State Practice of Asian Countries in International Law

Malaysia

*Shaun Kang**

DISPUTE SETTLEMENT – INTERNATIONAL COURT OF JUSTICE – REVISION OF DECISION

Application for Revision of the Judgment of 23 May 2008 in the Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore) (Malaysia v. Singapore), International Court of Justice

On 2 February 2017, Malaysia submitted an application pursuant to Article 61 of the Statute of the International Court of Justice, for the review of the Pedra Branca/ Pulau Batu Puteh decision of the ICJ rendered on 23 May 2008. The application was premised on the discovery of three documents at the National Archives of the United Kingdom, during the period of 4 August 2016 and 30 January 2017. Malaysia contended that the discovery of the new documents raises new facts not previously considered by the ICJ. The documents are the internal correspondence of the Singapore colonial authorities in 1958, an incident report filed in 1958 by a British naval officer and an annotated map of naval operations from the 1960s.

Malaysia opined that the ICJ awarded sovereignty over Pedra Branca/Pulau Batu Puteh to Singapore based on a shared understanding between Johor and Singapore that sovereignty over Pedra Branca/Pulau Batu Puteh had passed from the former to the latter. The court arrived at the decision after concluding that the shared understanding was demonstrated by an exchange of correspondence between the representatives of the parties' predecessors in 1953 and by the subsequent conduct of the parties. Malaysia submits that the recently discovered documents will show that Singapore had not considered Pedra Branca/ Pulau Batu Puteh as part of its territory until at least February 1966; by that time, Singapore had already ceased to be part of Malaysia. Malaysia submits that the discovery of the facts as such fulfils the requirement under

* Legal Adviser, International Committee of the Red Cross (ICRC). Any views expressed here are solely the authors and does not reflect the ICRC's views and positions.

Article 61 of the Statute, in particular, that the fact discovered was of a decisive factor, and that the fact was not known at the time the court rendered the judgment not owing to the negligence of the party. Accordingly, Malaysia requests that the court allow its application for revision of the decision. Proceedings were discontinued on 29 May 2018, following the agreement of the parties to the same.

**UNITED NATIONS – GENERAL ASSEMBLY RESOLUTION –
JERUSALEM – ISRAEL – PALESTINE**

**Illegal Israeli Actions in Occupied East Jerusalem and the Rest of the
Occupied Palestinian Territory, United Nations General Assembly Res-
olution, ES-10/L.22.**

On 21 December 2017, the UNGA held an emergency meeting where a vote was called to adopt a resolution on measures and actions relating to the Holy City of Jerusalem. This follows the decision by the United States Government to move its embassy from Tel Aviv to Jerusalem and to recognize Jerusalem as Israel's capital. 128 States including Malaysia voted in favour of the resolution, while 9 were against, and 35 abstained. The resolution called on all States to refrain from establishing embassies in the Holy City of Jerusalem. Further, the resolution demanded that States comply with all relevant UN Security Council resolutions and work to reverse the negative trends imperilling a two-State resolution of the Israeli-Palestinian conflict. In a statement, Malaysia deemed the Jerusalem decision as an infringement on the Palestinian people's rights. Malaysia expressed concern that the dire situation will feed into the agenda of the extremists and frustrate collective efforts towards combating terrorism and ending the cycle of violence.

**DISPUTE SETTLEMENT – INTERNATIONAL COURT OF JUSTICE –
STATUTE OF THE INTERNATIONAL COURT OF JUSTICE – HIGH
COURT, MALAYSIA-MANDAMUS – JUDICIAL REVIEW**

**Prabakaran a/l Srivijayan & Anor v Minister of Foreign Affairs & Anor
and Another Application [2017] MLJU 1636**

Facts

On 22 September 2014, Mr Prabakaran a/l Srivijayan, the first applicant was sentenced to death by the Singapore High Court for drug trafficking. The

decision was affirmed by the Singapore Court of Appeal on 2 October 2015. Following the decision, the applicant applied for leave for judicial review at the High Court of Malaysia, requesting for the court to grant leave and to subsequently compel the Government of Malaysia (respondent) to initiate proceedings against Singapore at the International Court of Justice (ICJ) as the Government has a duty to take all reasonable steps to uphold and protect the rights of the applicant.

In particular, the applicant asked that the Malaysian Government initiate proceedings against Singapore pursuant to Articles 35, 36 and 41 of the Statute of the ICJ. The applicant argued that the ICJ would be able to indicate provisional measures, halting the death sentence from being carried out on the applicant. Further, the applicant asked that the High Court of Malaysia declare that the Malaysian Government is legally obliged to protect and give effect to the applicant's right to a fair trial. The applicant contended that the order by the court for the Government to initiate proceedings against Singapore does not interfere with the policy decisions of the Government, instead, it is a lawful step to protect the constitutional right to life and liberty of the applicant. Further, the applicant argued that the right to a fair trial is guaranteed as a matter of customary international law (relied on the *Prosecutor v Zlatko Aleksovski*, Case No.: IT-95-14/1-T). The court also considered if Article 5 of the Federal Constitution of Malaysia, guaranteeing the right to life save by law, has extra-territorial application in Singapore.

Decision

The High Court of Malaysia found that it did not have the jurisdiction to hear the application as the decision to refer a matter to the International Court of Justice was a foreign policy decision best determined by the Government. Regarding the applicability of Article 5 of the Federal Constitution of Malaysia in Singapore, the Court found that it had no extraterritorial application.

The court recognized that the principle of non-intervention as customary international law and is deeply rooted in Article 2(4) of the UN Charter – it involves the right of every sovereign State to conduct its affairs without outside interference. The court underlined that the respondent has no obligation to meddle in the criminal justice system of Singapore as every State's domestic laws are sovereign. Furthermore, the court agreed that the invocation of the jurisdiction of the ICJ by Malaysia is contingent on Singapore providing consent to the same. Finally, the court concluded that the substantive question raised by the applicant is non-justiciable. Accordingly, the High Court denied leave for the application, underlining that there is no purpose for the court to grant leave for the purpose of investigation on full inter parts basis as there is no arguable case.

HUMAN RIGHTS – STATELESSNESS – CONVENTION ON THE RIGHTS OF THE CHILD (CRC)

Tan Siew Beng & Anor v Ketua Pengarah Jabatan Pendaftaran Negara & Ors [2017] 5 MLJ 662

Facts

Mr Tan (the appellant) adopted a child born in Malaysia. There was no information pertaining to the biological parents of the child. The appellant applied for citizenship of his child. The authorities, however, rejected the application, leading to the child being stateless. The appellant submitted an application at the High Court asking that the court reverse the decision of the authorities. The High Court disagreed with the appellant, leading to an appeal before the Court of Appeal.

The appellant submitted that the High Court judge had erred as the judge had failed to appreciate that there are provisions in domestic and international law, including the Convention on the Rights of the Child which compel the avoidance of statelessness of the appellant's child.

Decision

The Court of Appeal decided that the appellant had not fulfilled the requirement as provided for by the Federal Constitution, namely that the appellant had failed to prove that the child is born in Malaysia and have not acquired citizenship in another country. The adoption of the child does not confer a right of citizenship by operation of law. The Court emphasized that the Convention on the Rights of the Child have no force of law as it has not been incorporated into municipal legislation. Accordingly, the Court dismissed the appeal.

HUMAN RIGHTS – CAPITAL PUNISHMENT – RIGHTS – RIGHT TO LIFE

Amendment to Section 39B of the Dangerous Drugs Act 1952

Section 39B of the Dangerous Drugs Act 1952 (DDA), criminalises the act of trafficking in dangerous drugs, offer to traffic in a dangerous drug or do/ offer to do an act preparatory to, or for the purpose of trafficking in a dangerous drug. On conviction, the court is bound to sentence the accused to death by hanging. On 27 December 2017, the Parliament of Malaysia amended the provision (in force on 15 March 2018), giving courts the discretion to mete out a life

sentence and whipping instead of the death penalty, provided certain conditions are met. These conditions, as inserted by Section 39B (2A) DDA are that (i) there was no evidence of buying and selling of dangerous drug at the time when the person convicted was arrested, (ii) there was no involvement of agent provocateurs or the involvement of the person convicted is restricted to transporting, carrying, sending or delivering an dangerous drug and that the person convicted has assisted an enforcement agency in disrupting drug trafficking activities within or outside Malaysia.

TREATIES – DISARMAMENT – NUCLEAR WEAPONS

Treaty on the Prohibition of Nuclear Weapons 2017

The Treaty on the Prohibition of Nuclear Weapons is a treaty adopted in 2017, comprehensively prohibiting nuclear weapons, with the goal towards its total elimination. Malaysia voted in favor of the treaty. In a statement, the representative of Malaysia underlined that the Treaty sent a powerful political message that nuclear weapons were unacceptable and categorically rejected. The representative emphasized that the focus should now be on bringing the Treaty into force.

TREATIES – CLIMATE CHANGE – AMENDMENT TO TREATY

2012 Doha Amendment to the Kyoto Protocol

In 2012, the parties to the Kyoto Protocol adopted an amendment to the Protocol. It adds new emission reduction targets for the Second Commitment Period (2012–2020) for participating countries. On 12 April 2017, Malaysia accepted the 2012 Doha Amendment. The amendment is not yet in force as the minimum number of instruments (144 instruments) of acceptance have not been received.