our children may grow and flourish into worthy citizens. At all times the welfare and the best interest of the child must be kept in the mind.

Yet again we express our views with the direction that the authorities concerned, including the Police, Judiciary and the Probation Service are to accord importance in interpreting and implementing the Act and the Rules in order to take appropriate action in respect of children who come before them in accordance with the laws of the land, keeping in mind the best interest of the child.

**SEXUAL HARASSMENT, CONSTITUTIONAL GUARANTEE OF GENDER
EQUALITY AND NON-DISCRIMINATION, RIGHT TO EDUCATION
AND WORK, WOMEN'S RIGHTS UNDER THE UDHR, ICCPR,
ICESCR, APPLICABILITY OF INTERNATIONAL HUMAN RIGHTS
INSTRUMENTS**

***Bangladesh National Women Lawyers Association (BNWLA) v. Government of Bangladesh and Others*, 14 BLC (HCD)(2009) 694; 29 BLD (HCD) (2009) 415; 38 CLC (HCD) (2009). Supreme Court of Bangladesh, High Court Division (Special Original Jurisdiction)**

Facts

As there are no legislative provisions to address sexual harassment of women and female children, human and women rights activists recognised the need for an effective and/or alternative mechanism to deal with the

issue. On 7 July 2008, the Social Resistance Committee, a platform of comprising 47 rights-based organisations, including the petitioner, held a press conference focusing on the acuteness of sexual harassment of women and girls in various organisations and institutions. The Committee presented at the press conference statistics that revealed 333 incidents of repressions on women from January to June 2008. The Committee also adopted seven resolutions, including the framing of guidelines to stop sexual harassment and implementation thereof at all educational institutions and universities.

A writ petition was filed under Article 102 of the Constitution calling upon the respondents to show cause as to why they failed to adopt guidelines or policies or to enact proper legislation to address the issue of sexual harassment and to protect and safeguard the rights of the women and female children in the workplace, educational institutions/universities, and other places, despite regular media coverage of sexual harassment incidents. The petitioner also drew the Court's attention to numerous incidents of sexual harassment in the media, academia, NGOs, etc.

Judgment

The fundamental rights guaranteed in chapter III of the Constitution of Bangladesh are sufficient to embrace all the elements of gender equality including prevention of sexual harassment or abuse. Independence of judiciary is an integral part of our constitutional scheme. The international conventions and norms are to be read into the fundamental rights in the absence of any domestic law occupying the field when there is no inconsistency between them. It is now an accepted rule of judicial construction to interpret municipal law in conformity with international law and conventions when there is no inconsistency between them or there is a void in the domestic law.

Protection from sexual harassment and right to education and work with dignity is universally recognised as basic human rights. The common minimum requirement of these rights has received global acceptance. Therefore, the International Conventions and norms are of great significance in the formulation of the guidelines to achieve this purpose.

The Court referred to Articles 11 and 24 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in expounding on sexual harassment, its impact, and related state obligation. Specifically, the Court referenced General Recommendation No.

19 (11th Session, 1992) with respect to Article 11 of CEDAW, which states that “Equality in employment can be seriously impaired when women are subjected to gender-specific violence, such as sexual harassment in the workplace” and that

Sexual harassment includes such unwelcome sexually-determined behaviour as physical contacts and advances, sexually coloured remarks, showing pornography and sexual demands, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruiting or promotion, or when it creates a hostile working environment. Effective complaints procedures and remedies, including compensation should be provided.

The Court also referred to Specific Recommendation (24)(f), which states that “States Parties should include in their reports information about sexual harassment, and on measures to protect women from sexual harassment and other forms of violence of coercion in the workplace.”

The Court also referred to the fact that Bangladesh was a signatory to the “Declaration on the Elimination of Violence against Women (Resolution No. 48/104 of 20 December 1993),” which states in Article 1:

For the purposes of the Declaration, the term “violence against women” means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercions or arbitrary deprivation of liberty, whether occurring in public or in private life.

The Court further stated:

The framers of the Constitution were particularly impressed by the formulation of the basic rights in the Universal Declaration of Human Rights. If we make a comparison of Part III of the Constitution with the Universal Declaration of Human Rights (UDHR) we shall find that most of the rights enumerated in the Declaration have found place in some form or other in Part III and some have been recognised in Part II of the Constitution. The Declaration was followed by two Covenants- Covenant on Civil and Political Rights (ICCPR) and Covenant on Economic, Social and Cultural Rights (ICESCR) adopted by the United Nations General Assembly in December, 1966 making the rights contained in the UDHR

binding on all states that have signed the treaty, creating human rights law. Article 7 of UDHR states that all are equal before the law and are entitled without any discrimination to equal protection of the law and that all are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Our Courts will not enforce those Covenants as treaties and conventions, even if ratified by the State, are not part of the corpus juris of the State unless those are incorporated in the municipal legislation. However, the court can look into these conventions and covenants as an aid to interpretation of the provisions of Part III, particularly to determine the rights implicit in the rights like the right to life and the right to liberty, but not enumerated in the Constitution. In the case of *H.M. Ershad v. Bangladesh*, 2001 BLD (AD) 69, it is held: “The national courts should not ... straightway ignore the international obligations which a country undertakes. If the domestic laws are not clear enough or there is nothing therein the national courts should draw upon the principles incorporated in the international instruments.

The Court provided directives in the form of Guidelines to prevent and punish sexual harassment of women and girls. It stated:

In the backdrop of our discussion and observations made above, and in view of the inadequacy of safeguards against sexual abuse and harassment of women at work places and educational institutions whereby noble pledges of our Constitution made in so many articles to build up a society free from gender discrimination and characterized by gender equality are being undermined everyday in every sphere of life, we are inclined to issue certain directives in the form of guidelines as detailed below to be followed and observed at all work places and educational institutions till adequate and effective legislation is made in this field. These directives are aimed at filling up the legislative vacuum in the nature of law declared by the High Court Division under the mandate and within the meaning of article 111 of the Constitution.

These guidelines shall apply to all work places and educational institutions in both public and private sectors within the territory of Bangladesh.

The Court relied on case law from other jurisdictions in framing the Guidelines. They include *Apparel Export Promotion Council v. Chopra*, A.I.R. 1999 S.C. 625 (India), *Micari v. Mann*, 481 N.Y.S.2d 967 (N.Y. Sup. Ct. 1984), *Janzen and Govereau v. Platy Enterprise Ltd.* (Supreme Court of Canada),

David Dotchin v. Saskatchewan (Worker's Compensation Board), Queen's Bench, Judicial Centre of Regina, Canada, 2002 SKQB 279, *Vishaka and Others v. State of Rajasthan*, A.I.R. 1997 S.C. 3011 (India), and *Hira Nath Misra v. Principal Rajendra Medical College*, A.I.R. 1973 S.C. 1260 (India).

**CHILDREN'S RIGHTS - RIGHT TO EDUCATION -
CHILD LABOUR-HAZARDOUS WORK - IMPLEMENTATION OF
THE LABOUR ACT 2006, THE CRC AND
ILO CONVENTION NO.182 ON WORST FORMS OF CHILD LABOUR**

***Ain O Salish Kendra v. Bangladesh, represented by Secretary, Ministry of Labour and Manpower, Bangladesh Secretariat and others*, 31 BLD (HCD) (2011) 36; 39 CLC (HCD) (2010). Supreme Court of Bangladesh, High Court Division (Special Original Jurisdiction)**

Facts

An estimated 25,000 child workers between ages 4 and 14 were working in the "bidi" (hand-rolled cigarettes) factories at Haragacha, Rangpur in allegedly unhealthy and unhygienic conditions that posed a risk to their lives. This statistic was stated in a report published in the Daily Ittefaq on 05.10.2003. A similar report was published in the Daily Jugantar on 15.01.2004, reporting that 15,000 child workers between ages 8 and 16 were working in the 'bidi' factories of Haragacha, Rangpur in inhuman conditions. An editorial in the Daily Prothom Alo dated 04.10.2003 also spoke of how 10,000 children working in the "bidi" factories in Haragacha have lost their childhoods. In the wake of such stories, the petitioners, Ain O Salish Kendra (ASK) and Aparajeyo Bangladesh, both rights-based organisations, filed a writ petition seeking an order from the Court declaring the continuous failure of the respondents to ensure a healthy, hygienic, and safe work place for the workers within the 'bidi' factories of respondents Nos. 3 to 5 in accordance with the provisions of the Factories Act, 1965. The petitioners asserted that such activity should be declared as illegal and unconstitutional, as a violation of the fundamental rights guaranteed under Articles 27 and 31 of the Constitution, and the factories should be directed to discharge their legal duties to ensure compliance with the aforesaid provisions of law. The petitioners further prayed that the respondents Nos. 3, 4, and 5 be directed to provide cost of medical treatment to the workers

within those 'bidi' factories, including the children, who were suffering from diseases due to their work in those establishments.

Judgment

It appears to us that the gravity of the problems of child labour spreads throughout the country and across multifarious industries and work types where children are engaged in earning for the family due to dire food insecurity. We, therefore, felt the urge to leave the confines of the facts of the instant case in order to deal with the wider problem of child labour. It indeed appears to be a national problem and deserves more than just a cursory glance from the State machinery.

From the statistics that are available, we find that according to data published by UNDP Human Report, 2007-2008 there are 5.05 million working children between the age of 5 to 14 years, the total number of children being 35.06 million in that age group. It is as well to mention here the provisions of International Labour Organisation (ILO) Convention No.182, which Bangladesh ratified on 12.03.2001. Article 3(d) of the said convention includes in the definition of hazardous child labour as "work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children. An ILO study on hazardous child labour in Bangladesh found that more than 40 types of economic activities carried out by children were hazardous to them. The survey also reveals that except for light work, child labour usually had harmful consequences on the mental and physical development of children.

The sum and substance of the reports which have been placed before us lead us to the conclusion that child labour is a phenomenon created by poverty. It is also noteworthy that poverty itself creates a vicious circle where poverty generates more poverty due to lack of education and properly managed resources.

Among factors contributing to child labour are rapid population growth, adult unemployment, bad working conditions, lack of minimum wages, exploitation of workers, low standard of living, low quality of education, lack of legal provisions and enforcement, low capacity of institutions, gender discrimination, conceptual thinking about childhood, etc. One or more of the above contribute to the large numbers of children working under exploitative or hazardous conditions.

The Court quoted verbatim Articles 18.1, 18.2, 27.1, 31.1, 32.1, and 36 of the Convention on the Rights of the Child (CRC) and Articles 1, 3, and 7 of the ILO Convention C182 Worst Forms of Child Labour Convention, 1999 in support of their observations. It also referred to the obligation of Bangladesh to conform to international instruments:

It is by now well established that the provisions of international instruments, of which Bangladesh is a signatory are to be implemented in our domestic laws. There is an obligation, which we should not ignore, as was held in *Hussain Mohammad Ershad v. Bangladesh & others*, 21 BLD (AD) 69 and *State v. Metropolitan Police Commissioner*, 60 DLR 660.

We are appalled by the revelation that in this day and age there is bonded labour or servitude practised in the coastal fishing areas of the country and young children are the victims. We have no hesitation in directing the Ministry of Labour to take all necessary steps to put an end to such practice immediately and with the help of the law enforcing agencies to bring the perpetrators of such practice to justice. At the same time there must be a concerted effort on the part of the relevant Ministries and government departments to ensure full time education and necessary financial assistance to the parents/guardians of these children to enable them to desist from such illegal and harmful practices and to encourage them to educate their children.

In the light of the matters raised by the instant writ petition, Respondent No.1 is hereby directed to ensure that all employers, particularly those engaging children as labourers, abide by the law and do not engage those under the legal age stipulated by statute, and provide all necessary facilities and equipment to ensure a healthy working atmosphere in their establishments for those who may be lawfully engaged in remunerated work. Needless to say prompt action must be taken against those who violate the provisions of law thereby creating unhygienic, cramped and unhealthy workplaces.

In all earnest we suggest that those parents who, due to their financial condition, are compelled to send their children to work must be targeted, identified and assisted as mandated by the Constitution and the CRC.

**CHILDREN'S RIGHTS - CHILD DOMESTIC WORKER –
TORTURE - WORKING CONDITIONS - OBLIGATIONS UNDER
THE CRC, ILO CONVENTION NO.182 ON WORST FORMS OF
CHILD LABOUR, THE LABOUR ACT 2006**

Bangladesh National Women Lawyers Association v. The Cabinet Division, Represented by Cabinet Secretary, Bangladesh Secretariat, Dhaka and others (HCD) (2011); 40 CLC (HCD.) Supreme Court of Bangladesh, High Court Division (Special Original Jurisdiction)

Facts

BNWLA, an established and reputed organisation of women lawyers that deals with women's empowerment and children's rights, filed a writ petition under Article 102 of the Constitution of Bangladesh, drawing the Court's attention to an incident of physical violence against a child domestic worker reported in the daily national newspaper *Amar Desh* on 03.05.2010. The report stated that the lady of the house tied up the child housemaid, age 10, pushed her onto the floor, and inserted the handle of a hot cooking utensil (stirrer/paddle) into her anus for breaking a flower vase. The girl was in a critical condition and was receiving treatment at the Dhaka Medical College Hospital. The report also gave details of how the girl, sent by her poor father two years ago to work as a housemaid, was tortured on the slightest of pretexts. After the incident, she became ill, but was kept confined in the house. On the third day, seeing her critical condition, the lady of the house took her to the government hospital. The doctors informed the police, and the lady of the house was arrested.

A rule nisi was issued on 04.05.2010, calling on respondents Nos. 1 to 6 (relevant authorities) in connection with their failure to take appropriate steps against respondent No. 7 (the employer of the domestic child worker) in regards to the incident reported in the daily newspaper *Amar Desh* dated 03.05.2010 and to report to this Court within 24 hours with regard to their actions and measures taken in connection with the incident.

Judgment

It is patently clear that children of all ages, particularly from the poverty stricken rural areas, are being sent to the towns and cities for doing work in the household of their employers. Undoubtedly, there will be the lucky

ones who will work and help supplement their family's income without coming to any harm. However, we are most concerned at the large numbers of incidents where children of very tender age appear to have been sent out to work by their parents as domestic workers, who have been meted out horrendous treatment by their employers often leading to injury, death and sometimes suicide, not to mention the often invisible mental and psychological harm.

So far as the recent actions taken by the government in connection with children is concerned, we note with appreciation that the new Children Policy of 2011 defines a child as anyone up to the age of 18. At long last the definition of a child has come in line with the definition as recognised internationally.

It is as well to mention here the provisions of International Labour Organisation (ILO) Convention No.182, which Bangladesh ratified on 12.03.2001. Article 3(d) of the said convention includes in the definition of hazardous child labour as "work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.

In view of the circumstances of the case, the Court gave the Government a number of directions that included:

1. In order to make the provision and concept of compulsory primary education to be meaningful, we direct the government to take immediate steps to prohibit employment of children up to the age of 12 from any type of employment, including employment in the domestic sector, particularly with the view to ensuring that children up to the age of 12 attend school and obtain the basic education which is necessary as a foundation for their future life.
2. Education/training of domestic workers aged between 13 and 18 must be ensured by the employers either by allowing them to attend educational or vocational training institutes or by alternative domestic arrangements suitable to the concerned worker.
3. We urge the government to implement the provisions mentioned in the National Elimination of Child Labour Policy 2010 published in the gazette dated 08.04.2010. In particular, we strongly recommend the establishment of a focal Ministry/focal point, Child Labour Unit and National Child Labour Welfare Council in order to ensure implementation of the policies as mentioned in the 2010 Policy.

4. We direct the government to include domestic workers within the definition of “worker” in the Labour Act, 2006 and also to implement all the beneficial provisions of the draft of Domestic Worker Protection and Welfare Policy 2010 as announced by the government.
5. The cases relating to the violence upon the domestic workers must be monitored and prosecution of the perpetrators must be ensured by the government. We note with dismay the disinterested and sometimes motivated way in which the prosecution conducts the investigation and trial procedure resulting in the perpetrators being acquitted or discharged or even remaining untouched due to the high position, which they hold in the society. The government has a duty to protect all citizens of this country, be they rich or poor.
6. In order to prevent trafficking, in particular, and also to maintain a track on the movement of young children from the villages to the urban areas, parents must be required to register at the local Union Parishad the name and address of the person to whom the child is being sent for the purpose of employment. The Chairman of the Union Parishad must be required to maintain a register with the details of any children of his union who are sent away from the locality for the purpose of being engaged in any employment. If any middleman is involved, then his/her name and other details must be entered in the register.
7. The Government is directed to ensure mandatory registration of all domestic workers by all employers engaging in their household any child or other domestic worker and to maintain an effective system through the respective local government units such as Pourashava or Municipal Corporations in all towns and cities for tracking down each and every change of employment or transfer of all the registered domestic workers from one house-hold to another.
8. The Government should take steps to promulgate law making it mandatory for the employers to ensure health check up of domestic workers at least once in every two months.
9. The legal framework must be strengthened in order to ensure all the benefits of regulated working hours, rest, recreation, home-visits, salary etc. of all domestic workers.

10. Laws must also ensure proper medical treatment and compensation by the employers for all domestic-workers, who suffer any illness, injury or fatality during the course of their employment or as a result of it.

NEPAL

RESPONSIBILITY ARISING FROM THE INTERNATIONAL HUMAN RIGHTS CONVENTION - RIGHT TO FOOD - RIGHT TO LIFE.

***Advocate Prakash Mani Sharma and Others v. The Prime Minister of Nepal and Others.* Division Bench of the Supreme Court of Nepal, (Hon. Balaram K. C., & Hon. Bharat Raj Upreti, JJ.), decided on May 19, 2010.**

Facts

There are certain parts of Nepal, especially the western region of Nepal, where the roads do not connect. Often, during the summer, especially in the rainy season, local people face food crises due to the lack of food supply in the western region. Each government allocates its national budget to supply necessary grain to address food crises in those areas. Despite the budget allocation, the government all too often fails to supply adequate grain. The problem is deeply rooted in the difficult topography and political problems that have persisted for a long time. The petitioners invoked the jurisdiction of the Supreme Court of Nepal to enforce the fundamental right to “food sovereignty” enshrined in Article 18(3)¹⁷ of the Interim Constitution interpreted to characterize the right of those affected and the duty of the government towards those who are stricken with hunger, including those died as a result.

Judgment

In its decision, the Supreme Court of Nepal analyzed a number of international human rights conventions, declarations, and decisions. Among them, the International Covenant on Economic, Social, and Cultural Rights (ICESCR), Convention on the Elimination of Discrimination Against

17 Article 18(3) of the Interim Constitution of Nepal (2007) provides that “Every citizen shall have the right to food sovereignty as provided for in the law.”

Women (CEDAW), Convention on the Rights of Child (CRC), Universal Declaration on Human Rights (UDHR), Universal Declaration on the Elimination of Hunger and Malnutrition, and regional human rights conventions including African Charter on Human and Peoples Rights (ACHPR) are some of the important international instruments referred to and analyzed by the Supreme Court.

The Supreme Court observed that Part III of the Interim Constitution, which provides for “fundamental rights,” does not specifically recognize the “right to food” as a fundamental right. Nevertheless, Article 12(1)¹⁸ of the Interim Constitution guarantees every citizen the right to live with dignity. The “right to live with dignity” is a fundamental right that naturally incorporates the “right to food.” The Supreme Court reasoned that without the right to food, no one would be able to exercise the right to this freedom; thus, these two rights are mutually inclusive. The right to food also imposes a duty on the government to create an environment for jobs and employment by which people will have the opportunity to exercise their right to food and lead a dignified life.

The Supreme Court justified its proposition with reference to international human rights instruments. Among others, it referred to Article 6 of the ICESCR,¹⁹ which requires the government to create jobs and employment. The Supreme Court specifically noted that the rights enshrined in the ICESCR are rights that create a duty for the government to realize progressively, but without any delay. While government does not have the obligation to provide free food to its citizens, it also should not stand idly

18 Article 12(1) of the Interim Constitution of Nepal (2007) provides that “Every person shall have the right to live with dignity, and no law shall made which provides for capital punishment.”

19 Article 6 of the International Covenant on Economic, Social, and Cultural Rights (ICESCR) reads as follows:

1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.
2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programs, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

by when its citizens are dying of starvation. The government should be responsible to ensure the food supply. Especially in a region where there is no road access and food is not available on the market, the government should be accountable to supply necessary grain on time to address the problem of starvation. The government is also answerable to ensure that grain is available to needy people at a reasonable price. For people who cannot engage in employment due to age, disability, or disease, the government should protect their right to food through the mechanism of social security as directed by Article 9 of the ICESCR.²⁰

**APPLICABILITY OF INTERNATIONAL COVENANT ON CIVIL AND
POLITICAL RIGHTS - 1995 ELECTION ROLLS ACT - INTERIM
CONSTITUTION - CITIZENSHIP AND THE RIGHT TO VOTE**

***Advocate Sarojnath Pyakurel v. The Prime Minister of Nepal and Others.* Special Bench of the Supreme Court of Nepal, (Hon. Balaram K. C., Hon. Bharat Raj Upreti, & Hon. Prof. Bharat Bahadur Karki JJ.), decided on February 7, 2011.**

Facts

Section 8 of the 1995 Electoral Rolls Act of Nepal authorizes the Election Commission to prepare an electoral roll for the purpose of local and parliamentary elections. Article 65 of the Interim Constitution of Nepal,²¹ the Citizenship Act, and other domestic laws of Nepal extend the right to vote and right to be a candidate for any political position only to Nepalese citizens. In contravention to constitutional and legal requirements, Section 8 of the Electoral Rolls Act²² allows the Election Commission to include

20 Article 9 of the ICESCR provides that “The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.”

21 Article 65 of the Interim Constitution of Nepal (2007) provides that “Any person should possess the following qualifications in order to become a member of the Constituent Assembly: (a) Nepali citizen; (b) attained at least twenty-five years of age; (c) not have been punished on any criminal charge of moral turpitude; (d) not holding an office of profit.”

22 The explanation of Section 8(5) of the 1995 Electoral Rolls Act provides that “For the purpose of this sub-section, the citizenship certificate, land ownership certificate, any identity card issued by the governmental office or government

a name of a person on the electoral rolls on the production of documents such as land ownership title, identification card issued by government office or academic institutions, or recommendation letter by the local government office (Village Development Committee or Municipality). The petitioner claimed that the impugned Section 8 would pose two dangers. First, the political right to be exclusively exercised by citizens could also be exercised by non-citizens in contravention to the Interim Constitution and International Covenant on Civil and Political Rights (ICCPR). Second, the requirement of documents in addition to citizenship would diminish the political value of citizenship. The petitioner thus urged the Supreme Court to declare the impugned provision to be ultra vires to the Interim Constitution and ICCPR.

Judgment

The Supreme Court of Nepal determined that the right to vote and the right to be elected to a political position constituted political rights guaranteed only to citizens. This was provided for not only in the Interim Constitution (2007), but also Article 25 of the ICCPR²³ that recognizes the scope of political rights limited exclusively to the citizens. The Supreme Court also clearly maintained that the legislature is restrained to enact laws compatible with the Constitution. As constitutional supremacy is clearly established by Article 1 of the Interim Constitution, the legislative body cannot exercise its sovereign power beyond constitutional limits in the pretext of parliamentary supremacy. For any law enacted by the parliament in contravention to the Constitution, the Supreme Court retains the authority of declaring such law to be ultra vires to the Constitution. The

owned organization, or by an educational institute, and the recommendation letter given by the Village Development Committee or Municipality may also be taken as the evidence.”

- 23 Article 25 of the International Covenant on Civil and Political Rights (ICCPR) provides that “Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;”

...

legislative body is also required to be vigilant to comply with international treaties to which Nepal is a party. In this context, the impugned law seems inconsistent with Article 65 of the Interim Constitution and Article 25 of the ICCPR that applies to Nepal as its domestic law. However, the Constituent Assembly is constituted only for the purpose of the promulgation of the Constitution. It is not a permanent body. The Interim Constitution did not envision periodic elections for the Constituent Assembly. The question raised by the petitioner is thus a moot question. The Supreme Court should not exercise its power of judicial review on an “assumed potential invasion of right.” To declare any law or provision to be *ultra vires*, there should be a condition of an “actual and threatened invasion of right.”

The Supreme Court declined to declare the impugned provision to be *ultra vires* to the Constitution. However, it issued important directives to the government and the Election Commission. The directives are as follows:

1. The process of the preparation of an electoral roll is a continuous process. The right to vote and to give candidacy for a political position are influenced by the electoral roll prepared by the Election Commission. Thus, the Election Commission is required to respect Article 25 of the ICCPR in the preparation of an electoral roll and not to require any other documents besides proof of citizenship; otherwise, that would allow the presence of grey areas in the exercise of political rights.
2. No other document can substitute the authenticity of the citizenship card. However, if the authenticity of a citizenship card is disputed, the Election Commission can use other documentary evidence to verify the authenticity of the citizenship card.
3. In preparation of the electoral roll, the Election Commission is required to respect the provisions of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and take necessary steps not to deprive any eligible woman from exercising her political rights.

**ARTICLE 2 OF THE INTERNATIONAL COVENANT ON CIVIL AND
POLITICAL RIGHTS – WITHDRAWAL OF CRIMINAL CASES
AGAINST MAOIST INSURGENTS**

***Advocate Madhav Kumar Basnet and Others v. The Prime Minister of Nepal and Others.* Division Bench of the Supreme Court of Nepal, (Hon. Khil Raj Regmi, & Hon. Bharat Raj Upreti, JJ.), decided on February 16, 2011.**

Facts

Following the elections for the Constituent Assembly (CA) of Nepal in early 2009, the Maoist Party (formerly the insurgents' party) retained a majority of seats on the CA, formed the government as the largest party in parliament with a coalition of other parties. Former rebel leader Mr. Prachand (Pushpa Kamal Dahal) became Prime Minister. Among others, the Maoist government took a decision to withdraw 365 criminal cases lodged against Maoist rebels (insurgents). The government reasoned that all those cases were political and thus, could not be prosecuted as criminal cases. The petitioners challenged the blanket clemency decision of the government as a serious challenge to and violation of international human rights laws, the interim constitution of Nepal, and the rule of law. The petitioners asked the Supreme Court of Nepal to revoke the government's decision and allow a proper and efficient investigation, prosecution, and judicial decision against the crimes committed by anyone including the insurgents. The petitioners raised an important question for the interpretation by the Supreme Court of whether a crime could be exonerated on political and ideological grounds.

Judgment

With an extremely constrained perspective, the Supreme Court legitimized the decision of the Maoist government on the blanket withdrawal (clemency) of criminal cases lodged against the Maoist insurgents. The Supreme Court observed that the government, with prior approval of the concerned District Court where the cases were prosecuted, could withdraw cases. The authority of the government could not be questioned and invalidated on any grounds including Article 2 of the International Covenant on Civil and Political Rights.

The Supreme Court found unconvincing the contention of the petitioner that due to the clemency and withdrawal of criminal cases, the government was violating Article 2 of the ICCPR, promoting a state of impunity, protecting political criminalization, and weakening the rule of law. The Supreme Court also found that there was no need to develop standards by the judiciary in regards to clemency and withdrawal of criminal cases. The Supreme Court validated the government argument that the withdrawal of criminal cases was necessary to manage conflict and facilitate the peace process to its logical end.

The Supreme Court also observed that the discretionary power granted to the government by the law regarding the withdrawal of criminal cases should be exercised in a fair, reasonable, and just manner. The value of the rule of law would be defeated when if government kept exercising its discretionary power beyond any conceivable standards. All the same, the Supreme Court did not find any such misuse of power or violation of international human rights law by the government.

**TRANSITIONAL JUSTICE – CRIMES COMMITTED DURING
INSURGENCY - ARTICLE 166(3) OF THE INTERIM CONSTITUTION -
1992 PUBLIC PROSECUTION ACT**

***Sushil Pyakurel v. The Prime Minister.* Division Bench of the Supreme Court of Nepal, (Hon. Ramkumar Prasad Shah, & Hon. Prakash Osti, JJ.), decided on June 21, 2011.**

Facts

Nepal experienced a violent conflict coupled with an insurgency during 1996-2005. During this period, over 15,000 people were killed, thousands were displaced with numerous people who are still missing. Among others, a group called the Maoists started the insurgency, defied law and order, and killed and kidnapped civilians. The government was also involved in arresting, committing extra-judicial killings, and causing the disappearance of Maoists as well as civilians. Finally, the Maoists and the Government of Nepal entered into an agreement called the Comprehensive Peace Agreement (CPA) on November 21, 2006. Article 5.1.5 of the CPA provides that a High-Level Truth and Reconciliation Commission would be established to investigate the truth about violations of human rights and crimes against

humanity. The CPA has also made commitments towards the Universal Declaration of Human Rights, international humanitarian law, and the basic principles and values of human rights. However, the Truth and Reconciliation Commission has not been established. It left the question open as to whether complaints lodged by victims against crimes committed by insurgents could be investigated, prosecuted, and penalized under the regular legal system of the country. This question is both politically and legally important. At the same time, the former Maoist insurgents have come into power and the police have not properly investigated complaints lodged against them. Amidst this complex situation, the petitioner, a prominent human rights activist in Nepal, asked the Supreme Court of Nepal to order the Prime Minister to carry out a proper investigation of the cases lodged against the insurgents and terminate from public office a Maoist leader who was appointed Minister.

Judgment

Among other issues, the Supreme Court of Nepal examined two important issues. First, whether crimes committed during the insurgency could be investigated and prosecuted under the regular legal system. Second, whether a Minister charged under a murder case could continue in public office. When the government argued before the Court that acts perpetrated during the insurgency for a political purpose could not be brought before the regular jurisdiction of a law court, this demanded an analysis of the relationship between a transitional justice system and the regular legal system. In a nutshell, the Supreme Court opined that crimes committed during the insurgency could not be impugned purely on the basis of political reasons. No reasons, in fact could justify violations of human rights and legitimize the commission of a crime. Under no grounds could the rule of law be undermined.

Since the idea of transitional justice has been adopted under Article 166(3) of the Interim Constitution of Nepal by incorporating the Comprehensive Peace Agreement (CPA) as exhibited in its Annex 3, it would be natural to expect necessary legal action regarding human rights violations under the transitional justice mechanism. However, in a situation where the mechanism of transitional justice was not established, the Supreme Court found it necessary to apply the regular legal system to investigate, prosecute, and penalize criminal acts that took place during the insurgency.

The Supreme Court also ordered the carrying out of a proper investigation of the complaint registered against Mr. Agni Sapkota, the Maoist Minister. At the same time, the Supreme Court also found that though there was a registration of a complaint, one could not be considered an accused or a culprit. Unless one is sentenced for a morally degrading crime, the person could not be deprived of public office.

In light of the Universal Declaration of Human Rights and other international human rights instruments including the International Covenant on Civil and Political Rights to which Nepal is a party, a violation of human rights during the insurgency could not be exonerated. Further, the Supreme Court found that it was the duty of the Court to institutionalize the rule of law and implement international human rights instruments. The Supreme Court observed that it was unfortunate that the government, the parliament, and political parties did not give priority to the agenda of the establishment of a High-Level Truth and Reconciliation Commission envisioned under Article 33(s)²⁴ of the Interim Constitution. In the event of the establishment of a transitional justice system in the future, the investigation and prosecution of crimes that took place during the insurgency might be governed as provided for under the transitional system. Nevertheless, in a democratic society, the law and judicial system cannot be expected to be in a desultory state. The Supreme Court ordered that complaints lodged against crimes perpetrated during the insurgency should be investigated properly and the legal process should be taken under the 1992 Public Prosecution Act of Nepal.

APPLICATION OF 1994 IMMIGRATION LAWS – DISCRIMINATORY TREATMENT – VISA FEES

***Advocate Mira Dhungana and Others v. The Council of Ministers and Others.* Special Bench of the Supreme Court of Nepal, (Hon. Kalyan Shrestha, Hon. Girish Chandra Lal, & Hon. Gyanendra Karki, JJ.), decided on November 24, 2011.**

24 Article 33(s) of the Interim Constitution of Nepal (2007) provides that the State shall have the following responsibilities: “To constitute a High-Level Truth and Reconciliation Commission to investigate the facts regarding grave violation of human rights and crimes against humanity committed during the course of conflict, and create an atmosphere of reconciliation in the society.”

Facts

Since a long time, the Immigration Laws of Nepal levied a visa fee to male foreign citizens married to female Nepalese citizens when entering Nepal and also on the renewal of visas. In regard to female foreign citizens married to male Nepali citizens, the Immigration Laws of Nepal waived the visa fee. The petitioners, against this backgrounds, asked the Supreme Court of Nepal to declare Rule 9 Schedule 5.4 of the 1994 Immigration Rules of Nepal unconstitutional claiming that the impugned provision violates the right to equality guaranteed under the Interim Constitution of Nepal and the international human rights conventions to which Nepal is a party. The petitioners also raised the question that the impugned provision was discriminatory in a number of ways, including giving less favorable treatment to foreigners who are married to the Nepalese citizen than foreigners who are born to Nepali parents.

Judgment

The Supreme Court of Nepal declined to issue the writ petition and refused to declare the impugned provision to be ultra vires to Article 13.2²⁵ of the Interim Constitution, and Articles 2.1²⁶ and 3²⁷ of the International Covenant on Civil and Political Rights. The Supreme Court gratuitously reasoned that the immigration regulations were engendered by government policy to which the Court should give judicial deference rather than intervention. The act of formulating and implementing desired laws and policies to regulate and facilitate harmonious family relations belongs

25 Article 13.2 of the Interim Constitution of Nepal, 2007 provides that “No discrimination shall be made against any citizen in the application of general laws on grounds of religion, race, caste, tribe, sex, origin, language or ideological conviction or any of these.”

26 Article 2.1 of the ICCPR, 1966 provides that “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

27 Article 3 of the ICCPR, 1966 provides that “The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.”

to the jurisdiction of the legislature and the executive body. Thus, the Supreme Court reasoned that was not appropriate for the Court to enter into an inquiry on legislative wisdom and intervene in the policy issues of the executive body.

The Supreme Court observed that the Immigration Rules did not maintain a discriminatory visa fee between male and female foreigners. Both male and female are required to pay an equal amount. Foreigners, except those whose visa fee was waived by law, are required to pay a visa fee to enter Nepal. The legal requirement for the payment of a visa fee is a globally accepted practice. Therefore, the Supreme Court established that in regard to the visa fee, no one should expect equal treatment between citizens and foreigners.

Further, the Supreme Court mentioned that the Foreigners Act, which was already withdrawn, had legalized the waiver of the visa fee for a female foreigner married to a male Nepalese citizen. However, a similar provision is carried over by the Immigration Rules. The Supreme Court, despite acknowledging the differences in treatment between male foreigners married to female Nepalese citizens and female foreigners married to male Nepalese citizens, refused to recognize the discriminatory treatment on the basis of sex and gender. The reason tendered by the Supreme Court is derived from a proposition that the legality of the carried over provision by the Immigration Rules cannot be tested under existing laws including the Constitution and international conventions.

PHILIPPINES

COUNTERFEIT DRUGS – RIGHT TO HEALTH AND “BASIC DECENCIES OF HUMANITY”

***Roma Drug and Romeo Rodriguez v. The Regional Trial Court of Guagua, Pampanga et al.* [GR No. 149907. 16 April 2009]**

A team composed of the National Bureau of Investigation and the Bureau of Food and Drugs conducted a raid on Roma Drug, a duly registered sole proprietorship operating a drug store. The raid was conducted pursuant to

a search warrant. Subsequently, a complaint was filed against the owner of Roma Drug for violation of the Special Law on Counterfeit Drugs (SLCD).²⁸

The seized drugs are identical in content with their Philippine-registered counterparts. Their classification as “counterfeit” is based solely on the fact that they were imported from abroad and not purchased from the Philippine-registered owner of the patent or trademark of the drugs.

During preliminary investigation, the constitutionality of the SLCD was challenged for violating the equal protection clause of the Bill of Rights; Section 11, Article XIII, which mandates that the state make “essential goods, health and other social services available to all the people at affordable cost;” and Section 15, Article II, which states that it is the policy of the state “to protect and promote the right to health of the people and instill health consciousness among them.”

The Court held that the challenge is moot as the Universally Accessible Cheaper and Quality Medicines Act of 2008, which grants third persons the right to import or possess unregistered imported drugs, was passed and prevailed over SLCD. Besides, an implementation of the SLCD would have “implications that deny the basic decencies of humanity.” The law would make criminals of doctors from abroad on medical missions of international humanitarian organizations such as the International Red Cross, International Red Crescent and Medicin Sans Frontieres.

**RIGHT TO LIBERTY – CRIMINAL PROSECUTION AS
VALID RESTRICTION – UNAVAILABILITY OF THE REMEDY OF
AMPARO**

***Reverend Father Robert P. Reyes v. Court Of Appeals at al.* [GR No. 182161. 3 December 2009]**

A Hold Departure Order was issued against Fr. Robert Reyes by the Secretary of the Department of Justice Secretary Raul Gonzalez for Reyes’ alleged involvement in the Manila Peninsula Hotel siege on 30 November 30, 2007.

28 According to the Court, the section said to be violated prohibits the sale of counterfeit drugs, which under Section 3(b)(3) of said law, includes “an unregistered imported drug product.” The term “unregistered” signifies the lack of registration of a trademark, tradename, or other identification mark of a drug in the name of a natural or juridical person, the process of which is governed under Part III of the Intellectual Property Code.

Fr. Reyes petitioned the court for the issuance of the writ of Amparo as his right to travel—part of the right to liberty—was violated.

The Supreme Court upheld the decision of the Court of Appeals which had denied the petition for the issuance of the writ. The Court cited precedents such as *Secretary of National Defense et al. v. Manalo et al.*,²⁹ which expounded on the right to life, liberty, and security as enshrined in the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR). The restriction on his right to travel was a consequence of the criminal case against him was not unlawful and that he failed to establish that his right to travel was impaired in the manner and to the extent that it amounted to a serious violation of his right to life, liberty, and security, for which there exists no readily available legal recourse or remedy.

ENFORCED DISAPPEARANCE – AVAILABILITY OF THE REMEDY OF AMPARO

***Gen. Avelino I. Razon, Jr. Chief, Philippine National Police (PNP), at al. v. Mary Jean B. Tagitis* [GR No. 182498. 3 December 2009]**

This case was one of first impression in the use and application of the Rule on the Writ of Amparo in an enforced disappearance situation in the Philippines. Morced Tagitis, a consultant for the World Bank and the Senior Honorary Counselor for the Islamic Development Bank (IDB) Scholarship Programme, together with Arsimin Kunnong, an IDB scholar, arrived in Jolo, Sulu from a seminar in Zamboanga City. They checked-in at a pension house. Tagitis asked Kunnong to buy a return boat ticket for him. When Kunnong returned from this errand, Tagitis was already missing.

The disappearance of Tagitis was reported to the Jolo Police Station. More than a month later, Mary Jean Tagitis filed a Petition for the Writ of Amparo directed against several officials of the Armed Forces of the Philippines. The writ was issued by the Court of Appeals (CA) and further hearing on the matter was conducted. The CA issued its decision confirming that the disappearance of Tagitis was a case of enforced disappearance and extended the privilege of the writ to Tagitis and his family, directing

29 *Sec'y of Nat'l Def. v. Manalo*, G.R. No. 180906, (S.C., Oct. 7, 2008) (Phil.), available at <http://sc.judiciary.gov.ph/jurisprudence/2008/october2008/180906.htm>.

the officials to exert extraordinary diligence and efforts to protect the life, liberty, and security of Tagitis and obliging them to provide monthly reports of their actions to the CA.

The decision of the CA was questioned. In affirming the ruling, the Supreme Court held, among others, that the presentation of substantial evidence by the petitioner to prove her allegations was sufficient for the court to grant the privilege of the writ. Furthermore, the writ of Amparo does not determine the guilt nor pinpoint criminal culpability for the alleged enforced disappearance of the subject of the petition for the writ. It is rather a protective remedy against violations or threats of violation against the rights to life, liberty, and security.

In order to appreciate the application of the Amparo rule to an enforced disappearance situation, the Court looked at the historical context of the writ and enforced disappearances. The Court said that the phenomenon arising from state action first attracted notice in Adolf Hitler's *Nacht und Nebel* Erlass or Night and Fog Decree of 7 December 1941. In the mid-1970s, it resurfaced when individuals, numbering anywhere from 6,000 to 24,000, were reported to have "disappeared" during the military regime in Argentina, then in Latin America. Thus, victims of enforced disappearances began to be called the "*desaparecidos*" which literally means the "disappeared ones." The Court also recounted the numbers of persons who have disappeared in recent Philippine history.

With regard to enforced disappearance under Philippine law, the Court held that as the law now stands, extra-judicial killings and enforced disappearances in this jurisdiction are not crimes penalized separately from the component criminal acts undertaken to carry out these killings and enforced disappearances and are now penalized under the Revised Penal Code and special laws. The simple reason is that the Legislature has not spoken on the matter. However, even without the benefit of directly applicable substantive laws on extra-judicial killings and enforced disappearances, the Court said it is not powerless to act under its own constitutional mandate to promulgate "rules concerning the protection and enforcement of constitutional rights, pleading, practice and procedure in all courts"³⁰ since extrajudicial killings and enforced disappearances, by

30 Const. (1987), art. VIII, sec. 5 (Phil.).

their nature and purpose, constitute state or private party violation of the constitutional rights of individuals to life, liberty, and security.

From the international law perspective, the Court proclaimed that involuntary or enforced disappearance is considered a flagrant violation of human rights. The UN General Assembly first considered the issue in December 1978 under Resolution 33/173. In 1992, the UN General Assembly adopted the Declaration on the Protection of All Persons from Enforced Disappearance. In 2006, it adopted the International Convention for the Protection of All Persons from Enforced Disappearance. This convention is the first universal human rights instrument to assert that there is a right not to be subject to enforced disappearance and that this right is non-derogable.

Juxtaposing domestic and international law, the Court however said that while the Philippines is not yet formally bound by the terms of the Convention on enforced disappearance (or by the specific terms of the Rome Statute) – as it is not a party to the Convention – and has not formally declared enforced disappearance as a specific crime, there are reasons that reveal that, “enforced disappearance as a state practice has been repudiated by the international community, so that the ban on it is now a generally accepted principle of international law,³¹ which we should consider a part of the law of the land, and which we should act upon to the extent already allowed under our laws and the international conventions that bind us.” The main reason given by the Court to justify this conclusion is state practice with respect to enforced disappearance as evidenced, *inter alia*, by jurisprudence in other jurisdictions and in regional human rights bodies.

An Act Providing for the Magna Carta of Women, Republic Act No. 9710

The President approved the passage into law of the Magna Carta of Women on August 14, 2009. This law affirms the role of women in nation building and ensures the substantive equality of women and men. Through it, the

31 Art. II, Sec. 2 of the 1987 Philippine Constitution provides: “The Philippines renounces war as an instrument of national policy, adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations.”

state condemns discrimination against women in all its forms and pursues by all appropriate means and without delay the policy of eliminating discrimination against women in keeping with the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and other international instruments consistent with Philippine law. It also affirms women's rights as human rights and that the state shall intensify its efforts to fulfill its duties under international and domestic law to recognize, respect, protect, fulfill, and promote all human rights and fundamental freedoms of women.

The principles of the human rights of women are laid out and the magna carta declares the universality of human rights as encompassed in the words of Article 1 of the UDHR. Along with defining terms such as women empowerment and discrimination against women, it sets out the duties related to the human rights of women, rights and empowerment, and the rights and empowerment of marginalized sectors (e.g., food security and productive resources, housing, decent work).

The state is the primary duty-bearer in relation to the human rights of women and duties extend to all state agencies, offices, and instrumentalities. Importantly, it declares that all rights in the 1987 Philippine Constitution and those rights recognized under international instruments duly signed and ratified by the Philippines, in consonance with Philippine law, are rights of women under the Act that are to be enjoyed without discrimination. Specific provisions on human rights of women include protection from violence; rights of women affected by disasters, calamities, and other crisis situations; participation and representation; equal treatment before the law; equal access and elimination of discrimination in education, scholarships, and training; women in sports; women in the military; nondiscriminatory and non-derogatory portrayal of women in media and film; women's right to health; special leave benefits for women; and equal rights in all matters relating to marriage and family relations.

Gender mainstreaming is a strategy for implementing the magna carta. As such, gender focal points are established in government offices, including in embassies and consulates. The overall monitoring body and oversight to ensure the implementation of the Act is the National Commission on the Role of Filipino Women which was renamed as the Philippine Commission on Women. It is the primary policymaking and coordinating body of the women and gender equality concerns under the Office of the

President. The Commission on Human Rights (CHR) acts as the Gender and Development Ombud, consistent with its mandate.

Under the magna carta, upon finding of the CHR that a department, agency, or instrumentality of government, government-owned and -controlled corporation, or local government unit has violated any provision of this Act and its implementing rules and regulations, the sanctions under administrative law, civil service, or other appropriate laws shall be recommended to the Civil Service Commission and/or the Department of the Interior and Local Government. The person directly responsible for the violation as well as the head of the agency or local chief executive shall be held liable under the Act. If the violation is committed by a private entity or individual, the person directly responsible for the violation shall be liable to pay damages. If violence has been proven to be perpetrated by agents of the state, such shall be considered aggravating offenses with corresponding penalties depending on the severity of the offenses.

TORTURE AND OTHER CRUEL, INHUMAN AND DEGRADING TREATMENT OR PUNISHMENT

An Act penalizing Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment and prescribing penalties therefor, Republic Act No. 9745

Declaring as well the policy of the state to fully adhere to the principles and standards on the absolute condemnation and prohibition of torture as provided for in the 1987 Philippine Constitution; various international instruments to which the Philippines is a state party such as, but not limited to, the ICCPR, the Convention on the Rights of the Child (CRC), CEDAW, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); and all other relevant international human rights instruments to which the Philippines is a signatory, this Act was signed by the President on 10 November 2009. The Act defined torture as:

[A]n act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him/her or a third person information or a confession; punishing him/her for an act he/she or a third person has committed or is suspected of having committed; or intimidating or coercing him/her or a third person; or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a person in authority or agent of a person in authority. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.³²

Meanwhile, “other cruel, inhuman and degrading treatment or punishment” is referred to as “a deliberate and aggravated treatment or punishment not enumerated under Section 4 of this Act, inflicted by a person in authority or agent of a person in authority against a person under his/her custody, which attains a level of severity causing suffering, gross humiliation or debasement to the latter.”³³ Order of battle means any document or determination made by a law enforcement agency of government, listing names of persons and organizations that it perceived as “enemies of the state and considers as legitimate targets as combatants that it could deal with, through the use of means allowed by domestic and international law.”³⁴

Under the law, there are two general acts of torture: physical and mental/psychological torture. The former is a form of treatment or punishment that causes severe pain, exhaustion, disability, or dysfunction of one or more parts of the body of another in one’s custody. The latter is calculated to affect or confuse the mind and/or undermine a person’s dignity and morale. They have to be inflicted by a person in authority or agent of a person in authority. The assessment of the level of severity within the context of “other cruel, inhuman and degrading treatment or punishment” shall depend on all the circumstances of the case, including the duration of the treatment or punishment, its physical and mental effects and, in some cases, the sex, religion, age, and state of health of the victim.

32 An Act Penalizing Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment and Prescribing Penalties Therefor, Rep. Act No. 9745, § 3(a) (Nov. 10, 2009) (Phil.).

33 Id. at § 3(b).

34 Id. at § 3(d).

It should be pointed out that the Act declares torture and other cruel, inhuman and degrading treatment or punishment as criminal acts in all circumstances. A state of war or a threat of war, internal political instability, or any other public emergency, or a document or any determination comprising an “order of battle” shall not and can never be invoked as a justification for torture and other cruel, inhuman and degrading treatment or punishment. Secret detention places, solitary confinement, incommunicado, or other similar forms of detention, where torture may be carried out with impunity are hereby prohibited.

The principle of non-refoulement is also expressly provided for in the Act. Accordingly:

No person shall be expelled, returned or extradited to another State where there are substantial grounds to believe that such person shall be in danger of being subjected to torture. For the purposes of determining whether such grounds exist, the Secretary of the Department of Foreign Affairs (DFA) and the Secretary of the DOJ, in coordination with the Chairperson of the CHR, shall take into account all relevant considerations including, where applicable and not limited to, the existence in the requesting State of a consistent pattern of gross, flagrant or mass violations of human rights.³⁵

There are other provisions in the Act which deal with matters such as evidence obtained as a result of torture; disposition of writs of habeas corpus, Amparo and habeas data; torture as a separate and independent crime; and compensation to victims of torture.

LESBIAN, GAY, BISEXUAL OR TRANSGENDER RIGHTS

The Secretary of the Department of Justice was requested and has given opinions on matters relating to international law such as those on lesbian, gay, bisexual, and transgender rights in the Philippines, and the character of several agreements entered into by the Philippines with other states.

Opinion no. 05, s. 2009, 16 January 2009, “Legal opinion or position on issues surrounding lesbian, gay, bisexual or transgender (LGBT) rights.”

The opinion of Department of Justice Secretary Raul Gonzalez was sought by Representative Ana Theresa Hontiveros-Baraquel on the primary ques-

35 Id. at §17.

tion of who should craft Philippine policies on LGBTs. Secretary Gonzalez said it is the responsibility of the CHR. Citing Articles 2(2) and 26 of the ICCPR, to which the Philippines is a signatory, among others, he said that the state has the obligation to ensure that LGBTs are entitled to equal protection before the law.

Policies concerning human rights and constitutional guarantees on civil liberties are the jurisdiction of the CHR and the Presidential Human Rights Committee. However, questions of legislation belong to Congress of the Philippines, composed of the House of Representatives and the Senate.

SINGAPORE

CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA AND RELATED INTOLERANCE – REPORT OF UN SPECIAL RAPPORTEUR – SINGAPORE

At the invitation of the Government, Githu Muigai, the UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance visited Singapore from 21 to 28 April 2010. At the end of his visit, the Special Rapporteur issued a press statement. Singapore's Ministry of Foreign Affairs responded to what it felt were hasty conclusions and errors in the Special Rapporteur's press statement. Below are the two press statements.

Full text of the press statement delivered by the UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mr. Githu Muigai, in Singapore, 28 April 2010:

Ladies and Gentlemen,

I visited Singapore from 21 to 28 April. During my mission, I held meetings with representatives of the Government, members of the legislative and judicial branches, as well as with representatives of civil society, including community members, academics, lawyers and private individuals.

I came to Singapore at the invitation of the Government and wish to express my sincere gratitude for its full cooperation and openness in the preparation and conduct of my visit, as well as for the organization of a very rich programme. Its readiness to organise a last minute visit to the Changi Prison was much appreciated. I

was truly impressed by the professionalism and dedication demonstrated by members of the civil service and I would like to convey my appreciation for the detailed information received during all official meetings. I am also extremely grateful to all those individuals, including numerous civil society partners, who granted me interviews and provided me with information and other assistance during my mission.

As UN Special Rapporteur, I would like to reaffirm that I undertook my visit with an open mind and without any preconceived ideas. I came here with the desire to obtain a deeper understanding of Singapore and its people, to engage in a constructive dialogue with the authorities and civil society, to identify best practices that could be shared with the international community at large and to prepare an objective report with clear recommendations.

* * *

Singapore is rightly proud of its richly diverse society where individuals from a wide range of ethnic, religious and cultural backgrounds manage to cohabit and interact with each other on a small portion of territory. Considering that ethnic and religious riots occurred a few decades ago, the actual peaceful coexistence of the diverse communities is a remarkable achievement in itself.

The historical legacy of ethnic and religious tensions still casts a long shadow over the social and political life of Singapore today. To address this, the authorities have continuously and actively promoted social cohesion, religious tolerance and what they refer to as racial harmony, as fundamental pillars of the city-state. They have done so through a number of commendable policies and measures emphasizing tolerance, understanding and respect among the diverse ethnic and religious groups living in Singapore. The wide range of organisations seeking to and succeeding in offering common space for people to dialogue and learn about the cultural traditions and practices of the main ethnic groups in Singapore testify to the recognition that social harmony must not be taken for granted and that continuous efforts are needed to preserve it. In this regard, I was deeply impressed by the work achieved and activities undertaken by, *inter alia*, the National Integration Council, the National Steering Committee on Racial and Religious Harmony, the People's Association, OnePeople, as well as the Inter Racial and Religious Confidence Circles.

Social cohesion and political stability undoubtedly constitute essential elements of nation-building in a young country like Singapore. In this regard, the authorities have taken wide-ranging

measures to foster racial harmony and discourage intolerance. Most of these measures are widely appreciated by all sectors of the society. In addition, they demonstrate that the Government is committed to confronting these challenges in an open manner. On the other hand, various interlocutors pointed out that the legitimate goal of searching for racial harmony may have created blind spots in the policies and measures pursued by the Government.

There exist several legislative provisions which prohibit the promotion of feelings of “enmity”, “ill-will” or “hostility” between members of the different ethnic groups in Singapore. It appears that these restrictions aim to frame and limit any public debate or discourse on an issue considered as highly sensitive. Given Singapore’s historical legacy, the concerns of the authorities with regard to ethnic conflicts are understandable. However, it is absolutely necessary in a free society that restrictions on public debate or discourse and the protection of racial harmony are not implemented at the detriment of fundamental human rights such as freedom of expression and freedom of assembly. Many interlocutors assured me that Singaporean society had evolved substantially from the days of the violent confrontations 45 years ago, so as to have open public debate on a sensitive issue like ethnicity in a dispassionate and fruitful manner. I therefore believe that time is ripe for the authorities to review any legislative restrictions that may exist in the statute books in order to allow Singaporeans to share their views on matters of ethnicity, to identify potential issues of discomfort and above all, work together to find solutions.

Despite the existence of various policies and institutions seeking to provide all ethnic groups with equal opportunities, it would appear that the significance of ethnic identity has not diminished and indeed some would say has increased in one’s interactions with the State and with the Singaporean society at large. Consequently, individuals find themselves classified into distinct categories defined along ethnic lines. As an illustration, the ethnic background of Singaporeans is indicated on identification documents, although I was informed that the practice has now been made more flexible so as to enable individuals of mixed origins to display several ethnic backgrounds. Yet, individuals of mixed origins may find it difficult to relate to any of the self-help groups (CDAC, SINDA, Yayasan Mendaki, EA and AMP) established to assist members of their own communities. These self-help groups, which play a critical role in the provision of social services, are ethnically based. Consequently, it might be difficult for a non Tamil-speaking Indian Muslim to identify him- or herself with the Mendaki or the SINDA.

I was informed that the Group Representation Constituencies (GRC) were created for the purpose of ensuring minorities' political participation by requiring that a minority candidate be fielded in each of the GRC. Some interlocutors were of the view that this scheme had actually institutionalised and entrenched the status of minorities within Singaporean society.

In addition, concern was expressed that such schemes may tend to reinforce and perpetuate ethnic categorization. This in turn may lead to certain prejudices and negative stereotypes held against certain minority groups taking root. As an example, I was informed that people tend to think of "Little India" as an unsafe neighbourhood.

The benefits of a society which allows for more permeability between delimited ethnic categories and in which social interactions are not predetermined by ethnic identity cannot be overemphasised. I would therefore recommend as a starting point that the identification documents should not indicate the ethnic background of individuals in order to accord less significance thereto.

* * *

In addition to the general issues raised above, I am of the view that the following specific issues require attention:

HOUSING

The 1989 Ethnic Integration Policy - whereby ethnic quotas are imposed in each State-subsidized building and each neighbourhood - put in place in order to prevent the formation of ethnic enclaves, has been generally successful in terms of social integration. I was indeed told by many interlocutors that this policy allows the great majority of Singaporeans from diverse ethnic backgrounds to mix together and regularly interact, for instance in the "void decks" situated on the ground floor of each State-subsidized building.

While the rationale and objectives of this policy may be laudable, there are those who think that its implementation has created new problems. For instance, it is felt that the existing public housing quotas may prevent members of ethnic minorities finding an accommodation close to their families or that ethnic minorities encounter greater difficulties in reselling their apartments to members of their groups, as sale to other ethnic groups is prohibited under this policy.

Although the implementation of the Ethnic Integration Policy may already be of a rather complex nature, I would nonetheless suggest that more flexibility be allowed and that the authorities

keep it under constant review, so as to take into account the evolving needs of Singaporeans.

EDUCATION

The Singaporean public educational system has been successful in allowing all children, regardless of their backgrounds, to learn and play together. Moreover, education programmes fostering tolerance, understanding and respect have very much contributed to the peaceful coexistence of the diverse communities in Singapore.

According to Government officials, the principle of meritocracy, which is at the core of the public educational system – and of Singaporean society – ensures that all children are offered equal opportunities. Meritocracy has its merits. However, where there are acknowledged historical inequalities, as is the case with Malay students, this principle may serve to entrench them. Indeed, this may very well be the reason why the Government had until a decade ago directly supported free national education programmes for Malay students.

Despite statistics showing that great progress has been made in the last decades, Malay students seem to have remained below the national average. For instance, I was informed that since independence, only two Malay students had been granted Presidential scholarships which award the best students in the country.

Moreover, I was informed that Special Assistance Plan (SAP) schools, which have been established in order to nurture the best talents that will form the next generation of leaders in the various fields, had restricted access to Mandarin speakers. This has led to some resentment among non-Mandarin speakers. Critics argue that these schools favouring Chinese culture and language are a visible symbol of the marginalisation of minority groups, and that they create the impression that there exists a hierarchy of cultures.

Education is undoubtedly one of the most efficient tools to create a cohesive and tolerant society, where all children may be taught how diverse ethnic and national groups can coexist peacefully. Consequently, I would like to suggest that specific measures be taken to ensure that the educational interests of Malay students are protected and promoted, in accordance with article 152 of the Constitution of Singapore and international human rights standards. While there can be no doubt that meritocracy guarantees equality of opportunities, special measures within clearly defined timelines may help to address historical inequalities.

EMPLOYMENT

During my official meetings, I was informed of the promotional approach taken to address problems of discrimination against job-seekers and workers from certain ethnic or religious backgrounds. In this regard, I welcome initiatives taken by the Ministry of Manpower and the Tripartite Alliance for Fair Employment Practices aimed at educating employers and employees about the principle of non-discrimination or at resolving labour issues related to discrimination through mediation.

While the results of this approach appear to be good, in particular when it comes to language discrimination affecting job-seekers, my attention has nonetheless been drawn to the difficulties and negative stereotypes faced by members of the Malay and Indian communities in the field of employment. For instance, I was told that Malay individuals continue to be underrepresented in senior positions of the armed forces, the police and intelligence services, as well as in the judiciary. These are critical institutions that ought to reflect the diversity of the nation. I would therefore recommend that the authorities urgently review all laws, regulations, guidelines, policies and practices, so as to ensure sufficient representation of the minority ethnic groups in all employment sectors. In addition, I would like to suggest that the authorities consider adopting legally binding provisions prohibiting discrimination of all kinds, including on the grounds of ethnic or national origin, in the field of employment.

RECENT MIGRANTS

The influx of foreigners which has been supported by the Government to satisfy the demands of a fast-growing economy and to counter a declining birth rate has contributed to the building and the prosperity of this young nation in a positive manner. Yet, it has also created significant challenges. I was for instance told both by Government officials and civil society actors that the recent wave of migrants coming mainly from the People's Republic of China and India had led to some resentment by the Singaporean population. Depending on the nationality of these recent migrants, they could in some instances be perceived as taking away jobs from Singaporean citizens, threatening Singaporean families or affecting the fragile national demographic balance. There was also a perception among some interlocutors that the Government seemed to favour migrants from certain countries.

The National Integration Council seeks to address some of these concerns. However, there is still a need to formulate a more open and transparent immigration policy.

MIGRANT WORKERS, INCLUDING DOMESTIC WORKERS

The Government has to a large extent determined the employment areas in which certain foreign communities can work. In this regard, I was informed that for each sector of employment, there exists a list of “approved source countries” from which employers may hire foreign workers. As a result, domestic workers may originate from Indonesia, Myanmar or the Philippines, but not from the People’s Republic of China. Similarly, the construction sector may only hire foreign workers from the People’s Republic of China, Malaysia, India, Sri Lanka, Thailand, Bangladesh, as well as few other Asian countries. This has raised concerns that the system may reinforce ethnic stereotypes and taint the rest of the employment system.

While my mandate does not specifically relate to migrant workers, it is nonetheless concerned with discrimination on the grounds of national or ethnic origin preventing individuals from enjoying, *inter alia*, just and favourable conditions of work, equal pay for equal work, as well as equality before the law. In this regard, the living and working conditions of migrant workers, in particular of the low-skilled ones commonly referred to as “transient workers”, were frequently raised during my meetings.

I was told by virtually all my interlocutors that the authorities had taken numerous and commendable initiatives to prevent and address the manifold human rights violations and sometimes physical abuse suffered by low-skilled migrant workers. These include education programmes both for employers and employees; the conduct of random interviews of domestic workers during their initial months of employment; assistance by the Ministry of Manpower in resolving labour disputes through mediation; the sanctioning of companies when workers’ wages are left unpaid or the enhancement of penalties for offences committed by employers against their domestic workers.

Yet low-skilled migrant workers continue to face a number of difficulties. These include the sponsorship system which places migrant workers in a highly dependent relationship to their employer and severely limits labour mobility; unilateral cancellations of work permits by their employers; poor and unhygienic living conditions or denial of medical insurance by their employers contrary to of-

ficial policy. Concerns relating to migrant workers being trafficked into the country were also raised.

Migrant domestic workers, who constitute about a quarter of the migrant workforce, also face a number of additional difficulties due to their exclusion from the Employment Act and to their isolated working environment. For instance, migrant domestic workers are not always accorded a day of rest per week; in practice they are not always granted annual or medical leave; they are automatically deported if found pregnant and are prohibited from marrying Singaporean men.

While I received assurances from relevant authorities that these issues are under review, I would strongly urge the Government to act swiftly to ensure the protection of migrant workers' human rights, as this is one area where the situation is quite dire. In this regard, I particularly welcome the fact that the enforcement of a standard contract offering enhanced protection to migrant domestic workers is currently under review by the Ministry of Manpower. I recommend that the Government extends and enhances the effective implementation of the Employment Act; that efforts be undertaken to ensure that labour disputes are resolved expeditiously through accessible and effective mechanisms; and that a minimum wage for migrant workers particularly vulnerable to exploitation, such as construction and domestic workers, be introduced.

LEGAL AND INSTITUTIONAL FRAMEWORK TO FIGHT RACISM AND XENOPHOBIA

The fight against racism, racial discrimination, xenophobia and related intolerance can only be achieved in the most effective manner with the help of a solid and robust institutional and legal framework. While I understand that the Government wishes to ensure that it is in a position to fully implement international obligations contained in an international treaty before ratifying it, I nonetheless urge it to accede to international human rights instruments which enshrine the fundamental principles of equality and non-discrimination. These include the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, as well as the International Convention on the Rights of All Migrant Workers and Members of Their Families.

In addition, the Durban Declaration and Programme of Action, as well as the Outcome Document of the Durban Review Conference, to which Singapore made a positive contribution, provide the

most comprehensive frameworks for the fight against racism, racial discrimination, xenophobia and related intolerance. I would like to encourage the Government to continue taking concrete measures to achieve the goals and objectives contained therein.

While acknowledging that the Constitution of Singapore contains non-discrimination provisions, I would like to recommend that a specific legislation prohibiting racial discrimination in all areas of life, including employment, education and health, be enacted. This would allow for the set up of relevant reporting, reviewing and enforcement mechanisms, as well as specific funding, which usually allows for more effective policies against racism.

Given its constitutional status, the Presidential Council for Minority Rights (PCMR) appears to be the highest organ within the Government mandated with the task of protecting the rights of members of minority groups. It is my understanding that the PCMR, which is chaired by the Chief Justice, may consider and report on legislative and policy matters affecting persons of ethnic and religious communities only if referred to by Parliament or the Government. I was surprised to learn that in 40 years of existence, the PCMR had never issued a statement or taken a position on any particular legislation or public policy that may have affected the rights of members of ethnic minority groups. Moreover, it seemed to me that there exists a potential conflict between the dual role of the Chief Justice as head of an independent judiciary (to which a case may be filed questioning the constitutionality of any law or policy) and as Chairperson of the PCMR.

I would therefore encourage the authorities to review the mandate conferred to the PCMR and its composition, so that it may consider any legislation or public policy on its own initiative and that its independence be ensured.

CONCLUDING REMARKS

At the end of my visit, I have come to the conclusion that the Government of Singapore is acutely aware of the threats posed by racism, racial discrimination, xenophobia and related intolerance, and that it has endeavoured to put in place laws, policies and institutions that seek to combat these scourges. And while there may be no institutionalised racial discrimination in Singapore, several policies have further marginalized certain ethnic groups. This is a situation that must be acknowledged and acted upon in order to safeguard the stability, sustainability and prosperity of Singapore.

The country report, which I expect to present to the Human Rights Council in June 2011 will include a more detailed and ex-

haustive analysis of my preliminary findings. As I have said earlier, I will be drafting my report in the spirit of contributing positively towards the reforms already undertaken. I will of course remain available for further constructive interaction with the Government in order to facilitate the implementation of these recommendations.

Finally, I would like to stress that the task of enhancing the enjoyment of human rights in the Singaporean society must be borne by all. These include the Government, citizens, residents and civil society organisations. My mandate stands ready to provide any assistance as may be required in this regard.

I thank you for your attention.”

Ministry of Foreign Affairs Press Statement: MFA’s Response to the Press Statement of Mr Githu Muigai, UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, 28 April 2010

Mr Githu Muigai visited Singapore at the invitation of the Singapore Government. He had requested to come to Singapore to better understand our society, engage in dialogue, and identify best practices to be shared.

We told Mr Muigai that for Singapore, maintaining racial and religious harmony and treating minorities fairly is not just the morally correct thing to do. It is a political, economic and even foreign policy imperative for our continued survival and prosperity.

The principle of meritocracy is the basis of Singapore’s success and will continue to serve as the core value of our society.

Mr Muigai told us that he now better appreciates the complexity of Singapore society and how we deal with racial issues. He agreed with us that managing racial issues is a journey with no end and there will always be challenges. We told him that we will deal with them pragmatically as they arise; policies are continually reviewed and adjusted if changes are warranted.

The Singapore Government looks forward to reading Mr Muigai’s final report. We have an open mind because the maintenance of racial harmony is of such vital importance to us that we are prepared to consider any practical suggestion that advances this goal and is workable in our unique circumstances.

We do not expect Mr Muigai to agree with all our approaches; nor do we agree with all that he had shared with us. Such differences of opinion are natural when dealing with a subject as complex as race. We will respond fully as appropriate when we see his final report.

However, there are some comments in his press statement and from his press conference that require immediate clarification.

POSITION OF THE MALAYS

We are surprised that Mr Muigai had so quickly concluded that in the field of education, “special measures within clearly defined timelines” may be necessary to help address the historical inequalities faced by the Malay community.

As Mr Muigai himself has acknowledged, statistics show that “great progress has been made in the last decades” in terms of the Malay community’s performance in education and many other areas. These statistics are publicly available.

The approach that Mr Muigai appears to be advocating – popularly known as ‘affirmative action’ based on racially defined quotas – is one that has been tried by many countries without notable success. During our discussions with him, we found that Mr Muigai is well aware of failures of affirmative action and indeed shared with us an example of such a failure in another country.

During his meeting with MUIS, Mr Muigai directly asked the President of MUIS Haji Mohd Alami Musa whether he thought the Malay community wanted the government to create special provisions to help the Malay community. Haji Alami categorically told Mr Muigai that the Malays disapproved of any affirmative action policy because the Malay community had a deep sense of pride in its own ability to achieve steady progress under the national system of meritocracy.

RESTRICTIONS ON DISCUSSION OF SENSITIVE ISSUES

In the course of his press conference this afternoon Mr Muigai referred to restrictions in our laws such as the Penal Code and the Sedition Act and expressed the opinion that they may not as useful today as forty-five years ago. He called for greater openness in the public discussion of sensitive issues.

Here we must emphatically disagree with Mr Muigai. Race, language and religion will always be sensitive issues in Singapore. This does not mean that they cannot be discussed, but a balance must always be struck between free expression and preservation of racial and religious harmony.

This balance is only for the Singapore government to determine because only the Singapore government bears the responsibility should things go wrong. The UN bears no such responsibility and we see no reason to take risks for the sake of an abstract principle.

We believe most Singaporeans agree with the government's approach.

PRESIDENTIAL COUNCIL FOR MINORITY RIGHTS

Mr Muigai was of the opinion that there was a potential conflict between the role of the Chief Justice as head of an independent judiciary and as Chairman of the Presidential Council for Minority Rights (PCMR). Mr Muigai has not fully understood the Constitutional role of the PCMR. As the Chief Justice himself told Mr Muigai, if there was any conflict of interest in a case, the Chief Justice would recuse himself. Our judiciary is well respected internationally and the PCMR has worked well to preserve racial harmony in Singapore.

CATEGORISATION BY ETHNICITY

Mr Muigai has suggested that categorising individuals by ethnicity, for example on our National Registration Identity Cards and through our Group Representation Constituency system, may reinforce and perpetuate prejudices and negative stereotypes. However, during our discussions Mr Muigai acknowledged that there was no single correct approach to this issue and that there were good reasons not to pretend that ethnic differences did not exist.

ACCEDING TO INTERNATIONAL CONVENTIONS

Mr Muigai has also recommended that we accede to certain international human rights conventions. We have told Mr Muigai that we are in the process of studying some of these conventions and do not rule out acceding to them. But we do not value form for its own sake and will accede to these conventions if there is substantive value in doing so and we are prepared to implement all their provisions.

There are also factual errors in Mr Muigai's press release that need immediate correction.

EDUCATION FOR MALAY STUDENTS

Mr Muigai had noted that "the Government had until a decade ago supported free education programmes for Malay students". This implies that the Government has reduced the amount of money devoted to Malay education. This is not true. What has changed is that the money that used to be allocated to middle-class Malays who no longer need subsidies for education is now given to Mendaki for distribution to the most needy Malays. The total amount of money dedicated to Malay education has not changed.

NON-TAMIL-SPEAKING INDIAN MUSLIMS

Mr Muigai claimed that non-Tamil-speaking Indian Muslims may find it difficult to identify with Mendaki or SINDA. This is not true and in fact they have been making full use of programmes in both community groups. No Indian Muslim in need of help is denied help.

SPECIAL ASSISTANCE PLAN (SAP) SCHOOLS

Mr Muigai claimed that Special Assistance Plan (SAP) schools were established in order to nurture the best talents that will form the next generation of leaders in the various fields. This is a misunderstanding of the role that SAP schools play in Singapore. Then-DPM Lee Hsien Loong in his speech at the 300th Anniversary of the Birth of the Khalsa Sikh Vesakhi Celebrations in 1999 had explained fully the role of SAP schools. The speech is still relevant and Mr Muigai was given a copy of the speech today.

A report – A/HRC/17/40/Add.2 – was submitted to the UN General Assembly on 25 March 2011. Below are excerpts of Part IV of the Report dealing with “Main challenges in the fight against racism, racial discrimination, xenophobia and related intolerance” as well as the Rapporteur’s conclusions and recommendations.

Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Githu Muigai. Addendum Mission to Singapore, 21–28 April 2010. A/HRC/17/40/Add.2 dated 25 March 2011

IV. Main Challenges in the Fight Against Racism, Racial Discrimination, Xenophobia and Related Intolerance

23. Singapore is rightly proud of its richly diverse society, where individuals from a wide range of ethnic, religious and cultural backgrounds manage to cohabit and interact with each other on a small portion of territory. Considering that violent communal riots occurred just a few decades ago, the Special Rapporteur would like to emphasize that the peaceful coexistence of the diverse communities is a remarkable achievement in itself.

24. The historical legacy of ethnic and religious tensions still casts a long shadow over the social and political life of Singapore today. To address this, the authorities have continuously and actively promoted social cohesion, religious tolerance and what they refer

to as “racial harmony”, as fundamental pillars of the city State. They have done so through a number of commendable policies and measures emphasizing tolerance, understanding and respect among the diverse ethnic and religious groups living in Singapore. The wide range of organizations providing common space for people to dialogue and learn about the cultural traditions and practices of the main ethnic groups in Singapore testify to the recognition that social harmony must not be taken for granted and that continuous efforts are needed to preserve it. In this regard, the Special Rapporteur was deeply impressed by the work achieved by, *inter alia*, the National Steering Committee on Racial and Religious Harmony, the National Integration Council, the People’s Association, OnePeople.sg, as well as the Inter-Racial and Religious Confidence Circles. In this regard, the Special Rapporteur was very much impressed by the level of community engagement by the population in fostering understanding and maintaining social cohesion, which undoubtedly constitute essential elements of nation-building in a young country like Singapore.

25. The wide-ranging measures taken by the authorities to foster racial harmony, discourage intolerance and preserve political stability and prosperity are widely appreciated by all sectors of the society. They indeed demonstrate that the Government is committed to confronting these challenges in an open manner. Yet, various interlocutors pointed out that the legitimate goal of searching for racial harmony may have created some blind spots in the policies and measures pursued by the Government. The Special Rapporteur would like to highlight some of these concerns in the following sections.

A. Restrictions on freedoms of expression and assembly

26. During his mission, the Special Rapporteur was informed that there exist several legislative provisions which deal with the promotion of feelings of “enmity”, “ill-will” or “hostility” between members of the different ethnic groups in Singapore. These legislative provisions include sections 298 and 298A of Singapore’s Penal Code, sections 3 and 4 of the Sedition Act, section 4 of the Undesirable Publications Act and section 7 of the Public Order Act.

27. For instance, according to section 298A of the Penal Code, “whoever (a) by words, either spoken or written, or by signs or by visible representations or otherwise, knowingly promotes or attempts to promote, on grounds of religion or race, disharmony or feelings of enmity, hatred or ill-will between different religious or

racial groups; or (b) commits any act which he knows is prejudicial to the maintenance of harmony between different religious or racial groups and which disturbs or is likely to disturb the public tranquillity, shall be punished with imprisonment for a term which may extend to 3 years, or with fine, or with both". Section 4 of the Undesirable Publications Act states that "for the purposes of this Act, a publication is objectionable if, in the opinion of any controller, it ... describes, depicts, expresses or otherwise deals with ... (b) matters of race or religion in such a manner that the availability of the publication is likely to cause feelings of enmity, hatred, ill-will or hostility between different racial or religious groups". Section 7 of the Public Order Act provides that the police may refuse to grant a permit for a public assembly or public procession if it has reasonable ground for apprehending that the proposed assembly or procession may "cause feelings of enmity, hatred, ill-will or hostility between different groups in Singapore."

28. It appears that the above-mentioned restrictions are aimed at framing and limiting any public debate or discourse on issues that are regarded as highly sensitive. Given Singapore's historical legacy, the concerns of the authorities with regard to communal tensions are understandable. Yet, the Special Rapporteur takes the view that it is absolutely necessary in a free society that restrictions on public debate or discourse and the protection of racial harmony are not implemented at the detriment of human rights, such as freedom of expression and freedom of assembly. During his mission, many interlocutors assured the Special Rapporteur that the Singaporean society had evolved substantially from the days of the violent confrontations 45 years ago, and that it was now able to hold open public debate on a sensitive issue like ethnicity in a dispassionate and fruitful manner. The Special Rapporteur therefore believes that the time is ripe for the authorities to review any undue legislative restrictions that may exist in the statute books in order to allow all individuals living in Singapore to share their views on matters related to ethnicity, to identify potential issues of discomfort and above all, work together to find solutions.

B. Significance of ethnic identity

29. Despite the existence of various policies and institutions seeking to provide all ethnic groups with equal opportunities, it would appear that the significance of ethnic identity has not diminished. Some of the Special Rapporteur's interlocutors said it has even increased in one's interactions with the State and within the Singaporean society at large. Consequently, he notes that individuals find

themselves classified into distinct categories defined along ethnic lines. As an illustration, the ethnic identity of all Singaporeans is indicated on their identification documents and is used in a variety of purposes, including the choice of mother tongue instruction in schools and the ethnic quotas in the field of public housing (see sections below on housing and education).

30. Another example of ethnic categorization relates to the existence of “self-help groups” funded by the Government along ethnic or religious lines. While the Special Rapporteur was informed by the Government that there were various national schemes and programmes providing help to communities, including financial assistance to the needy through, for example, the Community Care Endowment Fund, these self-help groups seem to play a critical role in the provision of complementary social services, in particular in the field of education. Thus, the Yayasan Mendaki is to assist members of the Malay community, the Chinese Development Assistance Council has been established for members of the Chinese community, the Singapore Indian Development Association for members of the Indian community, the Eurasian Association for members of the Eurasian community and the Association of Muslim Professionals for members of the Muslim community.

31. According to the Government, these self-help groups provide tailored responses to the needs of each community, because they draw on and mobilize deep-seated ethnic, linguistic and cultural loyalties. Yet, various interlocutors questioned the compatibility of these officially endorsed self-help groups with the multi-ethnic, multi-religious and multicultural ideals promoted by the Government. Besides fears about the emphasis put on ethnic differences, concerns have been expressed that the smaller organizations are actually unable to compete with the Chinese self-help group, owing to its substantially larger financial resource base. Hence, it is felt that a more effective strategy might be to have a national body, instead of ethnically-based ones, to co-ordinate efforts and provide assistance to all individuals living in Singapore in an equal manner.

32. While the Special Rapporteur acknowledges that the self-help groups have occasionally pooled their resources to launch joint initiatives and that organizations such as OnePeople.sg provide valuable common space to all self-help groups, he nonetheless supports the idea of having a national body. In this regard, he takes the view that a national body would lessen the significance of ethnic identity in one’s interactions with the State and within Singaporean society at large. Such a body would also help remedy the challenges

faced by individuals of mixed origins or those who do not belong to the main ethnic groups, who seem to have difficulty in relating to any of the existing self-help groups.

33. During his mission, the Special Rapporteur was informed about the system of group representation constituencies (GRCs),⁷ which was introduced to “ensure the representation in Parliament of Members from the Malay, Indian and other minority communities”, according to article 39A of the Constitution. The official and laudable rationale behind the 1988 introduction of GRCs was to ensure that the needs, concerns and views of minority groups would not be ignored or neglected in an ethnically Chinese-dominant Singapore. Further, the authorities claimed that this measure would help counter the tendency of voters to vote along ethnic lines. Under the GRC scheme, voters therefore elect on a “one person, one vote” basis a team of Members of Parliament (rather than an individual Member of Parliament), of which there must be at least one minority candidate from a designated ethnic background. While the Special Rapporteur understands the well-intentioned rationale behind the GRC system, he was told that this scheme had actually institutionalized and entrenched the minority status of certain ethnic groups within Singaporean society. It was underlined that the system reinforced the views that members of minority groups were not electable on their own and that they needed to be part of a group of Members of Parliament to be able to get a seat in the Parliament of Singapore.

34. The Special Rapporteur would like to express his concerns vis-à-vis the abovementioned schemes. Indeed, he takes the view that they may tend to reinforce and perpetuate ethnic categorization, which in turn may lead to certain prejudices and negative stereotypes held against certain minority groups taking root. The Special Rapporteur believes that the benefits of a society that allows for more permeability between delimited

ethnic categories and in which social interactions are not predetermined by ethnic identity cannot be overemphasized. In this context, he would like to suggest, as a starting point, that the identification documents should not indicate the ethnic background of individuals. While he was informed during his mission that this practice had been made more flexible to enable individuals of mixed origins to display several ethnic backgrounds, the Special Rapporteur nonetheless would like to emphasize that removing the ethnic background of individuals from identification documents would represent an important step in order to accord less significance to

the ethnic identity in one's interactions with the State and within Singaporean society at large.

C. Housing

35. In 1989, the Government introduced the Ethnic Integration Policy in order to prevent the formation of ethnic enclaves and, more generally, to promote racial harmony. Under this policy, each of the main ethnic groups, i.e. Chinese, Malays, Indians and Eurasians, has a maximum quota of homes that may be rented or purchased by them in each public housing block and neighbourhood. Once the maximum quota has been reached for a particular ethnic group, no further sale or rental of apartments to members of that group will be allowed, unless the transaction is between members of the same ethnic group. Flexibility may be exercised vis-à-vis mixed couples, so that they may choose if they want to be considered as pertaining to one ethnic group or the other. During his mission, the Special Rapporteur was informed that a quota for permanent residents had been introduced in March 2010.

36. The Special Rapporteur was told by almost all his interlocutors that this policy had been generally successful in terms of social integration. Indeed, it allows the great majority of Singaporeans⁸ from diverse ethnic backgrounds to mix together. As a result, almost every neighbourhood may be seen as a thumbnail representation of Singapore as a whole. Each precinct contains flats of different sizes so that households of different income and social profiles live together. Common spaces and shared facilities such as playgrounds or fitness corners enable all communities to regularly interact and to gain entrance into each other's world of food, festivals or social customs. In particular, the Special Rapporteur's attention was drawn to the "void decks" situated on the ground floor of each public housing block. These shared open spaces, where weddings, funerals or group games frequently take place, were highlighted as representing an important element of multi-ethnic, multireligious and multicultural life in Singapore.

37. While the rationale and objectives of the Ethnic Integration Policy may be laudable, the Special Rapporteur was informed that its implementation had actually created new problems. For instance, it was alleged that the existing public housing quotas may prevent members of ethnic minorities from finding accommodation close to their families. Moreover, since this policy prevents individuals from selling their flats to members of other ethnic groups if the maximum quota for these ethnic groups is reached, ethnic minori-

ties seem to encounter greater difficulties in reselling their apartments in the secondary market to members of their minority group. In this regard, several civil society interlocutors stressed the fact that, for ethnic minorities, the pool of potential buyers was smaller and therefore the selling price would be lower than if they were allowed to sell their properties to members of the ethnic Chinese group, for instance. In addition, some civil society interlocutors expressed their concerns that this policy based on ethnic grounds may contravene article 12, paragraph 2, of the Constitution with regard to the acquisition, holding or disposition of property (see para. 13 above).

38. Although the implementation of the Ethnic Integration Policy may already be of a rather complex nature, the Special Rapporteur would therefore like to suggest that more flexibility be allowed in its implementation, so that members of ethnic minorities may be able to find accommodation close to their families, for instance. Moreover, while there seems to be general agreement that this policy has benefited Singapore society as a whole, the Special Rapporteur would like to encourage the authorities to keep it under constant review, so as to take into account the evolving needs of the population living in Singapore.

D. Education

39. The Singaporean public education system has been successful in allowing all children, regardless of their backgrounds, to learn and play together. It has also been successful in preserving the languages of the main ethnic groups by allowing pupils to be taught both in English and in their mother tongue, i.e. Mandarin, Malay or Tamil. During his mission, the Special Rapporteur was informed about various education policies and programmes fostering tolerance, understanding and respect among the youth. For instance, school curricula include topics on social cohesion and harmony; interschool partnerships are organized for schools that are rather homogenous so that pupils may experience the existing ethnic and religious diversity in Singapore; and classroom arrangements are monitored so as to avoid any ethnic congregation. In addition, the Racial Harmony Youth Ambassador Programme seeks to develop a dynamic generation of youths from different backgrounds who participate actively in the development of a cohesive community. To that effect, it appoints Racial Harmony Ambassadors, whose tasks are, *inter alia*, to spread the message of multi-ethnic harmony among their families and friends, and to organize multi-ethnic activities. Another initiative relates to the yearly celebration in

schools of the Racial Harmony Day on 21 July to mark the anniversary of the 1964 communal riots. According to the Ministry of Education, this day serves to remind Singaporean pupils that promoting social cohesion and racial harmony requires constant effort. It is a day for schools to reflect on and celebrate the success of Singapore as a harmonious nation and society built on a rich diversity of cultures and heritages.

40. The Special Rapporteur would like to commend the Government for these fruitful policies and programmes. He indeed takes the view that they have very much contributed to the peaceful coexistence of the diverse communities in Singapore and as such, constitute good practices that may be shared with other States.

41. According to Government officials, the principle of meritocracy, which is at the core of the public educational system and Singaporean society more generally, ensures that all children are offered equal opportunities. On the face of it, meritocracy appears to be a laudable and legitimate principle. However, the Special Rapporteur notes that where there are acknowledged historical inequalities, as is the case with Malay students, this principle may contribute to entrenching these inequalities, rather than to correcting them. Despite statistics showing that great progress has been made in the last decades, Malay students seem to always remain below national average. As an illustration, the Special Rapporteur was informed that since Singapore's independence, only two Malay students had been granted the President's Scholarship, which is awarded to the best students in the country. Moreover, although the proportion of Malay pupils with at least five O-level passes has increased from 46 per cent in 1998 to 59.4 per cent in 2007 and the proportion of a Malay Primary One cohort admitted to post-secondary education institutions has increased from 62.6 per cent in 1998 to 83.5 per cent in 2007, the performance of their Chinese counterparts has consistently remained better over the years.

42. The Special Rapporteur was told during his mission that all communities adhered to the principle of meritocracy and that none would support the introduction of ethnic quotas. Yet, he would like to stress that Malay students who are persistently left behind may find it difficult to continue to adhere to the principle of meritocracy in the future. Indeed, if this principle is not perceived as benefiting all individuals living in Singapore in an equitable manner, members of the Malay community may well start to feel some resentment in the years or decades to come.

43. In addition to the above, the Special Rapporteur was informed that Special Assistance Plan (SAP) schools had been established in 1979 to provide an enriched teaching and learning environment for academically gifted students, who are destined to form the cultural elite of the country. He was also informed by the Ministry of Education that there exist equivalent programmes to nurture gifted Malay and Tamil students, albeit not in a whole-school setting. While English is the primary language of instruction in SAP schools and the latter appear to be open to all students, these schools are *de facto* restricted to Mandarin speakers. Indeed, the Special Rapporteur was told by various interlocutors that SAP schools seek to promote Mandarin as a tool for cultural transmission, but also for its economic advantage in terms of trade and investment in mainland China. This has led to some resentment among non-Mandarin speakers. Critics argue that these schools favouring Chinese language and culture are a visible symbol of the marginalization of ethnic minorities, and that they create the impression that there is a hierarchy of cultures in Singapore. In this context, critiques have also been expressed vis-à-vis the fact that non-Chinese students were not allowed to study Mandarin in schools. They are compelled to take courses in their mother tongue and must ask for special permission from the Ministry of Education before they can study Mandarin. This policy has been perceived by some interlocutors as denying access to the Mandarin language, which is regarded as an economically useful language.

44. Education is undoubtedly one of the most efficient tools to create a cohesive and tolerant society, in which all children may be taught how diverse ethnic and national groups can coexist peacefully. Consequently, the Special Rapporteur would like to encourage the authorities to ensure that the educational interests of Malay students are protected and promoted, in accordance with article 152 of the Constitution and international human rights standards. While there can be no doubt that meritocracy guarantees equality of opportunities, special measures within clearly defined timelines may help to address historical inequalities. In this context, he would like to encourage the authorities to consider making small adjustments to the educational system, for instance with special temporary programmes allowing Malay students to catch up. He also would like to suggest that all special programmes subsidizing tuition fees for Malay students be supported directly by the Government, rather than through the Yayasan Mendaki self-help group. In this manner, the Government could reinforce the message that the persistent lagging behind of the Malay community

in the field of education is not an issue to be addressed in isolation by the Malay community, but rather an issue that should be dealt with at the national level.

45. In addition to the above, the Special Rapporteur takes the view that in a society based on meritocracy, special schools for the most deserving students should be open to all, so that students from all communities may develop their skills in a non-discriminatory manner. On the question of the mother tongue taught at school, the Special Rapporteur acknowledges that this is a complex issue and that there is therefore no ready-made solution to it. He appreciates the Government's willingness to preserve the cultural features, including language, of each main ethnic group. However, he takes the view that the Government may consider ways of implementing its educational policy in a more flexible manner, so as to allow children to choose what language other than English they would like to take at school.

E. Employment

46. During his official meetings, the Special Rapporteur was informed of the promotional approach taken to address problems of discrimination against job-seekers and workers from certain ethnic or religious backgrounds. In this regard, he welcomes the initiatives taken by the Ministry of Manpower and the Tripartite Alliance for Fair Employment Practices aimed at educating employers and employees about the principle of non-discrimination or at resolving labour issues related to discrimination through mediation. In particular, the Special Rapporteur would like to emphasize the Tripartite Guidelines on Fair Employment Practices, aimed at promoting merit-based employment practices and preventing discrimination at the workplace. These guidelines clearly state that "race should not be a criterion for the selection of job candidates as multiracialism is a fundamental principle in Singapore. Selection based on race is unacceptable and job advertisements should not feature statements like 'Chinese preferred' or 'Malay preferred'". These guidelines also touch upon the issue of language requirements; for instance, they provide that "if a job entails proficiency in a particular language, employers should justify the need for the requirement. This would reduce ambiguity and minimise incidence of misunderstanding between the job seekers and the recruiting party". Other fruitful initiatives include the organization of various workshops on how to, inter alia, handle grievances, create an inclusive workplace, manage diversity and understand assumptions.

47. According to information provided by the Tripartite Alliance, the promotional approach aimed at changing mindsets among employers, employees and the general public to adopt fair and equitable employment practices has had good results. For instance, whereas before 1999 the ethnic criterion was referred to in 34 per cent of job ads, there is almost no mention of it in job ads today. Likewise, the Tripartite Alliance argues that the language criteria used to be mentioned in 20 per cent of job ads before 2006 and that this percentage has now been reduced to 1 per cent.¹³ In addition, the media allegedly also examines the content of job advertisements and may refuse to publish them if they are not compliant with the Tripartite Guidelines on Fair Employment Practices.

48. Notwithstanding these achievements, the Special Rapporteur's attention was drawn to the difficulties and negative stereotypes faced by members of the Indian and Malay communities in the field of employment. For instance, the Special Rapporteur received reports indicating that Indian individuals applying for professional positions had been dismissed because they were not regarded as being hard workers. He was also told that Malay individuals continue to be underrepresented in senior positions in critical institutions that should reflect the diversity of Singapore, such as the armed forces, the police and the judiciary. Perceived lack of loyalty from members of the Malay community would appear to explain why they remain unable to gain access to sensitive positions in these institutions. While guidelines, policies and practices leading to the underrepresentation of the Malay community in these institutions may have found some political legitimacy during the few years immediately following the independence of the country, the Special Rapporteur would like to encourage the authorities to urgently review all of them, so as not to perpetuate the views that Singaporean citizens of Malay background cannot be trusted. In a diverse society like Singapore, it is all the more important for the authorities to ensure sufficient representation of the ethnic minorities in all employment sectors. In addition, the Special Rapporteur would like to suggest that the authorities consider adopting legally binding provisions prohibiting discrimination of all kinds, including on the grounds of ethnic or national origin, in the field of employment.

F. Migrant workers

1. Integrating recent migrants into Singaporean society

49. In order to satisfy the demands of a fast-growing economy and counter a declining birth rate and ageing population, the Govern-

ment has supported a significant influx of foreign workers – both skilled and unskilled – over the last decades. These foreign workers, who represent today about one third of the workforce residing in Singapore, have undoubtedly contributed to the building and the prosperity of this young nation. Yet, their presence has also created challenges for the Singaporeans. The Special Rapporteur was told both by Government officials and civil society actors that the recent immigration of individuals coming mainly from China and India had led to some resentment in the Singaporean population. Indeed, these recent migrants had in some instances been perceived as taking away jobs from Singaporean citizens, threatening Singaporean families, affecting the fragile national demographic balance or raising security concerns when foreign workers' dormitories are built close to residential areas. In fact, whereas numerous interlocutors recognized that there were today fewer tensions between the so-called "old" communities (i.e., ethnic Chinese, ethnic Malays, ethnic Indians and others) residing in Singapore since independence, they also acknowledged that new challenges had surfaced in terms of interactions between the old and newly arrived communities.

50. There was also a perception among some civil society interlocutors that the Government seemed to favour migrant workers from certain countries, in particular from China. According to these interlocutors, the rationale behind this policy would be to maintain the ethnic Chinese population above the critical threshold of 75 per cent. In this context, the interlocutors would like the authorities to provide them with more information, so that the parameters used to design immigration policy, in particular when relating to employment, may be more open and transparent.

51. The Special Rapporteur believes that the concerns described above, if unaddressed in a timely and open manner by the Government, could alter the peaceful coexistence of the great variety of ethnic and national groups residing in the country. This could indeed lead to generalized resentment against foreigners in Singapore and thus to overt xenophobic attitudes. In this regard, the Special Rapporteur would like to support the work undertaken by the National Integration Council (NIC), set up in 2009, which seeks to promote and foster social integration among Singaporeans and new immigrants. To that effect, NIC encourages collaborative social integration efforts among the people, the public and the private sectors, through various initiatives at schools, workplaces, in the media and at the community level. According to some civil society

interlocutors, however, NIC would mainly focus its work on the social integration of skilled migrant workers and would therefore not pay sufficient attention to those who were unskilled or semi-skilled, who often live in isolation from the rest of the Singaporean society. The Special Rapporteur therefore would like to encourage NIC to include unskilled and semi-skilled migrant workers – who sometimes stay for several years – in their programmes, so that they may also enjoy the benefits of social integration into Singaporean society.

2. Enhancing the living and working conditions of unskilled and semi-skilled migrant workers, including domestic workers

52. While the mandate of the Special Rapporteur does not specifically relate to migrant workers, it is nonetheless concerned with discrimination on the grounds of national or ethnic origin preventing individuals from enjoying, *inter alia*, just and favourable conditions of work, equal pay for equal work, as well as equality before the law. In this regard, the living and working conditions of migrant workers, in particular of the unskilled and semiskilled ones commonly referred to as “transient workers”, were frequently raised during the mission.

53. The Special Rapporteur was told by virtually all his interlocutors that the authorities had taken numerous and commendable initiatives to prevent and address the manifold human rights violations and sometimes physical abuse suffered by unskilled and semiskilled migrant workers, including domestic workers. These include awareness-raising and education programmes both for employers and employees; the conduct of random interviews of domestic workers during their initial months of employment; the monitoring of employers who change domestic workers frequently; assistance from the Ministry of Manpower in resolving labour disputes through mediation; the imposing of sanctions on employers when workers’ wages are unpaid; and the enhancement of penalties by one and a half times for offences committed by employers against their domestic workers. 54. Yet unskilled and semi-skilled migrant workers continue to face a number of difficulties. These include the abuses by labour-recruitment agencies in Singapore and in the countries of origin; the sponsorship system, which places migrant workers in a highly dependent relationship with their employer and severely limits labour mobility; unpaid salaries; unilateral cancellations of work permits by their employers; poor and unhygienic living conditions; or denial of medical insurance by their employers contrary to official policy. Concerns relating to

migrant workers being trafficked into the country were also raised by some civil society representatives.

55. Migrant domestic workers, who constitute about one fifth of the migrant workforce, also face a number of additional difficulties due to their exclusion from the Employment Act and to their isolated working environment. For instance, migrant domestic workers are not always accorded a day of rest per week; in practice they are not always granted annual or medical leave; they are automatically deported if found pregnant and are prohibited from marrying Singaporean men. Migrant domestic workers may also be prevented from leaving the house, due to the employer's fear of losing the S\$ 5,000 compulsory security bond, which seeks to ensure that the employers repatriate their work permit holders once the term of employment ends.

56. While the Special Rapporteur received assurances from relevant authorities that these issues are under review, he would like to strongly urge the Government to act swiftly to ensure the protection of migrant workers' human rights, as this is one area where the situation is dire. In this regard, he particularly welcomes the fact that the enforcement of a standard contract offering enhanced protection to migrant domestic workers is currently under review by the Ministry of Manpower. The Special Rapporteur also would like to suggest that the Government extend and enhance the effective implementation of the Employment Act; that efforts be undertaken to ensure that labour disputes are resolved expeditiously through accessible and effective mechanisms; and that a minimum wage for unskilled and semi-skilled migrant workers particularly vulnerable to exploitation, such as construction and domestic workers, be introduced.

3. Countering ethnic stereotypes concerning migrant workers

57. The Government has, to a large extent, determined the employment areas in which members of certain foreign communities can work. In this regard, the Special Rapporteur was informed that for each sector of employment, there exists a list of "approved source countries or territories" from which employers may hire foreign workers. For instance, domestic workers may originate from Indonesia, Myanmar or the Philippines, but not from China; the construction sector may hire migrant workers only from Bangladesh, China, India, Malaysia, Sri Lanka, Thailand, and a few other Asian countries; and service sector companies may recruit workers from China; Hong Kong, China; Macao, China; Malaysia; the Republic

of Korea; and Taiwan Province of China. This policy of approved source countries or territories implemented by the Ministry of Manpower has raised concerns among civil society actors. They argue that this policy may entrench ethnic stereotypes within Singaporean society by associating certain low-skilled professions with certain nationalities and that this may taint the rest of the employment system. For instance, women from Indonesia and the Philippines would in most cases be perceived as being domestic workers. The Special Rapporteur therefore would like to suggest that the authorities consider reviewing their policy concerning the list of approved source countries or territories, so as to prevent and address the negative stereotypes applied to certain ethnic or national groups which are associated with unskilled or low-skilled professions. 58. In addition, the Special Rapporteur received reports concerning ethnic or national bias in salaries. As such, it appears that the principle of meritocracy would not apply to domestic workers and that, as a consequence, a maid from the Philippines would earn more than a maid from Indonesia, for instance. While these economic differences between national or ethnic groups do not stem from a deliberate governmental policy, some civil society interlocutors were nonetheless of the view that this economic differentiation was backed up by a range of prejudices and stereotypes affecting particular ethnic or national groups among unskilled and semi-skilled migrant workers.

V. CONCLUSIONS AND RECOMMENDATIONS

59. Singapore is rightly proud of its richly diverse society, in which individuals from a wide range of backgrounds manage to cohabit and interact with each other on a small territory. Considering that violent communal riots occurred just a few decades ago, the peaceful coexistence of the diverse communities in Singapore is a remarkable achievement in itself.

60. Due to the historical legacy of communal tensions, the Government of Singapore is acutely aware of the threats posed by racism, racial discrimination, xenophobia and related intolerance. In this regard, the authorities have endeavoured to establish laws, policies and institutions that seek to actively combat these scourges and to continuously promote social cohesion, religious tolerance and what they refer to as “racial harmony”. The numerous measures taken by the authorities to preserve political stability and foster understanding among the diverse ethnic and religious groups living in Singapore testify to the recognition that social harmony must not be taken for granted and that continuous efforts are needed

to preserve it. As such, these measures are widely appreciated by all sectors of the society.

61. Yet, the Special Rapporteur notes that the legitimate goal of searching for racial harmony may have created some blind spots in the measures pursued by the Government and may in fact, and to a certain extent, have further marginalized some ethnic minorities. Even if there is no institutionalized racial discrimination in Singapore, the Special Rapporteur emphasizes that the marginalization of ethnic minorities must be acknowledged and acted upon in order to safeguard the stability, sustainability and prosperity of Singapore. In this regard, he would like to make the following recommendations.

On Restrictions to Freedom of Expression and Assembly

62. The Special Rapporteur recommends that the Government review undue legislative restrictions on public debate or discourse related to matters of ethnicity. Given Singapore's historical legacy, the Special Rapporteur understands that matters related to ethnicity may be regarded as highly sensitive. Yet the protection of racial harmony should not be implemented at the detriment of human rights, such as freedom of expression and freedom of assembly. The Special Rapporteur therefore recommends that the Government remove legislative provisions preventing all individuals living in Singapore from holding open public debate on matters related to ethnicity, so that they may share their views, identify potential issues of discomfort and above all, work together to find solutions.

On the Significance of Ethnic Identity

63. Despite the existence of various policies and institutions seeking to provide all ethnic groups with equal opportunities, it appears that Singaporeans find themselves classified into distinct categories defined along ethnic lines. As such, strong emphasis is put on the significance of ethnic identity, which is indicated on Singaporeans' identification documents.

64. The establishment of officially endorsed self-help groups providing complementary social services to the main ethnic groups in Singapore also testifies to the significance of ethnic identity. While the Special Rapporteur acknowledges that these self-help groups may provide tailored and effective responses to the needs of each community, he nonetheless recommends that the Government consider setting up a national body, instead of ethnically-based ones, to coordinate efforts and provide people living in Singapore

with assistance in an equal manner. Such a national body would lessen the significance of ethnic identity in one's interactions with the State and within Singaporean society at large and also help remedy the challenges faced by individuals of mixed origins or those who do not belong to the main ethnic groups, who seem to have difficulty in relating to any of the existing self-help groups.

65. Although the Special Rapporteur understands the well-intentioned rationale behind the system of group representation constituencies, which aims to ensure that the needs of minorities are not neglected in an ethnically Chinese-dominant Singapore, he takes the view that this system has actually institutionalized and entrenched the minority status of certain ethnic groups within Singaporean society. Further, it reinforces the views that members of ethnic minorities may sit in Parliament only if they belong to a larger group of Members of Parliament.

66. The Special Rapporteur emphasizes that the self-help groups and group representation constituency schemes may tend to reinforce and perpetuate ethnic categorization, which in turn may lead to prejudices and negative stereotypes held against certain ethnic minorities taking root. Taking into account the fact that a society may only benefit from social interactions that are not predetermined by ethnic identity, the Special Rapporteur recommends as a starting point that ethnic identity be removed from Singaporeans' identification documents.

On Housing

67. The Ethnic Integration Policy, aimed at preventing the formation of ethnic enclaves, has been generally successful in terms of social integration. However, the Special Rapporteur recommends that the Government implement it in a more flexible manner, to ensure that members of ethnic minorities are not disadvantaged vis-à-vis ethnic Chinese individuals when seeking an accommodation close to their families or when trying to sell their accommodation in the secondary housing market.

On Education

68. The principle of meritocracy, which is at the core of the public educational system and of Singaporean society more generally, ensures that all children are offered equal opportunities. However, where there are acknowledged historical inequalities – as is the case with Malay students who consistently remain below their Chinese counterparts – meritocracy may contribute to entrench-

ing these inequalities, rather than to correcting them. The Special Rapporteur therefore recommends that the Government consider making small adjustments to the educational system, for instance with special temporary programmes allowing Malay students to catch up. He also recommends that the programmes subsidizing tuition fees for Malay students be supported directly at national level, rather than through the Yayasan Mendaki selfhelp group.

69. In addition, the Special Rapporteur recommends that Special Assistance Plan schools be open to all, including to non-Mandarin native speakers, so that academically gifted students from all communities may have the opportunity to develop their skills in an environment that seeks to nurture the best talents of the country.

On Employment

70. The promotional approach taken by the Ministry of Manpower and the Tripartite Alliance for Fair Employment Practices to address problems of discrimination against job-seekers and workers from certain ethnic or religious backgrounds appears to have had good results. Nonetheless, the Special Rapporteur recommends that the authorities adopt a firmer approach through legally binding provisions prohibiting discrimination of all kinds, including on the grounds of ethnic or national origin, in the field of employment.

71. In a diverse society like Singapore, it is essential to ensure sufficient representation of the ethnic minorities in all employment sectors. The Special Rapporteur therefore recommends that the Government urgently review all guidelines, policies and practices which may prevent members of ethnic minorities to be employed in institutions that should reflect the diversity of Singapore, such as the armed forces, the police and the judiciary.

On Migrant Workers

72. The significant influx of foreign workers supported by the Government to satisfy the demands of a fast-growing economy and counter a declining birth rate and ageing population has significantly contributed to the building of the country. Yet, it has also created some resentment by the population, which at times perceives these migrant workers as taking away jobs from Singaporean citizens, threatening Singaporean families, affecting the fragile national demographic balance or raising security concerns. The Special Rapporteur recommends that these concerns be addressed in a timely and open manner by the Government, so as to prevent generalized resentment against foreigners, which could

lead to overt xenophobic attitudes. In this regard, he recommends that the National Integration Council treat the social integration of unskilled and semi-skilled migrant workers – who often live in isolation from Singaporean society – as a priority.

73. While numerous and commendable initiatives have been taken to prevent and address the manifold human rights violations and sometimes physical abuse suffered by unskilled and semi-skilled migrant workers, their situation remains dire. Difficulties faced by these migrant workers include the sponsorship system, which places them in a highly dependent relationship with their employers; unpaid salaries; unilateral cancellations of work permits by their employers; poor and unhygienic living conditions; or denial of medical insurance by their employers. The Special Rapporteur strongly urges the Government to act swiftly to ensure the protection of migrant workers' human rights. In this regard, he recommends that the Government enhance the effective implementation of the Employment Act and extend it to cover domestic workers; that efforts be undertaken to ensure the expeditious resolution of labour disputes through accessible and effective mechanisms; and that a minimum wage for migrant workers particularly vulnerable to exploitation, such as construction and domestic workers, be introduced.

74. The Special Rapporteur also recommends that the authorities consider reviewing their policy concerning the list of "approved source countries or territories", so as to prevent and address the negative stereotypes applied to certain ethnic or national groups, which can be associated with unskilled or low-skilled professions.

On the Legal and Institutional Human Rights Framework

75. While the Special Rapporteur understands that the Government wishes to be in a position to fully implement the obligations contained in an international treaty before ratifying it, he nonetheless urges it to accede to international human rights instruments that contain provisions reaffirming the fundamental human rights principles of non-discrimination and equality. These include the International Convention on the Elimination of All Forms of Racial Discrimination; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

76. In the light of general recommendation No. 30 (2004) on non-citizens of the Committee on the Elimination of Racial Discrimination, the Special Rapporteur recommends that the constitutional provisions restricting certain human rights to Singaporean citizens – including the right to non-discrimination on the ground of religion, race, descent or place of birth in any law or in the appointment to any employment under a public authority, the rights in respect to education and the freedom of speech, assembly and association – be revised to extend equal human rights protection to all individuals residing in Singapore, including non-citizens.

77. While taking into account that the principles of equality and nondiscrimination are included in various domestic legislative acts, the Special Rapporteur recommends that the Government adopt a stand-alone law dedicated to the prohibition of racism, racial discrimination, xenophobia and related intolerance. Such legislation would clearly demonstrate Singapore's political commitment in the fight against racism and allow for enhanced visibility and accessibility of the law for all individuals, thereby enabling them to resort to the relevant provisions more easily and more effectively.

78. In order to strengthen the existing institutional human rights framework, the Special Rapporteur recommends that the Government review the mandate of the Presidential Council for Minority Rights, so that the latter may act on its own initiative. This Council should be empowered to consider and report on matters affecting the rights of members of ethnic minorities, without having to wait for the Speaker of Parliament or an appropriate Minister to refer such matters to it. Moreover, the Special Rapporteur recommends that the authorities take all necessary measures to guarantee the independence of this Council, including by ensuring that its Chairperson may not be faced with potential conflicts of interest.

SRI LANKA

RIGHTS OF ELDERS - UN RESOLUTION OF 1991

Protection of the Rights of Elders (Amendment) Act, No. 5 of 2011

This Act is an amendment to the Protection of the Rights of Elders Act, No. 9 of 2000. The amending Act has inserted a Preamble to the original

Act immediately after the long title. Paragraph 3 of the Preamble refers to the UN Resolution of 1991 and states:

AND WHEREAS Sri Lanka has adopted and ratified the United Nations Resolution No. 46/91 of December 16, 1991, which appreciates the contribution made by elders to society and is mindful that the State must provide the necessary infrastructure to assist elders who are advancing in years to live a life which is socially, economically, physically and spiritually fulfilling.

ARBITRARY DEPRIVATION OF LIFE – TORTURE AND ILL-TREATMENT – LACK OF PROPER INVESTIGATION – RIGHT NOT TO BE SUBJECTED TO ARBITRARY OR UNLAWFUL INTERFERENCE WITH ONE’S FAMILY – RIGHT TO THE FAMILY.

Annakkarage Suranjini Sandamali Pathmini Peiris v. Sri Lanka. Communication No. 1862/2009, Human Rights Committee, 103rd session, 17 October to 4 November 2011, CCPR/C/103/D/1862/2009, 22 December 2011.

The author of the communication submitted it on behalf of herself, her deceased husband, and her two minor children. She claimed violations of the following paragraphs of the International Covenant on Civil and

Political Rights: namely, Article 6³⁶ read in conjunction with Article 2(3);³⁷ Article 7³⁸ read in conjunction with Article 2(3); Articles 17³⁹ and 23(1).⁴⁰

According to the author, there was a dispute between her husband, Nishantha Fernando, and a police officer over the sale of a vehicle. Her husband had made a complaint regarding the police officer and a disciplinary inquiry was instituted against the latter. The officer and several of his colleagues had threatened Fernando, and although the officer subsequently died, the threats continued.

From 2003 to 2008 the author and her family were subject to continuous threats, intimidation, and assault by the police. These included fabricated complaints against Fernando, verbal abuse, and death threats. They were also arrested and charged in court on fabricated charges and attacked and assaulted in their own home. The author and Fernando responded to these attacks by complaining to the Human Rights Commission of Sri Lanka, the National Police Commission, the Deputy Inspector General of Police, and the Bribery Commission. They received no redress from any of these institutions, and their complaints merely provoked further attacks from the police. They also filed a fundamental rights action in the Supreme

36 Article 6 relates to the right to life.

37 Article 2(3) - Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.

38 Article 7 - No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

39 Article 17 - (1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. (2) Everyone has the right to the protection of the law against such interference or attacks.

40 Article 23(1) - The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Court. In addition, the lawyer appearing on behalf of the family was also threatened. On 20 September 2008, Fernando was shot inside his lorry by two masked men. In November 2008, the author filed an affidavit in the Negombo Magistrate's Court "alleging that there were serious threats against her and her family in her pursuit of her complaints of bribery and torture instituted against police officers." At later points in time, the staff of the organisation "Right to Life" that was assisting the author were threatened, her lawyer was assaulted at the police station, and grenades were thrown into the house of the lawyer appearing in the fundamental rights application.

The author submitted that she and her family suffered public assaults and threats culminating in her husband's murder. Although they submitted continuous complaints to the relevant institutions, no action was taken by the State Party to protect them, resulting in a violation of Article 6 of the Covenant, read together with Article 2(3). The author also submitted that they were severely tortured on 12 November 2007, resulting in herself and her daughter being hospitalised. They had also been forced to live in hiding. She contended that though torture is a crime in Sri Lanka, nobody was punished in her case, and the fundamental rights application filed in the Supreme Court was still pending. This resulted in a violation of her rights under Article 7 of the Covenant, read together with Article 2(3). She also contended that the state breached her rights under Article 9 of the Covenant⁴¹ by failing to take adequate action to protect her family.

In 2009 and 2011, the Committee requested the State Party to submit information on the admissibility and merits of the communication, but the information was not received. The Committee regretted this failure and noted that Article 4(2) of the Optional Protocol obliges State Parties to examine in good faith all allegations made against them and communicate the information to the Committee. The Committee noted that "[i]n the absence of a reply from the State Party, due weight must be given to the author's allegations, to the extent that they are substantiated."

The Committee also regretted that the State Party has failed to respond to its request to take measures to protect the author and her family while

41 Article 9 relates to the right to liberty and security of person.

the case is under consideration. It noted, “flouting of the rule⁴² undermines the protection of the Covenant’s rights through the Optional Protocol.”

The Committee considered the admissibility of the case, as well as the merits. In regard to admissibility, the Committee concluded that for purposes of Article 5(2)(a) of the Protocol, the same matter is not being examined under any other procedure of international investigation or settlement. It noted that the State Party had not made any submissions in regard to admissibility and the author has declared that domestic remedies had not been effective, and therefore declared the communication admissible.

In regard to the merits of the case, the Committee noted firstly that, in the absence of submissions by the State Party, due weight must be given to the author’s allegations as far as they are substantiated. Regarding Article 6 of the Covenant, the Committee stated that the right to life is supreme and no derogation from this right is permitted. It went on to state that State Parties must ensure the protection of an individual’s rights, which may be violated not only by its agents but also by private persons. In view of the facts of the case, the Committee determined that the death of the author’s husband must be attributable to the State Party, which is in breach of Article 6. It also determined that the facts showed that the rights of the author and her family under Article 7 of the Covenant had also been violated. Criminal investigation and consequent prosecutions are necessary remedies for violations of the rights under these two Articles, and failure to take necessary steps in this regard resulted in a violation of the author’s rights under Article 2(3), read with Articles 6 and 7. Finally with regard to Article 9(1), the Committee recalled its jurisprudence that the Covenant protects the right to security of persons outside the context of the formal deprivation of liberty. The fact that the State Party did not take necessary action to protect the author and her family resulted in a violation of her rights to security of person under Article 9(1). The privacy of the family was also violated under Article 17.

The Committee held that the State Party is under an obligation to provide the author with an effective remedy. This includes ensuring that the perpetrators are brought to justice, that the author and her two children can return to their home in safety, and that reparation is granted, including compensation and an apology to the family.

42 Rule 92 of the Rules of Procedure.

The Committee requested information from the State Party about the measures taken to give effect to the Committee's views and further requested that the Committee's views be translated into the official languages of the State Party and widely distributed.

International Humanitarian Law

PHILIPPINES

CRIMES AGAINST INTERNATIONAL HUMANITARIAN LAW, GENOCIDE AND OTHER CRIMES AGAINST HUMANITY

An Act defining and penalizing Crimes against International Humanitarian Law, Genocide and Other Crimes against Humanity, organizing Jurisdiction, designating Special Courts, and for related purposes, Republic Act No. 9851

This Act, also known as the Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity, declares principles and state policies of the Philippines in relation to international humanitarian law.

- (a) The Philippines renounces war as an instrument of national policy, adopts the generally accepted principles of international law as part of the law of the land and adheres to a policy of peace, equality, justice, freedom, cooperation and amity with all nations.
- (b) The State values the dignity of every human person and guarantees full respect for human rights, including the rights of indigenous cultural communities and other vulnerable groups, such as women and children;
- (c) It shall be the responsibility of the State and all other sectors concerned to resolved armed conflict in order to promote the goal of "Children as Zones of Peace;"
- (d) The state adopts the generally accepted principles of international law, including the Hague Conventions of 1907, the Geneva Conventions on the protection of victims of war and international humanitarian law, as part of the law our nation;

- (e) The most serious crimes of concern to the international community as a whole must not go unpunished and their effective prosecution must be ensured by taking measures at the national level, in order to put an end to impunity for the perpetrators of these crimes and thus contribute to the prevention of such crimes, it being the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes;
- (f) The State shall guarantee persons suspected or accused of having committed grave crimes under international law all rights necessary to ensure that their trial will be fair and prompt in strict accordance with national and international law and standards for fair trial. It shall also protect victims, witnesses and their families, and provide appropriate redress to victims and their families. It shall ensure that the legal systems in place provide accessible and gender-sensitive avenues of redress for victims of armed conflict; and
- (g) The State recognizes that the application of the provisions of this Act shall not affect the legal status of the parties to a conflict, nor give an implied recognition of the status of belligerency.⁴³

Signed into law on 11 December 2009, the law defines concepts that are important to international humanitarian law, such as apartheid, armed conflict, attack directed against any civilian population, effective command and control or effective authority and control, enslavement, extermination, hors de combat, military necessity, perfidy, persecution, and works and installations containing dangerous forces.

In the chapter on crimes against international humanitarian law, genocide and other crimes against humanity, “war crimes” or “crimes against International Humanitarian Law” are categorized to mean: (a) in case of an international armed conflict, grave breaches of the Geneva Conventions of 12 August 1949; (b) in case of a non-international armed conflict, serious violations of common Article 3 to the four Geneva Conventions of 12 August 1949; or (c) other serious violations of the laws and customs applicable in armed conflict, within the established framework

43 An Act Defining and Penalizing Crimes against International Humanitarian Law, Genocide and Other Crimes against Humanity, Organizing Jurisdiction, Designating Special Courts, and for Related Purposes, Rep. Act No. 9851, § 2 (Dec. 11, 2009) (Phil.).

of international law.⁴⁴ Genocide and “other crimes against humanity” are defined and penalized.

In the chapter dealing with some principles of criminal liability, sections on individual criminal responsibilities, irrelevance of official capacity, non-prescription, and orders from superiors are found. In the chapter on protection of victims and witnesses, the Act states that in addition to existing provisions in Philippine law for protection of victims and witnesses, there are measures that have to be undertaken by the state for them. Reparations to victims may include restitution, compensation, and/or rehabilitation.

In the chapter on jurisdiction, the Act provides that the state shall exercise jurisdiction over persons, whether military or civilian, suspected or accused of a crime defined and penalized in the Act, regardless of where the crime is committed, provided, any one of the following conditions is met: (a) the accused is a Filipino citizen; (b) the accused, regardless of citizenship or residence, is present in the Philippines; or (c) the accused has committed the said crime against a Filipino citizen. However, in the interest of justice, Philippine authorities may dispense with the investigation or prosecution if another court or international tribunal is already conducting the same. Instead, they may surrender or extradite suspected or accused persons in the Philippines to the appropriate international court, if any, or to the other state pursuant to the applicable extradition laws and treaties. Foreign nationals may not be prosecuted if they have been tried by a competent court outside the Philippines in respect of the same offense and acquitted, or having been convicted, already served their sentence.⁴⁵

The following sources are to guide Philippine courts in the application and interpretation of the Act:

- (a) The 1948 Genocide Convention;
- (b) The 1949 Geneva Conventions I-IV, their 1977 Additional Protocols I and II and their 2005 Additional Protocol III;
- (c) The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, its First Protocol and its 1999 Second Protocol;

44 *Id.* at § 4.

45 *Id.* at § 17.

- (d) The 1989 Convention on the Rights of the Child and its 2000 Optional Protocol on the Involvement of Children in Armed Conflict;
- (e) The rules and principles of customary international law;
- (f) The judicial decisions of international courts and tribunals;
- (g) Relevant and applicable international human rights instruments;
- (h) Other relevant international treaties and conventions ratified or acceded to by the Republic of the Philippines; and
- (i) Teachings of the most highly qualified publicists and authoritative commentaries on the foregoing sources as subsidiary means for the determination of rules of international law.⁴⁶

International Organizations

PHILIPPINES

CHARACTER OF THE PHILIPPINE NATIONAL RED CROSS AS A NATIONAL SOCIETY

***Liban v. Gordon* [GR No. 175352. 15 July 15, 2009]**

Liban, together with other petitioners, petitioned in Court to declare Senator Richard Gordon as having forfeited his seat in the Senate as he was elected Chairman of the Philippine National Red Cross (PNRC) Board of Governors. They argued that by accepting the responsibility, Gordon ceased to be a member of the Senate as provided in Sec. 13, Article VI⁴⁷ of the 1987 Philippine Constitution.

In ruling that Senator Gordon did not relinquish his senatorial post despite his election to and acceptance of the PNRC post, the Supreme Court held that PNRC is a private organization merely performing public func-

⁴⁶ *Id.* at §15.

⁴⁷ Art. VI, Sec. 13 of the 1987 Philippine Constitution provides: "No person shall be a Member of the House of Representatives unless he is a natural-born citizen of the Philippines and, on the day of the election, is at least twenty-five years of age, able to read and write, and, except the party-list representatives, a registered voter in the district in which he shall be elected, and a resident thereof for a period of not less than one year immediately preceding the day of the election."

tions and that the PNRC Chairman is not a government official or employee. The PNRC Charter⁴⁸ was signed into law on 22 March 1947. It is a non-profit, donor-funded, voluntary, humanitarian organization, whose mission is to bring timely, effective, and compassionate humanitarian assistance for the most vulnerable without consideration of nationality, race, religion, gender, social status, or political affiliation.

Furthermore, the Republic of the Philippines, adhering to the Geneva Conventions, established the PNRC as a voluntary organization for the purpose contemplated in the Geneva Convention of 27 July 1929 (Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field). It is a member of the National Society of the International Red Cross and Red Crescent Movement (Movement), which is composed of the International Committee of the Red Cross, the International Federation of Red Cross and Red Crescent Societies (International Federation), and the National Red Cross and Red Crescent Societies (National Societies). The Movement is united and guided by its seven Fundamental Principles that provide a universal standard of reference for all members of the Movement. As a member of the National Society of the Movement, it has the duty to uphold the Fundamental Principles and ideals of the Movement and has to be autonomous in accordance with Article 4 of the Statutes of the International Red Cross and Red Crescent Movement. The Court added:

The reason for this autonomy is fundamental. To be accepted by warring belligerents as neutral workers during international or internal armed conflicts, the PNRC volunteers must not be seen as belonging to any side of the armed conflict. In the Philippines where there is a communist insurgency and a Muslim separatist rebellion, the PNRC cannot be seen as government-owned or controlled, and neither can the PNRC volunteers be identified as government personnel or as instruments of government policy. Otherwise, the insurgents or separatists will treat PNRC volunteers as enemies when the volunteers tend to the wounded in the battlefield or the displaced civilians in conflict areas.

PNRC is and should be viewed as autonomous, neutral, and independent from the Philippine government. It does not have government assets and does not receive any appropriation from the Philippine Congress. An over-

48 An Act to Incorporate the Philippine National Red Cross, Rep. Act No. 95, as amended by Pres. Dec. No. 1264 (Oct. 1, 1979) (Phil.).

whelming majority of the board is elected or chosen by the private sector members of the PNRC. For not being a government official or employee, the PNRC Chairman, as such, does not hold a government office or employment. Thus, Article VI, Section 13 of the Constitution does not apply.

However, the PNRC Charter is violative of the constitutional proscription against the creation of private corporations by special law. Some of its provisions were struck down as unconstitutional and other parts declared valid as they can be considered as recognition by the state that the unincorporated PNRC is the local National Society of the International Red Cross and Red Crescent Movement, and thus entitled to the benefits, exemptions and privileges set forth in the PNRC Charter. They implement the Philippine Government's treaty obligations under Article 4(5) of the Statutes of the International Red Cross and Red Crescent Movement, which provides that to be recognized as a National Society, the Society must be "duly recognized by the legal government of its country on the basis of the Geneva Conventions and of the national legislation as a voluntary aid society, auxiliary to the public authorities in the humanitarian field."

International Law and Municipal Law

PHILIPPINES

RATIFICATION OF A TREATY – VALIDITY OF THE VISITING FORCES AGREEMENT (BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF THE PHILIPPINES)

Suzette Nicolas Y Sombilon v. Alberto Romulo et al. [G.R. No. 175888. 11 February 2009]

Jovito R. Salonga et al. v. Daniel Smith et al. [G.R. No. 176051. 11 February 2009]

Bagong Alyansang Makabayan (Bayan) at al. a. President Gloria Macapagal-Arroyo et al. [G.R. No. 176222. 11 February 2009]

Lance Corporal Daniel Smith, a member of the United States Armed Forces, was charged with the crime of rape committed against a Filipina

sometime on 1 November 2005. Pursuant to the Visiting Forces Agreement (VFA) between the United States of America and the Republic of the Philippines,⁴⁹ the United States, at its request, was granted custody of defendant Smith pending the proceedings. The United States faithfully complied with its undertaking to bring defendant Smith to the trial court every time his presence was required. Smith was found guilty of rape by the Regional Trial Court of Makati and was briefly detained at the Makati jail, until he was transferred to the US Embassy as provided for under new agreements between the Philippines and the United States, referred to as the Romulo-Kenney Agreement of 19 December 2006 and the Romulo-Kenney Agreement of 22 December 2006.

Petitioners contended that the Philippines should have custody of Smith because, first of all, the VFA is void and unconstitutional as it was not ratified by the United States Senate. The Court upheld the validity of the VFA, entered into on 10 February 1998, but the Romulo-Kenney Agreements were declared as not in accordance with the VFA, and the Secretary of Foreign Affairs was ordered to negotiate with United States representatives for the appropriate agreement on detention facilities under Philippine authorities as provided in Art. V, Sec. 10⁵⁰ of the VFA.

The Court noted that Art. XVIII, Sec. 25⁵¹ of the 1987 Philippine Constitution was designed to ensure that any agreement allowing the presence of foreign military bases, troops or facilities in Philippine territory shall be equally binding on the Philippines and the foreign sovereign state involved. Recalling historical antecedence, the idea was to prevent a

49 Entered into on February 10, 1998.

50 Art. V, Sec. 10 of the 1987 Philippine Constitution provides: "The confinement or detention by Philippine authorities of United States personnel shall be carried out in facilities agreed on by appropriate Philippines and United States authorities. United States personnel serving sentences in the Philippines shall have the right to visits and material assistance."

51 Art. XVIII, Sec. 25 of the 1987 Philippine Constitution provides: "After the expiration in 1991 of the Agreement between the Philippines and the United States of America concerning Military Bases, foreign military bases, troops, or facilities shall not be allowed in the Philippines except under a treaty duly concurred in by the Senate and, when the Congress so requires, ratified by a majority of the votes cast by the people in a national referendum held for that purpose, and recognized as a treaty by the other contracting State."

recurrence of the situation in which the terms and conditions governing the presence of foreign armed forces in Philippine territory were binding upon the Philippines but not upon the foreign state.

The presence of US Armed Forces in Philippine territory pursuant to the VFA is allowed under a treaty duly concurred in by the Senate and recognized as a treaty by the other contracting state. The Court provided two reasons for this. First, as held in *Bayan v. Zamora*,⁵² the VFA was duly concurred in by the Philippine Senate and has been recognized as a treaty by the United States as attested and certified by the duly authorized representative of the United States government. The fact that it was not submitted for advice and consent of the United States Senate does not detract from its status as a binding international agreement or treaty recognized by the United States for this is a matter of internal United States law. The Court took note of the internationally known practice by the United States of submitting to its Senate for advice and consent agreements that are policymaking in nature, whereas those that carry out or further implement these policymaking agreements are merely submitted to Congress, under the provisions of the so-called Case-Zablocki Act,⁵³ within 60 days from ratification.

Second, the VFA, which is the instrument agreed upon to provide for the joint military exercises, is simply an implementing agreement to the main Military Defense Treaty of 30 August 1951 between the United States and the Philippines. This treaty was signed and duly ratified with the concurrence of both the Philippine Senate and the United States Senate. As an implementing agreement of the Mutual Defense Treaty, it was not necessary to submit the VFA to the US Senate for advice and consent, but merely to the US Congress under the Case-Zablocki Act. This substantially complies with the requirements of Art. XVIII, Sec. 25 of the Philippine Constitution. Since the VFA is valid and binding, the Court said that the parties are required as a matter of international law to abide by its terms and provisions.

The Romulo-Kenney Agreements were declared invalid as they are not in accordance with the VFA. The detention should have been carried

52 *Bayan v. Zamora*, G.R. No. 138570, (S.C., Oct. 10, 2000) (Phil.), available at <http://sc.judiciary.gov.ph/jurisprudence/2000/oct2000/138570.htm>.

53 Case-Zablocki Act, 1 U.S.C. §112b (a) (2012).

out in facilities agreed on by authorities of both parties, but also that the detention shall be “by Philippine authorities.” The Agreements are not in accord with the VFA itself because such detention was not “by Philippine authorities.”

There was also the contention that the VFA violates another provision of the Constitution, namely, that providing for the exclusive power of the Supreme Court to adopt rules of procedure for all courts in the Philippines.⁵⁴ They argued that to allow the transfer of custody of an accused to a foreign power is to provide for a different rule of procedure for that accused, which also violates the equal protection clause of the Constitution.⁵⁵

The Court said there was a substantial basis for a different treatment of a member of foreign military armed forces allowed to enter our territory and all other accused. The rule in international law is that a foreign armed forces allowed to enter one's territory is immune from local jurisdiction, except to the extent agreed upon due to the recognition of extraterritorial immunity given to such bodies. Nothing in the Constitution prohibits such agreements. It in fact states that the Philippines adopts the generally accepted principles of international law as part of the law of the land.⁵⁶

Lastly, the Court addressed the recent decision of the United States Supreme Court in *Medellin v. Texas*⁵⁷ which held that treaties entered into by the United States are not automatically part of their domestic law unless these treaties are self-executing or there is an implementing legislation to make them enforceable. The Philippine Supreme Court held the following points: first, the VFA is a self-executing Agreement, as that term is defined in *Medellin* itself, because the parties intend its provisions to be enforceable, precisely because the Agreement is intended to carry out obligations and undertakings under the Mutual Defense Treaty; second, the VFA is covered by implementing legislation, namely, the Case-Zablocki Act because it is the very purpose and intent of the United States Congress that executive agreements registered under it be immediately implemented. As such, the DFA differs from the Vienna Convention on Consular Relations and the

54 Const. (1987), art. VIII, sec. 5(5) (Phil.).

55 Const. (1987), art. III, sec. 1 (Phil.).

56 Const. (1987), art. II, sec. 2 (Phil.).

57 *Medellin v. Texas*, 552 U.S. 491 (2008).

Avena decision of the International Court of Justice, the subject matter of the Medellin decision.

Memorandum of Understanding

Opinion no. 41, s. 2009, 1 September 2009, "Whether the proposed Memorandum of Understanding (MOU) entered into by and between the Government of the Philippines and the Government of the Socialist Republic of Vietnam, concerning the release and utilization of the earmarked emergency rice reserve for the East Asia Emergency Rice Reserve (EAERR) can be considered as an executive agreement and, as such may not be subject to the rules and regulations provided for under Republic Act (R.A.) No. 9184, or the "Government Procurement Reform Act."

Department of Agriculture Secretary Arthur Yap sought the opinion of Justice Secretary Agnes Devanadera on whether the Memorandum of Understanding between the governments of the Philippines and Vietnam could be considered an executive agreement. Under the memorandum, the Vietnamese government committed to supply rice to the Philippines under the Tier 1 Project of the East Asia Emergency Rice Reserve (EAERR).

Since it is an executive agreement, Secretary Devanadera held that the move of Secretary Yap to purchase rice from Vietnam is not covered by the provisions of the Government Procurement Reform Act⁵⁸ that requires public bidding. The importation could be used to augment supply during calamities. It was of utmost importance that the agreement was considered temporary only as it covers the years 2008 to 2010.

DISASTER MANAGEMENT AND EMERGENCY RESPONSE

ASEAN Agreement on Disaster Management and Emergency Response (AADMER). Philippine Senate Resolution No. 202, 14 September 2009

The Philippine Senate concurred with the ASEAN Agreement on Disaster Management and Emergency Response (AADMER) which was signed on 26 July 2005 in Vientiane, Lao PDR. The concurrence with the AADMER is largely seen as an impetus for change in the legal framework in the

58 An Act Providing for the Modernization, Standarization and Regulation of the Procurement Activities of the Government and for Other Purposes, Rep. Act No. 9184 (Jan. 10, 2004) (Phil.).

Philippines that deals with climate change and disaster risk reduction and management.

In the resolution concurring with AADMER, the Senate affirms that the AADMER aims to provide a comprehensive regional framework for substantial reduction of disaster losses in lives and in the social, economic and environmental assets of ASEAN states, and to jointly respond to disaster emergencies through national efforts and intensified regional and international cooperation. The AADMER establishes an ASEAN Coordinating Centre for Humanitarian Assistance on disaster management and an ASEAN Disaster Management and Emergency Relief Fund.

SINGAPORE

APPLICATION OF CUSTOMARY INTERNATIONAL LAW IN MUNICIPAL COURTS – APPLICABILITY OF INTERNATIONAL HUMAN RIGHTS NORMS TO INTERPRETATION OF CONSTITUTION

Yong Vui Kong v Public Prosecutor and Another Matter. Criminal Appeal No 13 of 2008; Criminal Motion No 7 of 2010. Singapore Court of Appeal. [2010] 3 Singapore Law Reports 489; [2010] SGCA 20

Facts

The appellant was convicted of trafficking in 47.27g of diamorphine, an offence that carried the mandatory death penalty under the Misuse of Drugs Act (Cap 185, 2001 Rev Ed). He argued that the mandatory death penalty (MDP) was unconstitutional as it violated Article 9(1) of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) (the ‘right to life’) and Article 12(1) (‘guarantee of equality’). One argument raised by the appellant was that word ‘law’ in both Article 9(1) and Article 12(1) of the Constitution incorporated rules of customary international law (CIL) and that the Misuse of Drugs Act violated the CIL rule that prohibits ‘inhuman punishment’.

Judgment

... We agree that domestic law, including the Singapore Constitution, should, as far as possible, be interpreted consistently with Singapore’s international legal obligations. There are, however, inherent limits on the

extent to which our courts may refer to international human rights norms for this purpose. For instance, reference to international human rights norms would not be appropriate where the express wording of the Singapore Constitution is not amenable to the incorporation of the international norms in question, or where Singapore's constitutional history is such as to militate against the incorporation of those international norms ... In such circumstances, in order for our courts to give full effect to international human rights norms, it would be necessary for Parliament to first enact new laws ... or even amend the Singapore Constitution to expressly provide for rights which have not already been incorporated therein.... In short, the point which we seek to make is this: where our courts have reached the limits on the extent to which they may properly have regard to international human rights norms in interpreting the Singapore Constitution, it would not be appropriate for them to legislate new rights into the Singapore Constitution under the guise of interpreting existing constitutional provisions.

Where the Singapore Constitution is concerned, we are of the view that it is not possible to incorporate a prohibition against inhuman punishment through the interpretation of existing constitutional provisions (in this case, Art 9(1)) for two reasons.

First, unlike the Constitutions of the Caribbean States, the Singapore Constitution does not contain any express prohibition against inhuman punishment. Our constitutional history is quite different from that of the Caribbean States. Belize and the other Caribbean States modelled their Constitutions after the ECHR [European Convention on Human Rights], whereas the Singapore Constitution – specifically, Pt IV thereof on fundamental liberties – was derived (albeit with significant modifications) from Pt II of the 1957 Constitution of the Federation of Malaya (“the 1957 Malayan Constitution”), which formed the basis of what we shall hereafter refer to as “the 1963 Malaysian Constitution” (viz, the Constitution of Malaysia that came into effect when Malaysia (comprising the Federation of Malaya, Singapore, Sabah and Sarawak) was formed on 16 September 1963). It is a little known legal fact that the ECHR was made applicable to Singapore and the Federation of Malaya in 1953 just as it was made applicable to Belize and several other British colonies by virtue of the UK's declaration under Art 63 of the ECHR (see Karel Vasak, *The European Convention of Human Rights Beyond the Frontiers of Europe* 12 ICLQ 1206, 1210). The ECHR ceased to apply in the respective British colonies upon their

independence (in the case of Singapore, the ECHR ceased to apply when we became a constituent State of Malaysia in 1963), but Belize and many other former British colonies (especially those in the Caribbean) modelled their Constitutions after the ECHR. As a result, the Constitutions of these countries included a prohibition against inhuman punishment. This was not the case for either Malaysia or Singapore.

When the 1957 Malayan Constitution was drafted (pursuant to advice from the Federation of Malaya Constitutional Commission chaired by Lord Reid (“the Reid Commission”)), no reference was made to a prohibition against inhuman punishment in any provision of the draft Constitution; ie, the Reid Commission did not recommend the incorporation of such a prohibition. Given that the Reid Commission’s report (viz, Report of the Federation of Malaya Constitutional Commission, 1957 (CO No. 330, Feb. 11, 1957) was published in 1957 when the prohibition against inhuman punishment already existed in the ECHR (which applied to the Federation of Malaya prior to its independence), the omission of a similar prohibition from the 1957 Malayan Constitution was clearly not due to ignorance or oversight on the part of the Reid Commission. The prohibition against inhuman punishment was likewise omitted from the 1963 Malaysian Constitution.

When Singapore separated from Malaysia and became an independent sovereign republic on 9 August 1965, we inherited a state Constitution (ie, the Constitution of the State of Singapore set out in Schedule 3 to the Sabah, Sarawak and Singapore (State Constitutions) Order in Council 1963 (GN No S1 of 1963)) and many provisions of the 1963 Malaysian Constitution, including (inter alia) the provisions on fundamental liberties that are now Arts 9-16 in Pt IV of the Singapore Constitution. As a result of the aforesaid developments in our constitutional history, the Singapore Constitution, unlike many other Commonwealth Constitutions, is not modelled after the ECHR and does not contain an express prohibition against inhuman punishment. This weakens Mr Ravi’s contention that the Singapore Constitution should be read as incorporating an implied prohibition to this effect.

The second and more important reason why it is not possible to interpret the Singapore Constitution as incorporating a prohibition against inhuman punishment is that a proposal to add an express constitutional provision to this effect was made to the Government in 1966 by the constitutional commission chaired by Wee Chong Jin CJ (“the Wee Commission”), but

that proposal was ultimately rejected by the Government. The Wee Commission was appointed to look into (among other things) the protection of minority rights in Singapore after we became an independent sovereign republic. To this end, the Wee Commission studied the constitutional texts of some 40 different British colonies and dominions and newly independent nations as well as non-Commonwealth Constitutions (see *EVOLUTION OF A REVOLUTION: FORTY YEARS OF THE SINGAPORE CONSTITUTION* (11-12 (Li-ann io & Kevin Y L Tan eds., Routledge Cavendish 2009), and, in its written report (viz, *REPORT OF THE CONSTITUTIONAL COMMISSION 1966* (Aug. 27, 1966) (“the 1966 Report”)), went out of its way to recommend, *inter alia*, the inclusion of a constitutional provision prohibiting torture or inhuman punishment.

The Wee Commission gave the following reasons for its recommendation (see the 1966 Report at ¶ 40):

In looking at other written Constitutions[,] we find a fundamental human right which is acknowledged and protected in all of them but which is not written into the Constitution of Malaysia [ie, the 1963 Malaysian Constitution, certain provisions of which continued in force in Singapore after 9 August 1965 by virtue of the Republic of Singapore Independence Act 1965 (Act 9 of 1965)]. This is the right of every individual not to be subjected to torture or inhuman treatment. We think it is beneficial if this right is written into the Constitution of Singapore as a fundamental right and accordingly we recommend a new Article as follows -

13.-(1) No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that the law in question authorises the infliction of any punishment or the administration of any treatment that was lawful immediately before the coming into force of this Article.

For convenience, we shall hereafter refer to the new Article proposed by the Wee Commission as “the proposed Art 13”, and to the two subsections of this proposed Article as, respectively, “the proposed Art 13(1)” and “the proposed Art 13(2)”.

Three things may be noted about the proposed Art 13. The first is that the proposed Art 13(1) is effectively word for word the same as both Art 3 of the ECHR and s 7 of the Belize Constitution (which was the subject

matter of the decision in *Reyes* ([2002] 2 A.C. 235). The second is that the proposed Art 13(1) and the proposed Art 13(2) are *in pari materia* with: (a) ss 15(1) and 15(2) respectively of the Constitution of Barbados (which provisions were commented on by the Privy Council in *Boyce* ([2005] 1 A.C. 400) at, inter alia, [28]); and (b) ss 17(1) and 17(2) respectively of the Constitution of Jamaica (which Constitution was construed in *Pratt* ([1994] 2 AC 1), a decision rejected by this court in *Jabar* ([1995] 1 SLR(R) 326). Third, the proposed Art 13(2), which is essentially a savings clause to preserve the validity of punishments existing before the coming into force of the proposed Art 13 (regardless of whether or not such punishments are inhuman), is also substantially the same as para 10 of Schedule 2 to the Saint Lucia Constitution Order 1978 (SI 1978/1901) (“the Saint Lucia savings clause”).

The Saint Lucia savings clause reads as follows:

Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of section 5 of the Constitution [of Saint Lucia] to the extent that the law in question authorises the infliction of any description of punishment that was lawful in Saint Lucia immediately before 1 March 1967 (being the date on which Saint Lucia became an associated state).

In *Hughes* ([2002] 2 A.C. 259), the Privy Council held that the above clause was inadequate to save the MDP imposed for murder under s 178 of the Criminal Code of Saint Lucia as revised in 1992 (“Saint Lucia’s Criminal Code”) from unconstitutionality (in terms of violating the constitutional prohibition against inhuman punishment set out in s 5 of the Constitution of Saint Lucia). The Privy Council, relying on the word “authorises” (which is also used in the proposed Art 13(2)), stated (at [47] of *Hughes*):

[T]here is a world of difference between a law that requires a judge to impose the death penalty in all cases of murder and a law that merely authorises him to do so. More particularly, it is because the law requires, rather than merely authorises, the judge to impose the death sentence that there is no room for mitigation and no room for the consideration of the individual circumstances of the defendant or of the murder. [emphasis added]

Proceeding on this basis, the Privy Council held that s 178 of Saint Lucia’s Criminal Code fell outside the scope of the Saint Lucia savings clause “to the extent that it ... require[d] the infliction of the death penalty in all cases

of murder” (at [48]). In other words, the Saint Lucia savings clause saved only the discretionary death penalty, but not the MDP.

Since the proposed Art 13 is not part of the Singapore Constitution, the Privy Council’s decision in *Hughes*, which turned on the interpretation of the word “authorises” in the Saint Lucia savings clause, is not relevant in the present appeal. Nevertheless, we wish to add that, whatever the legislative intent of the Saint Lucia savings clause was, we find it difficult to believe that when the Wee Commission raised the proposed Art 13(2) for the Government’s consideration, it intended to exclude from the protection of this provision all punishments “required” by law, such as the MDP for murder, mandatory caning for other offences as well as the various mandatory minimum punishments prescribed under the then existing criminal statutes (for example, the Vandalism Act 1966 (Act 38 of 1966), which came into force on 16 September 1966). It seems to us that the converse was more likely, ie, the Wee Commission intended the proposed Art 13(2) to prevent the raising of any argument that any pre-existing lawful punishment of whatever nature would be in violation of the proposed Art 13(1) upon the proposed Art 13 taking effect.

In this regard, we note that the word “requires” was not used in the proposed Art 13(2). The word used was, instead, “authorises”. It is an established principle of interpretation that the meaning of a word is derived from the context in which that word is used. The purpose of a savings clause in the nature of the proposed Art 13(2) is clearly to save from possible unconstitutionality all existing punishments that were lawful prior to the coming into effect of a new constitutional right (such as that set out in the proposed Art 13(1)). If the word “authorises” in such a savings clause is indeed intended to exclude existing punishments that are “required” to be imposed (ie, mandatory punishments such as the MDP), it would be far easier to simply abrogate all those punishments so as to conform to the new constitutional right in question, instead of leaving the constitutional validity of those punishments in doubt until a court decides, long after the event, which of the “required” punishments are saved and which are not. It seems to us rather surprising that a punishment which the court is “required” to impose for a particular offence (eg, the MDP) can be construed as falling outside the ambit of “authorised” punishments. This is because, if the court is “required” to inflict a particular punishment, it is a fortiori authorised to inflict that punishment.

Returning to the Wee Commission's recommendations as set out in the 1966 Report, the Government accepted many of those recommendations in their entirety. There were other recommendations which the Government agreed to in principle, but not with regard to the details; and there were yet other recommendations which the Government found to be unacceptable. In respect of the proposed Art 13, the Government accepted in principle that no individual should be subjected to torture, but it omitted any reference to protection from inhuman punishment (*see* SINGAPORE PARLIAMENTARY DEBATES, OFFICIAL REPORT (Dec. 21, 1966) vol 25 at cols 1052-1053) (Mr EW Barker, Minister for Law and National Development)). Ultimately, the Government did not include the proposed Art 13 in the amendments to the Singapore Constitution, and the Constitution (Amendment) Act 1969 (Act 19 of 1969), which was passed to give effect to provisions of the 1966 Report that the Government accepted, provided for only the establishment of what is now the Presidential Council for Minority Rights to, *inter alia*, serve as "an additional check on ... matters which might affect the minorities" (see the 1966 Report at para 16).

The Government's rejection of the proposed Art 13 was unambiguous, whatever the reasons for such rejection were. This development, in our view, forecloses Mr Ravi's argument that it is open to this court to interpret Art 9(1) of the Singapore Constitution as incorporating a prohibition against inhuman punishment. We may reasonably assume that the Wee Commission recommended the inclusion of the proposed Art 13 in the Singapore Constitution because Art 9(1) did not deal with the same subject matter as that of the proposed Art 13(1) (*viz*, prohibition of inhuman punishment); otherwise, Art 9(1) would have been redundant. The Government's rejection of the proposed Art 13(1) - the content of which forms the basis of the ruling in the Privy Council cases relating to Art 9(1) that the MDP is an inhuman punishment - makes it impossible for the Appellant to now challenge the constitutionality of the MDP by relying on these Privy Council cases. It is not legitimate for this court to read into Art 9(1) a constitutional right which was decisively rejected by the Government in 1969, especially given the historical context in which that right was rejected. We therefore conclude that Mr Ravi's proposed interpretation of Art 9(1) as incorporating a prohibition against inhuman punishment is an interpretation which our courts are barred from adopting.

In this connection, we wish to highlight Lord Bingham's observation in *Reyes* at [28] that States are not bound to give effect in their Constitutions to norms and standards accepted elsewhere, perhaps in very different societies. It is also pertinent to refer to the judgment of Lord Nicholls in *Matthew* ([2005] 1 A.C. 433), where his Lordship said:

... If the requisite legislative support for a change in the Constitution is forthcoming, a deliberate departure from fundamental human rights may be made, profoundly regrettable although this may be. That is the prerogative of the legislature.

If departure from fundamental human rights is desired, that is the way it should be done. The Constitution should be amended explicitly.

... Let us first consider the effect of the proposition that the expression "law" in Art 9(1) includes CIL. If this proposition were accepted, it would mean that any rule of CIL would be cloaked with constitutional status and would override any existing MDP legislation, such as s 302 of the Singapore Penal Code, which, as mentioned at [84] above, can be traced back to 1883 (see s 1 of the Penal Code Amendment Ordinance).

Ordinarily, in common law jurisdictions, CIL is incorporated into domestic law by the courts as part of the common law in so far as it is not inconsistent with domestic rules which have been enacted by statutes or finally declared by the courts. (A rule of CIL may, of course, also be incorporated by statute, but, in that situation, the rule in question will become part of domestic legislation and will be enforced as such; ie, it will no longer be treated as a rule of CIL.) The classic exposition of the principle delineating when a CIL rule becomes part of domestic common law is set out in the Privy Council case of *Chung Chi Cheung* ([1939] A.C. 160) (cited by this court in *Nguyen* ([2005] 1 SLR(R) 103), where Lord Atkin explained (at 167-168):

[S]o far, at any rate, as the Courts of this country are concerned, international law has no validity save in so far as its principles are accepted and adopted by our own domestic law. There is no external power that imposes its rules upon our own code of substantive law or procedure. The Courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals.

Other authorities which illustrate this principle include *Collco Dealings Ltd v Inland Revenue Commissioners* [1962] A.C. 1 (likewise referred to in *Nguyen* at [94]); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* (Oxford University Press, 7th ed, 2008) at p 44; OPPENHEIM'S *INTERNATIONAL LAW, VOL. 1: PEACE* (Jennings & Watts eds., Longman 9th ed. 1992) at p 56; and PETER MALANCZUK, *AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 69 (Routledge, 7th ed, 1997).

The principle enunciated by Lord Atkin in *Chung Chi Cheung* entails that, at common law, a CIL rule must first be accepted and adopted as part of our domestic law before it is valid in Singapore - ie, a Singapore court would need to determine that the CIL rule in question is consistent with "rules enacted by statutes or finally declared by [our] tribunals" (per Lord Atkin in *Chung Chi Cheung* at 168) and either declare that rule to be part of Singapore law or apply it as part of our law. Without such a declaration or such application, the CIL rule in question would merely be floating in the air. Once that CIL rule has been incorporated by our courts into our domestic law, it becomes part of the common law. The common law is, however, subordinate to statute law. Hence, ordinarily, CIL which is received via the common law is subordinate to statute law. If we accept Mr Ravi's submission that the expression "law" in Art 9(1) includes CIL, the hierarchy of legal rules would be reversed: any rule of CIL that is received via the common law would be cloaked with constitutional status and would nullify any statute or any binding judicial precedent which is inconsistent with it.

In our view, a rule of CIL is not self-executing in the sense that it cannot become part of domestic law until and unless it has been applied as or definitively declared to be part of domestic law by a domestic court. The expression "law" is defined in Art 2(1) to include the common law only "in so far as it is in operation in Singapore". It must therefore follow that until a Singapore court has applied the CIL rule prohibiting the MDP as an inhuman punishment (if such a rule exists) or has declared that rule as having legal effect locally, that rule will not be in operation in Singapore. In the present case, given the existence of the MDP in several of our statutes, our courts cannot treat the alleged CIL rule prohibiting inhuman punishment as having been incorporated into Singapore law, and, therefore, this alleged CIL rule would not be "law" for the purposes of Art 9(1). We might add that (as noted at [44] above), in *Nguyen*, this court held (at [94]) that

in the event of any conflict between a rule of CIL and a domestic statute, the latter would prevail.

There is an even stronger reason why, even if we accept that “law” in Art 9(1) includes CIL, the specific CIL rule prohibiting the MDP as an inhuman punishment (assuming there is such a rule) cannot be regarded as part of “law” for the purposes of this provision. As mentioned earlier (at [64]-[65] and [71] above), the Wee Commission had in 1966 recommended adding a prohibition against inhuman punishment (in the form of the proposed Art 13) to the Singapore Constitution, but that recommendation was rejected by the Government. Given that the Government deliberated on but consciously rejected this suggestion of incorporating into the Singapore Constitution an express prohibition against inhuman punishment generally, a CIL rule prohibiting such punishment - let alone a CIL rule prohibiting the MDP specifically as an inhuman punishment - cannot now be treated as “law” for the purposes of Art 9(1). In other words, given the historical development of the Singapore Constitution, it is not possible for us to accept Mr Ravi’s submission on the meaning of the expression “law” in Art 9(1) without acting as legislators in the guise of interpreters of the Singapore Constitution.

In any event, there is one other crucial threshold which Mr Ravi must cross before he can make out a case that “law” in Art 9(1) includes the CIL prohibition against the MDP (assuming this prohibition does indeed exist), namely, he must show that the content of the CIL rule prohibiting inhuman punishment is such as to prohibit the MDP specifically.

[Appeal dismissed]

Jurisdiction

SINGAPORE

EXTRA-TERRITORIAL JURISDICTION – PRESUMPTION AGAINST EXTRA-TERRITORIAL APPLICATION OF STATUTES – PRINCIPLES OF COMITY

Huang Danmin v Traditional Chinese Medicine Practitioners Board, Originating Summons No 849 of 2008, 18 May 2010. [2010] 3 SLR 1108; [2010] SGHC 152. Tay Yong Kwang J.

Facts

The appellant, Huang was a Singapore-registered traditional Chinese medicine (“TCM”) practitioner with a clinic in Singapore. In 2003, the family members of a patient who had been diagnosed with terminal rectal cancer approached Huang to treat him. Huang agreed and informed them that he also operated a clinic in the neighbouring Malaysian state of Johor, and that he had some special equipment in his Johor clinic that might be helpful to the patient. Accordingly, Huang treated the patient at his Johor clinic. One form of treatment deployed by Huang required the use of a “electro-thermal needle” machine which inserted a needle into the patient’s tumour area.

In 2008, Huang’s registration as a TCM practitioner was cancelled by the respondent Traditional Chinese Medicine Practitioners Board (“the Board”) after considering the findings and recommendations of the Investigation Committee in respect of three complaints that had been filed against the Appellant. One of these complaints concerned his questionable treatment of the patient in his Johor clinic. Huang argued that the Board erred in finding his Johor treatment procedure to be against TCM practice. Among other things, the appellant argued that the TCM Act did not apply to acts committed by him while outside Singapore as there was a well-known principle of statutory interpretation that a statute is not extra-territorial in its application unless it expressly so provides.

Judgment

... Before I proceed with the substantive analysis, I would just make some comments regarding the presumption against extra-territoriality.

My first comment relates to Ms Koh's [counsel for appellant's] submissions that the presumption against extra-territoriality applies only to "offence creating" statutes and that there is no such presumption when the statute in question is not an "offence creating" one. In support of this proposition, she cited the case of *PP v Pong Tek Yin* [1990] 1 SLR(R) 543, where the court held at [16] that:

The question is one of construction, and in construing that section it must be borne in mind that there is a well-established presumption that in the absence of clear and specific words to the effect a statute which creates an offence is not intended to make an act taking place outside the territorial jurisdiction of the country an offence triable in the courts here: *Air-India v Wiggins* [1980] 2 All ER 593.

While Ms Koh's argument is an attractive one, it may not be easy to determine whether a particular law is an offence creating statute or not. Virtually every law that purports to regulate behaviour provides for a penalty (either a fine or a jail sentence) in the event that it is breached. For example, in *Mackinnon v Donaldson, Lufkin & Jenrette Securities Corporation* [1986] Ch 482, Hoffman J invoked the presumption against extra-territoriality in refusing to interpret s 7 of the Bankers' Books Evidence Act 1879 (c 11) (UK), which allowed a court to order the inspection of entries in a banker's book, as having extra-territorial effect (at 493). Although the said s 7 did not explicitly make a party's refusal to comply with a court inspection order a criminal offence, such refusal would certainly have been regarded as contempt of court and would have attracted a fine or even a jail sentence. In this sense, every statutory instrument can be regarded as an "offence creating" statute by virtue of the state's exercise of its coercive power in enforcing it. In this case, s 19 of the TCM Act relies primarily on the Board's power to cancel a practitioner's registration to ensure compliance with its rules. At first glance, this may seem to be a "non offence" because the penalty of cancellation of registration is different from traditional criminal penalties like a fine or a jail sentence. However, s 19(2)(b) of the TCM Act also allows the Board to impose a penalty of up to \$10,000 in lieu of such deregistration. Although the TCM Act refers to it as a "penalty" and not a fine and s 19(4) provides that this penalty is recoverable "as a debt due

to the Board”, it is difficult to see how this penalty differs conceptually from a fine in its effect.

The definition of an “offence creating” statute may be narrowed by making references to traditional notions of what constitutes a crime. Yet even this path is fraught with difficulty. As many academics have pointed out, there is no clear definition of what constitutes a crime (e.g., G Williams, *The Definition of Crime*, CURRENT LEGAL PROBLEMS 107, at 130 (1955); A SIMESTER AND G SULLIVAN, CRIMINAL LAW: THEORY AND DOCTRINE 3–4 (Oxford University Press, 3 ed, 2007)). The concept of crime can be defined in many ways. One way is to define it to mean all activities that are prohibited by the state and which are enforced by penalties imposed directly by it. Another way to define it is by looking at factors such as the type of proceedings that are brought to enforce it, the type of evidence that can be adduced and the burden of proof that is required. In the absence of any consensus as to what exactly is an “offence creating” statute, I shall proceed on the basis that there is a presumption against extra-territoriality in the construction of all statutes.

Secondly, the cases dealing with the presumption against extra-territoriality tend to do so in a way that suggests that there is a strict dichotomy between laws with extra-territorial effect and laws that do not. Of course, reality is more complex than that and it is probably more accurate to speak of degrees of extra-territoriality than to think of extra-territoriality as a discrete category. For example, a law that affects the actions of foreigners in a foreign jurisdiction is clearly more “extra-territorial” than one which only seeks to control the actions of a country’s citizens in a foreign jurisdiction, although both can be regarded as having some form of extra-territorial effect. In so far as the presumption against extra-territoriality is based on a hypothetical legislative concern about the problems that extra-territorial effect may create, the strength of the presumption may vary depending on the extent to which extra-territorial effect is claimed, since a law with lesser extra-territorial effect can be expected to present lesser problems.

Thirdly, counsel for the Respondent and Ms Koh have cited many cases where the acts of professionals in foreign jurisdictions were taken into consideration in disciplinary proceedings. Strictly speaking, these cases are not of direct relevance to the question of whether s 19(1)(i) of the TCM Act should be construed as having extra-territorial effect since they were based on the interpretation of different statutory instruments.

However, in so far as the courts had, in these cases, identified the purpose which the statutes were meant to serve and determined that those purposes could only be fulfilled by interpreting the statutes to have some degree of extra-territorial effect, they provide helpful guidance as to the degree of extra-territorial effect that is required to achieve a certain purpose.

PURPOSE, ENFORCEABILITY AND COMITY

Section 9A of the Interpretation Act requires the court to interpret a written law in a way that would promote the purpose or object underlying the written law. One of the ways to determine the underlying purpose or object of a statute is by looking at the Parliamentary debates. During the second reading of the Traditional Chinese Medicine Practitioners Bill on 14 November 2000 (SINGAPORE PARLIAMENTARY DEBATES, OFFICIAL REPORT (14 November 2000), vol 72 at cols 1126, 1127 and 1130), the Parliamentary Secretary to the Minister for Health, Mr Chan Soo Sen, informed Parliament that:

In July 1994, the Ministry of Health appointed a Committee to look into the regulation of TCM. The Committee recommended a phased approach, (ie a step-by-step approach) to the regulation of TCM practitioners in order *to safeguard patients' interest and safety, as well as to enhance the standard of training and professionalism of TCM practitioners in Singapore.*

...
[S]tatutory regulation of TCM practice is necessary to safeguard patients' interest and safety. We have to ensure that TCM practitioners are properly trained and qualified before they are allowed to practise. There should also be a framework to raise the professional standard of TCM practitioners in Singapore. ...

[emphasis added]

It is clear from the above that the overriding purpose of the TCM Act is to ensure the safety and well being of patients by ensuring a minimum standard of professionalism among the TCM practitioners. The legislative intent of the TCM Act is reinforced by the Ethical Code and Ethical Guidelines for TCMP (January 2006) ("Ethical Code"), which provides at p 5 that:

This 'Ethical Code and Ethical Guidelines for TCM Practitioners' represents the fundamental tenets of conduct and behaviour expected of TCM practitioners practising in Singapore, and elaborates on their applications. They are intended as a guide to all TCM

practitioners as to what the Board regards as the minimum standards required of all TCM practitioners in the discharge of their professional duties and responsibilities in the practice of TCM in Singapore.

In fairness, the Ethical Code does mention “practising in Singapore” and “the practice of TCM in Singapore”, thus implying that it accepts the presumption against extra-territoriality.

Having determined the purpose of the TCM Act, the next step is to select an interpretation of s 19(1)(i) of the TCM Act that would best serve that purpose. In doing this, it is important to remember that the number of ways which a statute can be interpreted depends on the number of factors which the interpreter regards as being legally significant. Hence, if a court finds that a statute ought to be interpreted as having extra-territorial effect in a particular factual situation, it should also highlight the legally significant factors that form the basis for its decision.

25 A survey of the cases suggests that there are two main problems associated with interpreting a statute to have extra-territorial effect. The first is the problem of enforceability while the second is that of comity among nations. In *Parno v SC Marine Pte Ltd* [1999] 3 SLR(R) 377, the Court of Appeal held at [41] that Parliament could not have intended the provisions of the now defunct Factories Act (Cap 104, 1998 Rev Ed) to apply to factories abroad because:

... enforcement of the Act would be impossible without infringing on the sovereignty of another state, let alone the practical difficulties associated with such enforcement worldwide. The main object of the Act is clearly to protect and ensure the safety of the many workmen who work on industrial premises in Singapore. To hold that the Factories Act is applicable to the case at hand, when there is no doubt that the Sumpile 8 was at the material time within the territorial waters of Myanmar, would be to intrude into the jurisdiction of another state.

The Court in *R (on the application of Carson) v Secretary of State for Work and Pensions* [2002] 3 All ER 994 explained the rationale behind the presumption against extra-territoriality in terms of enforceability and comity thus:

The comity of nations is doubtless one basis for this presumption: one state should not be taken to interfere with the sovereignty of

another state by enacting legislation extending to its territory. Another is practicality: most legislation cannot practically be applied to those present in another state.

As mentioned ... above, there are different degrees of extra-territoriality and correspondingly varying degrees of problems with enforcement and comity issues. The question of enforcement is essentially a practical one and depends largely on whether the penalty that is sought to be imposed on the party who has infringed the statute can be done so effectively. Where the party against whom enforcement is sought has substantial links to the domestic jurisdiction (either because he is a citizen of that jurisdiction or has substantial property there), enforcement is more likely to be more successful. Finally, to use an example that is more relevant to the case at hand, where the penalty sought to be imposed involves the cancellation of a licence that allows the infringer to engage in some regulated activity in the domestic jurisdiction, there is certainty of successful enforcement for obvious reasons. This probably explains why many courts in different jurisdictions have been willing to find that disciplinary tribunals are entitled to consider the acts of their members that were committed overseas when determining if disciplinary action should be taken against them. (See, *Marinovich v General Medical Council* [2002] UKPC 36; *Re Legault and Law Society of Upper Canada* (1975), 58 D.L.R. 3d 641(Can.); *Ewachniuk v Law Society (British Columbia)* [1998] Carswell B.C. 358].

Comity is a more controversial concept. Unlike enforceability which is usually a pure question of fact, the idea of comity is affected both by customary international law and legal history. For example, the interpretation of a statute to cover acts committed by a country's nationals in a foreign jurisdiction is regarded as less harmful to comity than if that statute were interpreted to cover acts committed by foreigners in that foreign jurisdiction. This is so despite the fact that in both situations, the state is seeking to punish an individual for acts committed in a foreign jurisdiction. The reason is probably because historically, law was regarded as personal and it was only until the advent of the territorial state that it became more fixed to the territory over which the state had effective control (J.L. Brierly, "The 'Lotus' Case" 44 LAW QUARTERLY REVIEW 154 at 155-156 (1928)). Furthermore, states do claim some form of jurisdiction over acts committed by their citizens in foreign jurisdictions (see, e.g., s 8A of the Misuse of Drugs

Act (Cap 185, 2008 Rev Ed) and s 37 of the Prevention of Corruption Act (Cap 241, 1993 Rev Ed)).

Both Ms Koh and counsel for the Respondent have cited the case of *Re Wong Sin Yee* [2007] 4 SLR(R) 676 to show that a statute should be interpreted as having extra-territorial effect if doing so would serve its underlying purpose. In that case, the High Court had to determine whether s 30 of the Criminal Law (Temporary Provisions) Act (Cap 67, 2000 Rev Ed) (“the CLTPA”), which allows the Home Affairs Minister to detain individuals without trial for up to 12 months, could be used to authorise the detention of a person for criminal activities committed outside Singapore. The detainee relied on the presumption against extra-territoriality to support his case for a narrow interpretation of s 30 of the CLTPA.

The detainee’s argument was rejected by Tan Lee Meng J who held that s 30 of the CLTPA allowed the Minister to take into consideration activities committed outside Singapore in determining whether the detention order was required in the interests of public safety, peace and good order in Singapore. He stated, at [21]:

While the Minister must be satisfied that a detention order is required in the interests of public safety, peace and good order in Singapore, it does not follow that the threat to public safety, peace and good order must result from criminal activities in Singapore. Otherwise, a person who is believed to be a threat to public safety, peace and good order in Singapore because of his criminal activities abroad must be given some time to become involved in criminal activities in Singapore before he can be detained under s 30 of the CLTPA. The applicant’s first ground for challenging the Detention Order thus fails.

No doubt this decision was fully justified because of the obvious purpose of the CLTPA. However, it is worth mentioning that the detainee in that case was a Singaporean, hence the abovementioned problems of enforcement and comity did not feature there.

Accordingly, I find that the question of whether a statute should be interpreted as having any degree of extra-territorial effect depends on the extent to which its purpose would be served by such an interpretation and whether this interpretation would result in problems relating to enforcement and international comity.

ANALYSIS

Having regard to the fact that the overriding purpose of the TCM Act is to ensure the safety and well being of patients by ensuring a minimum standard of professionalism among TCM practitioners, I must now choose an interpretation of s 19(1)(i) that will best achieve this purpose.

I accept the Board's submission that to hold that section 19(1)(i) of the TCM Act does not apply in the present case would undermine its underlying purpose. Registered TCM practitioners who wish to perform unauthorised and possibly unsafe treatments on their patients will have a ready mechanism: they can simply cross the Causeway and perform those treatments there with seeming impunity. This is a loophole that cannot be accepted. Accordingly, an interpretation of s 19(1)(i) of the TCM Act that covers the facts of the present case would better serve its underlying purpose.

What are the legally significant factors that form the basis of this decision? In this respect, the case of *Re Linus Joseph* [1990] 2 SLR(R) 12 ("*Re Linus Joseph*") provides useful guidance. In that case, the defendant was an advocate and solicitor of both the Singapore bar and the Brunei bar. The defendant had allegedly dishonestly withheld professional fees from his employers, a Brunei firm of advocates and solicitors, whilst in the employment of that firm in Brunei. The issue in that case was whether the Disciplinary Committee could take this alleged misconduct into consideration when determining whether the defendant was guilty of grossly improper conduct under s 80(2)(b) of the Legal Profession Act (Cap 161, 1985 Rev Ed).

The court held that the words "guilty of fraudulent or grossly improper misconduct in the discharge of his professional duty" under s 80(2)(b) of the Legal Profession Act referred to the discharge of a solicitor's duty in his capacity as an advocate or solicitor of the Supreme Court of Singapore. Since it was clear that the defendant's acts had been committed in his capacity as a Brunei solicitor, they did not fall within s 80(2)(b) of the Legal Profession Act. More significantly, the court considered that if a solicitor had acted improperly in his capacity as a Singapore solicitor, such conduct would fall under s 80(2)(b) of the Legal Profession Act notwithstanding that it took place in a foreign jurisdiction.

The court in *Re Linus Joseph* chose the capacity in which the defendant solicitor acted as the legally significant factor for determining the jurisdictional ambit of s 80(2)(b) of the Legal Profession Act. In my opinion, an

interpretation of s 19(1)(i) of the TCM Act to cover all sorts of professional misconduct committed by a registered practitioner in his capacity as such, regardless of where those acts were committed, best serves the underlying purpose of the TCM Act and does not result in an overreaching effect.

This interpretation will not create any substantial problem with enforcement or comity. As mentioned above at [27], there is unlikely to be any problem with the enforcement of statutes relating to professional disciplinary bodies regardless of the extent of extra-territorial effect that is claimed because the mode of enforcement (ie, the cancellation of registration) is one that can be effected easily.

Neither will there be comity problems if the basis of the jurisdiction under s 19(1)(i) of the TCM Act is linked to the TCM practitioner acting in his capacity as a Singapore registered practitioner. After all, the cancellation of the practitioner's registered status only prevents him from practising TCM in Singapore. He is still free to practise TCM in other jurisdictions. Hence, the foreign jurisdictions' power to regulate the type of treatments that may be performed within their territory is unaffected. Furthermore, jurisdiction that is linked to the capacity in which the TCM practitioner acts is quite similar to the type of nationality-based jurisdiction mentioned in [28] above. Just as nationality-based jurisdiction is justified on the ground that a citizen who enjoys the protection of his state should accept the restrictions imposed on him, the jurisdiction of s 19(1)(i) of the TCM Act extends to a TCM practitioner whenever he conducts himself as a Singapore registered TCM practitioner.

Accordingly, I find that s 19(1)(i) of the TCM Act extends to a TCM practitioner whenever and wherever he conducts himself as a Singapore registered TCM practitioner.

Territory

JAPAN

SENKAKU ISLANDS - SHIP COLLISION - EAST CHINA SEA

On 7 September 2010, while on patrol close to the Senkaku Islands, the Japanese Coast Guard vessel, Yonakuni, found a Chinese trawling vessel

fishing inside the territorial waters of the Senkaku Islands. Yonakuni issued a warning against the fishing vessel to leave the Japanese territorial waters. The fishing vessel, after hauling a net onto the boat, started to sail. The fishing boat, at 10:15, 12 km north-northwest of Kuba Island, deliberately collided with Yonakuni. The fishing boat, after the collision, continued to sail while Japanese patrol ships, Mizuki and Hateruma, ordered it to stop and started to pursue the vessel. At 10:56, 15 km within Japanese territorial waters north-northwest of Kuba island, the fishing boat steered quickly to the left and intentionally collided with Mizuki during pursuit. Although Mizuki and Hateruma tried to stop the ship by intercepting its course and by using water cannons, the vessel refused orders to stop. At 27 km north-northwest of Kuba island outside of Japanese territorial waters, Mizuki forced the ship and the vessel was boarded.

On 8 September, 02:03, 8.7 km from the western edge of Uotsuri Island within Japanese territorial waters, the Chinese fishing boat captain was arrested for violating laws against interfering with a government official in the act of duty. On 9 September, 10:41, the captain was referred to the Ishigaki Branch of Naha District Public Prosecutors' Office and the case was sent for violation of the Act on Regulation of Fishing Operation by Foreign Nationals and of laws against interfering with the crew of Yonakuni in their acts of duty. The captain of the fishing boat was released on 25 September, and on 21 January, the charge against the captain was dropped.

MARINE SCIENTIFIC RESEARCH - EXCLUSIVE ECONOMIC ZONE - EAST CHINA SEA

On 31 July 2011 at 7:25 in the morning inside the Japanese Exclusive Economic Zone in the East China Sea, a Japanese Coast Guard reconnaissance plane spotted a Chinese marine research vessel that was suspected of conducting a marine survey by towing a wire from its stern without prior notification as required by international rules. A Japanese Coast Guard vessel and plane warned that it was not permitted to conduct a survey without the prior consent of Japanese government and urged an immediate halt to the survey. The Chinese research vessel sailed out from the Japanese Exclusive Economic Zone at 4:27 in the afternoon on the same day.

From September to December in the same year, there were a total six incidents in which Chinese marine research vessel conducted research

within Japanese Exclusive Economic Zone in the East China Sea. In each case, the Japanese Coast Guard issued a warning against those vessels.

Act concerning Conservation of Low-Water Mark and Improvement of Important Facilities for Promoting Conservation and Utilization of Exclusive Economic Zone and Continental Shelf (Act No. 41 of June 2, 2010)

Japan enacted a law concerning the preservation of the low-water mark and improvement of important facilities for promoting the conservation and utilization of the exclusive economic zone and continental shelf. The Act was enacted in regard to the maintenance of low-water mark for the delineation and preservation of the Exclusive Economic Zone and other areas and to the improvement of important facilities on strategically important isolated islands as the bases of operation for the preservation and utilization of exclusive economic zones and other areas. The purpose of the Act is to stipulate the basic plan; to regulate underwater drilling in the low-water mark preservation zone; to construct port facilities on designated remote islands; and to take other measures, as well as to promote the preservation and utilization of Exclusive Economic Zone and other areas; and finally to contribute to the sound development of the economy and society of Japan and to improve the stability of the lives of the citizenry. There is a recognition that Japan's exclusive economic zones and continental shelf are important sites for exploitation and exploration of the natural resources and for the conservation of the marine environment and other activities. The Act consists of 20 articles and supplementary provisions. Minamitorishima and Okinotorishima have been designated as designated isolated islands by Cabinet Order No.157 of 2010.

The Act includes penal provisions (Articles 17 to 20) and in accordance with article 17, if a person conducts drilling in specific areas without prior authorization by the Minister of Land, Infrastructure and Transportation, the person shall be sentenced to imprisonment for not more than one year or be liable to a fine not exceeding 500,000 yen.

PHILIPPINES

NATIONAL TERRITORY OF THE PHILIPPINES

An Act to amend certain provisions of Republic Act No. 3046, as amended by Republic Act No. 5446, to define the Archipelagic Baselines of the Philippines, and for other purposes, Republic Act No. 9522

Signed into law by the President of the Philippines on 10 March 2009, this Act further amended Republic Act No. 3046, defining and describing the baselines of the Philippine archipelago using, among others, the parameters of the World Geodetic System of 1984. Moreover, it states that the baseline in the Kalayaan Island Group (as constituted under Presidential Decree No. 1596) and Bajo de Masinloc (also known as Scarborough Shoal)—areas over which the Philippines likewise exercises sovereignty and jurisdiction—shall be determined as “Regime of Islands” under the Republic of the Philippines, consistent with Article 121 of the United Nations Convention on the Law of the Sea.

The law affirmed that the Republic of the Philippines has dominion, sovereignty, and jurisdiction over all portions of the national territory as defined in the Constitution and by provisions of applicable laws including, without limitation, the Local Government Code of 1991,⁵⁹ as amended. It ordered the deposit and registration of this Act, together with the geographic coordinates and the chart and maps indicating the defined baselines, with the Secretary General of the United Nations. The National Mapping and Resource Information Authority (NAMRIA) was tasked to produce and publish charts and maps of the appropriate scale clearly representing the delineation of basepoints and baselines as set forth in the Act.

59 Local Government Code of 1991, Rep. Act 7160 (Phil.).

SINGAPORE

MALAYSIAN RAILWAY LAND IN SINGAPORE

Joint Statement For The Meeting Between Prime Minister Lee Hsien Loong And Prime Minister Dato' Sri Mohd Najib Tun Abdul Razak On The Implementation Of The Points Of Agreement On Malayan Railway Land In Singapore (POA), 20 September 2010, Singapore

1. Prime Minister Lee Hsien Loong and Prime Minister Dato' Sri Mohd Najib Tun Abdul Razak met in Singapore on 20 September 2010 to follow up on their earlier meetings of 24 May 2010 and 22 June 2010.

2. At the Singapore-Malaysia Leaders' Retreat on 24 May 2010, the two leaders issued a Joint Statement that they had agreed on the steps to move the Points of Agreement (POA) forward, and that both countries would embark on new bilateral co-operation, including the development of a rapid transit system link and an iconic project in Iskandar Malaysia.

3. On 22 June 2010, Prime Minister Lee visited Malaysia to discuss the land swap issue with Prime Minister Najib and conveyed Singapore's offer on the land swap. Following the same meeting, Prime Minister Lee sent a revised land swap offer to Prime Minister Najib on 28 June 2010. Prime Minister Najib accepted the offer on 17 September 2010 and Prime Minister Lee replied on 19 September 2010 confirming his agreement. Both Leaders have agreed as follows:

- The Singapore Government shall vest four land parcels in Marina South (TS30-361T, TS30-362A, TS30-363K and TS30-364N) and two land parcels in Ophir-Rochor (TS13-1115N and TS13- 1116X) in M-S Pte Ltd, in lieu of the three parcels of POA land in Tanjong Pagar, Kranji and Woodlands and three pieces of land in Bukit Timah (Lot 76-2 Mk 16, Lot 249pt Mk 4 and Lot 32-10 Mk 16).
- The four Marina South parcels are located at the heart of the financial and business cluster in Singapore's Marina Bay, while the two Ophir-Rochor parcels are located next to the Kampong Glam Historic District, in a new growth corridor that is being developed as an extension of Singapore's Central Business District.

- The Marina South and Ophir-Rochor land parcels shall be vested in M-S Pte Ltd for joint development when Keretapi Tanah Melayu Berhad (KTMB) vacates the Tanjong Pagar Railway Station (TPRS). The KTMB station will be relocated from Tanjong Pagar to the Woodlands Train Checkpoint (“WTCP”) by 1 July 2011 whereby Malaysia would co-locate its railway Custom, Immigration and Quarantine (“CIQ”) facilities at WTCP.
 - Both countries have different views relating to the development charges payable on the three parcels of POA land in Tanjong Pagar, Kranji and Woodlands. Both Leaders have agreed to settle this issue amicably through arbitration under the auspices of the Permanent Court of Arbitration. They have further agreed to accept the arbitration award as final and binding.
 - Both Leaders also agreed that the arbitration will proceed on its own track, and shall not affect the implementation of the POA and the other bilateral initiatives agreed in the Joint Statement of 24 May 2010, which shall continue to be implemented.
 - The Joint Implementation Team shall conclude by 31 December 2010 their discussion on the details of the implementation of the POA.
4. Both Leaders reiterated their commitment to the matters set out in the Joint Statement of 24 May 2010, including:
- The 50-50 joint venture company between Khazanah Nasional Berhad and Temasek Holdings Limited to undertake the development of the iconic wellness township project in Iskandar Malaysia.
 - The joint development of a rapid transit system link between Johor Bahru and Singapore with a single co-located CIQ facility in Singapore aimed at enhancing connectivity between the two countries.
5. Both Leaders noted with satisfaction the progress on a number of bilateral initiatives, including:
- The increase in cross-border bus services between Singapore and Johor;

- The reduction of tolls at both the Singapore and Malaysian sides of the Second Link since 1 August 2010; and
- Joint co-operation on the environment and tourism, including the joint study on a cross-border eco-tourism project twinning Sungei Buloh Wetland Reserve on Singapore side with the three Ramsar sites of Sungai Pulai, Pulau Kukup and Tanjung Piai at Johor under a "One Experience, Two Destinations" concept.

6. Prime Minister Najib expressed Malaysia's appreciation on Singapore's decision to hand over the waterworks under the 1961 Water Agreement to the Johor water authorities free of charge and in good working order upon the expiry of the 1961 Water Agreement on 31 August 2011.

7. Both Leaders encouraged the Joint Implementation Team, led by the Secretary General of the Ministry of Foreign Affairs, Malaysia and the Permanent Secretary of the Ministry of Foreign Affairs, Singapore to maintain the momentum of its work on the implementation details.

DELIMITATION OF TERRITORIAL SEA – WESTERN PART OF STRAIT OF SINGAPORE – TREATY BETWEEN SINGAPORE AND INDONESIA

Treaty between the Republic of Indonesia and the Republic of Singapore Relating to the Delimitation of the Territorial Seas of the Two Countries in the Western Part of the Strait Of Singapore. Done 10 March 2009; Ratified 30 August 2010

THE REPUBLIC OF INDONESIA AND
THE REPUBLIC OF SINGAPORE

NOTING that the coasts of the two countries are opposite to each other in the Strait of Singapore

HAVING partially settled their territorial sea boundary in the Strait of Singapore in the Treaty between the Republic of Indonesia and the Republic of Singapore relating to the Delimitation of the Territorial Sea of the Two Countries in the Strait of Singapore signed on 25 May 1973 (hereinafter referred to as "1973 Treaty")

CONSIDERING further that the territorial sea boundary in the western part of the Strait of Singapore shall continue the boundary line under the 1973 treaty.

DESIRING to further strengthen the bonds of friendship between the two countries,

PURSUANT THERETO, desiring to establish the boundaries of the territorial seas of the two countries in the western part of the Strait of Singapore.

HAVE AGREED AS FOLLOWS:

ARTICLE 1

1. The boundary line of the territorial seas of the Republic of Indonesia and the Republic of Singapore in the Strait of Singapore in the area west of Point 1 of the boundary line agreed in the 1973 Treaty located at 1° 10' 46.0" North and 103° 40' 14.6" East shall be a line, consisting of straight lines drawn between points, the co-ordinates of which are as follows:

POINTS	NORTH LATITUDE	EAST LONGITUDE
1	1° 10' 46.0"	103° 40' 14.6"
1A	1° 11' 17.4"	103° 39' 38.5"
1B	1° 11' 55.5"	103° 34' 20.4"
1C	1° 11' 43.8"	103° 34' 00.0"

2. The co-ordinates of the points 1A, 1B and 1C specified in paragraph 1 are geographical co-ordinates based on the World Geodetic System 1984 and the boundary line connecting points 1 to 1C is indicated in Annexure "A" to this Treaty.

3. The actual location of the above mentioned points at sea shall be determined by a method to be mutually agreed upon by the competent authorities of the two countries.

4. For the purpose of paragraph 3, "competent authorities" in relation to the Republic of Indonesia means the National Coordinating Agency for Survey and Mapping and the Indonesian Hydro-Oceanographic Office and in relation to the Republic of Singapore means any entity so designated by the Government of the Republic of Singapore

ARTICLE 2

The boundary line of the 1973 Treaty as well as the boundary line depicted in Article 1 paragraph 1 are shown in Annexure “B” of this Treaty, purely for illustration purposes.

ARTICLE 3

Any disputes between the two countries arising in relation to the interpretation of implementation of this Treaty shall be settled peacefully by consultation or negotiation.

ARTICLE 4

This Treaty shall be ratified in accordance with the constitutional requirements of the two countries.

ARTICLE 5

This Treaty shall enter into force on the date of the exchange of the Instruments of Ratification.

DONE IN DUPLICATE AT Jakarta on 10 March 2009 in the English and Indonesian languages. In case of any conflict between the texts or any divergence in interpretation, the English text shall prevail.

Treaties

INDIA

Statement by India on Agenda Item 79 - Report of the International Law Commission, Chapter X: Treaties over Time at the Sixth Committee of the 65th Session of the United Nations General Assembly on November 01, 2010.

India welcomed the establishment of a Study Group on the topic “Treaties over Time,” which considered the question of the scope of the work and agreed on a course of action to begin the consideration of the topic.