LEGAL MATERIALS

STATE PRACTICE OF ASIAN COUNTRIES IN THE FIELD OF INTERNATIONAL LAW*

CHINA¹

JUDICIAL DECISIONS

Extradition

CASE OF APPLICATION FILED BY THE REPUBLIC OF FRANCE FOR EXTRADITING MARTIN MICHEL²

[Extradition Ruling of the Supreme People's Court of the People's Republic of China] [Extradition No.1 [2001] of the Supreme People's Court]

Chief Judge Nan Ying and Judges Gao Jinghong, Xue Shulan

14 November 2002

Clerk: Chang Zhaohui

On 1 June 2001, the Republic of France filed an application to the People's Republic of China for extraditing Martin Michel, who is a citizen of the Republic of France and is suspected of being involved in a rape. Martin Michel, male, born on 3 March 1945, of the nationality of the Republic of France, lived in No. 353 of Republic Avenue, Barmister Plain City, the Republic of France. He entered into the territory of China in September 1998, and temporarily stayed in No. 48 of Fenghuang

* Edited by B.S. Chimni and Joydeep Narayan Choudhuri. The years for which the State Practice has been collated are 2003 and 2004. However, in many instances, prior state practice has been included. This editorial decision was taken for two reasons: first, that readers may find useful this state practice of previous years; second, that often this previous state practice is only available in later years. The responsibility for the content of each contribution is that of the national contributor to the State Practice Section. The original footnote form has been retained in each contribution.

¹ Contributed by Zhang Xinjun, School of Law, Tsinghua University, Beijing, China.

² Gazette of the Supreme People's Court of the People's Republic of China (2004, No.9), published by the General Office of the Supreme People's Court, pp.16-17 (*Chinese*). The English translation is from *lawinfochina.com* <<http://www.lawinfochina.com/display.asp?db=2&id=208>>

New Village, the Lianmeng County, Kunming Municipality, Yunnan Province, People's Republic of China. He was arrested for extradition on 30 October 2001 and was in custody.

Pursuant to the Extradition Law of the People's Republic of China, this Court designated the Higher People's Court of Yunnan Province of the People's Republic of China to examine the request for extradition filed by the Republic of France on 25 September 2001 by Decision on the Designation of Examination of the Extradition Request – the Criminal Extradition No.1 [2001]. The Higher People's Court of Yunnan Province made an extradition ruling in terms of Extradition No.1 [2001] of the Higher People's Court of Yunnan on 21 December 2001, which ruled that the request of the Republic of France for extraditing Martin Michel complies with the conditions for extradition as prescribed in the Extradition Law of the People's Republic of China, and reported it to this Court for examination and approval. This Court convened a collegial panel according to law and carried out re-examination of the extradition ruling of the Higher People's Court of Yunnan.

Upon re-examination, this Court confirmed that: "Martin Michel against whom a request for extradition is filed by the Republic of France is suspected of rape and attempted rape of minors under 15 and minors over 15 and [to] have parental power therewith from 1982 to 1992 in the Republic of France, and pursuant to the Criminal Law of the People's Republic of China and the Criminal Law of the Republic of France, he may be imposed with a fixed-term imprisonment of more than one year or a more serious penalty. The request of the Republic of France for extraditing Martin Michel complies with the conditions for extradition as prescribed in the Extradition Law of the People's Republic of China."

During the re-examination period of this Court, Martin Michel and his attorneys submitted that the evidence for determining Martin Michel's involvement in the rape was insufficient and if he was to be extradited to his country, he could possibly be subjected to cruel treatment. They further submitted that Martin Michel entered into the territory of China lawfully; he has a daughter with the Chinese citizen Xi, and so his fundamental rights should be protected and the request for extradition should be disapproved.

The Court held that: "The Republic of France has provided evidence and materials as required by the Extradition Law of the People's Republic of China for extraditing Martin Michel; the issue raised by Martin Michel regarding possibility of cruel treatment after returning to his country are insufficient; his lawful entry into China is not a statutory condition for disapproval of extradition and the rights and interests in relation to his daughter born by the Chinese citizen Xi will be properly settled by the Republic of France. Therefore, the claims of Martin Michel and his attorneys for disapproval of extradition will not be accepted. The ruling made by the Higher People's Court of Yunnan is correct. Based thereon, a ruling is given as follows pursuant to Item (1) of Article 26 of the Extradition Law of the People's Republic of China:

"The ruling of the Higher People's Court of Yunnan that the request of the Republic of France for extraditing Martin Michel complies with the conditions for

extradition as provided for in the Extradition Law of the People's Republic of China and is hereby approved.'"

NATIONAL LAWS ON INTERNATIONAL LAW MATTERS

Incorporating a human rights clause into the Constitution The 2004 Amendments to the Constitution of the People's Republic of China

Introductory note

The Amendments to the Constitution of the People's Republic of China, which were adopted at the Second Session of the Tenth National People's Congress of the People's Republic of China on 14 March 2004, were promulgated and put into force on the same day.

One important amendment is to incorporate a human rights clause in the Constitution. According to Article 24 of the 2004 Amendments to the Constitution of the People's Republic of China, a paragraph shall be added to Article 33 of the Constitution as paragraph 3, namely, "The state respects and protects human rights."

Text of Excerpt from the Amendments and the Constitution of 2004³

Amendments to the Constitution of the People's Republic of China

[Date of Promulgation: 14 March 2004]

[Effective Date: 14 March 2004]

Article 24. One paragraph shall be added to Article 33 of the Constitution as paragraph 3, that is 'The state respects and protects human rights.' And paragraph 3 shall be changed into paragraph 4 accordingly.

CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA (2004)

Article 33. All persons holding the nationality of the People's Republic of China are citizens of the People's Republic of China.

All citizens of the People's Republic of China are equal before the law.

³ For the Amendments of 2004, see, Gazette of the Standing Committee of the National People's Congress of the People's Republic of China, Special Issue, published by the General Office of the Standing Committee on the National People's Congress on March 15, 2004, pp.64-66 (*Chinese*). The excerpt appears in p.65. For the Constitution of 2004, see, *ibid*, pp.77-102 (*Chinese*). The excerpt appears in p.85. The English excerpts are edited by Zhang Xinjun with reference to the English translation of the Constitution of 2004 in *Zhong Hua Ren Min Gong He Guo Xian Fa (Constitution of the People's Republic of China)*, People's Publishing House, 2004.

The state respects and protects human rights.
Every citizen is entitled to the rights and at the same time must perform the duties prescribed by the Constitution and the law.

Implementation of Clean Development Mechanism Projects under Article 12 of the Kyoto Protocol to the United Nations Framework Convention on Climate Change

Interim Measures for Operation and Management of Clean Development Mechanism (CDM) Projects

Introductory note

The People's Republic of China ratified the Kyoto Protocol on 30 August 2002, making the country eligible for hosting CDM project activities. On 31 May 2004, the People's Republic of China promulgated the decree "Interim Measures for Operation and Management of Clean Development Mechanism Projects" (Interim Measures),⁴ in which the National Development and Reform Committee (NDRC) is designated to be the People's Republic of China's Designated National Authority (DNA), acting on behalf of the Chinese government in managing and supervising CDM project activities in the People's Republic of China.

The Interim Measures may be subject to a revision in the following one or more years based on experience gained through the implementation of the CDM projects. The Interim Measures consist of general provisions, permission requirements, institutional arrangement for project management and implementation, project procedures, and miscellaneous provisions.

Article 17 provides an eligibility requirement prescribing that the project proponent shall be controlled and/or owned by a Chinese entity. Also Article 24 provides for "benefit sharing," in which the Chinese Government will retain the benefit from project proponents in selling Certified Emission Reductions (CERs). This regulation on benefit sharing does not provide further details on the manner of sharing.

⁴ These "Interim Measures" have been nullified by "Measures for Operation and Management of Clean Development Mechanism Projects," promulgated on 12 October 2005. *See*, Article 26 of the "Measures". The Chinese text of the updated regulation can be found at the official website of NDRC's (National Development and Reform Commission) Office of National Coordination Committee on Climate Change. < <http://cdm.ccchina.gov.cn/UpFile/File538.PDF> >. A change made in the new regulation is the "benefit sharing" provision in Article 24. The new Article 24 sets up a criterion for collecting fixed portion of revenue from different types of CDM projects.

Text of the Interim Measures⁵

Interim Measures for Operation and Management of Clean Development Mechanism Projects

[No.10 Ministry Order of National Development and Reform Commission, Ministry of Science and Technology, and Ministry of Foreign Affairs]

[Date of Promulgation: May 31, 2004]

[Effective Date: June 30, 2004]

I. General Provisions

Article 1. These interim measures are formulated in accordance with the provisions of the United Nations Framework Convention on Climate Change (hereinafter referred to as “the Convention”) and its Kyoto Protocol (hereinafter referred to as “the Protocol”), both ratified and approved by the People’s Republic of China, and the relevant decisions adopted under the Convention and the Protocol, with a view to strengthening the effective management of Clean Development Mechanism (hereinafter referred to as “CDM”) project activities by the Chinese Government, protecting China’s rights and interests, and ensuring the proper operation of CDM projects.

Article 2. According to the Protocol, CDM is a project-based mechanism under which developed country Parties cooperate with developing country Parties in achieving greenhouse gas (hereinafter referred to as “GHG”) emission reductions. The purpose of this mechanism is to assist developing country Parties in achieving sustainable development and in contributing to the realization of the ultimate objective of the Convention as well as to assist developed country Parties in achieving compliance with their quantified GHG emission limitation and reduction commitments. The core of the CDM is to allow developed country Parties, in cooperation with developing country Parties, to acquire “certified emission reductions” (hereinafter referred to as “CERs”) generated by the project activities implemented in developing countries.

Article 4. The priority areas for CDM project activities in the People’s Republic of China are energy efficiency improvement, development and utilization of new and renewable energy, and methane recovery and utilization.

Article 5. In accordance with the relevant decisions adopted under the Convention and the Protocol, when implementing CDM project activities, the principles of transparency, efficiency, and accountability shall be observed.

⁵ Gazette of the State Council of the People’s Republic of China (2005, No.8), published by the General Office of the State Council, pp.22-25 (*Chinese*). The English version is edited by Zhang Xinjun.

II. Permission Requirements

Article 6. CDM project activities shall be consistent with the People's Republic of China's laws and regulations, sustainable development strategies and policies, and the overall requirements for national economic and social development planning.

Article 7. The implementation of CDM project activities shall conform to the requirements of the Convention, the Protocol and relevant decisions by the Conference of Parties.

Article 9. Funding for CDM projects from the developed country Parties shall be in addition to their current official development assistance and their financial obligations under the Convention.

Article 10. CDM project activities should promote the transfer of environmentally sound technology to the People's Republic of China.

Article 11. Chinese funded or Chinese-holding enterprises within the territory of the People's Republic of China are eligible to conduct CDM projects with foreign partners.

V. Other Provisions

Article 21. Developed country Parties mentioned above refer to Parties included in Annex I of the Convention.

Article 24. Revenue from the transfer of CERs shall be owned jointly by the Government of the People's Republic of China and the project proponent, with the allocation ratio of the revenue to be decided by the Government of the People's Republic of China. Before the decision, the revenue belongs to the project proponent.

Article 25. NDRC, in consultation with MOST and MFA, is responsible for the interpretation of these interim measures.

Article 26. These Interim Measures take effect as of 30 June 2004.

Implication of UN Security Council Resolution 1526⁶

⁶ <<http://daccessdds.un.org/doc/UNDOC/GEN/N04/226/69/PDF/N0422669.pdf?OpenElement>>

Notice of the Ministry of Foreign Affairs concerning the Implication of UN Security Council Resolution 1526

[MFA Circulation (2004) No.2]

[Date of Promulgation: May 31, 2004]

To Ministries and Commissions under the State Council, Organizations and Institutions directly under the State Council, Foreign Affairs Offices of each province, autonomous region and municipality:

On 30 January 2004, the United Nations Security Council adopted Resolution 1526 with respect to the problem of the Taleban and sanctions towards the Al-Qaida organization. The resolution is to improve sanctions measures towards Usama Bin Laden, members of the Al-Qaida organization and the Taleban as well as other individuals and entities listed in the "Comprehensive Inventory" created by the Sanctions Monitoring Committee established under UN Security Council Resolution 1267 (1999).

The resolution is an enforcement undertaking operated by the Security Council in accordance with Chapter VII of the Charter of the United Nations and is legally binding on all Member States. In order to fulfil these international obligations placed upon the Chinese Government in the resolution, all relevant organizations and institutions are requested to adopt concrete measures in accordance with the resolution to ensure implementation. During the implementation, if any serious problems concerning state policy arise, please consult in time with the Ministry of Foreign Affairs. In the event the United Nations Security Council through further resolutions modify, cancel, or extend the implementation of the aforementioned resolution, the Ministry of Foreign Affairs will give particular notice.

OTHER RELEVANT STATE PRACTICE

Reform of the United Nations

Text of Excerpt from Position Paper at the Fifty-ninth Session of the UN General Assembly⁷

Position Paper of the People's Republic of China at the Fifty-ninth Session of the UN General Assembly

[Date of Issuing: 5 August 2004]

⁷ <<http://www.fmprc.gov.cn/eng/wjzb/zzjg/gjs/gjzzyhy/2594/2602/t146392.htm>>

2. United Nations Reforms

China supports the United Nations to keep abreast of the times and undertake necessary and reasonable reforms. The purpose of the United Nations reforms is to enhance the role of the United Nations and its capacity to meet new threats and challenges. The principle of the reforms should follow the purposes and principles of the United Nations Charter. Furthermore, the approach of the reforms is to build broad consensus on the basis of full consultations in a democratic and transparent manner.

Peace and development are mutually reinforcing. The key to the United Nations reforms is to achieve progress on development issues. In the reforms, the reasonable concerns and legitimate rights and interests of the developing countries should be fully accommodated, the developing countries should be given a bigger say in United Nations matters, and more contributions should be made by the United Nations in development.

China supports the Security Council in conducting necessary and reasonable reforms. First and foremost, the reform needs to redress the current imbalanced composition of the Security Council by following the principle of equitable geographical distribution and increasing representation of the developing countries as a priority. China is in favour of taking further measures to improve the working methods of the Security Council, so as to make it more efficient and transparent.

China supports the work of the High-level Panel on Threats, Challenges and Change initiated by Secretary-General Kofi Annan. China also looks forward to strategic analyses and recommendations from the Panel on how to tackle the major world threats of the day, which will be discussed by all Member States.

INDIA⁸

JUDICIAL DECISIONS

Scope and definition of “Environment” – Balancing environment and development – Environmental Impact Assessment – International norms in construing domestic law

K.M. CHINNAPPA v. UNION OF INDIA AND OTHERS

**Supreme Court of India, October 30, 2002
AIR 2003 Supreme Court 724**

⁸ Contributed by V.G. Hegde, Associate Professor, School of International Studies, Jawaharlal Nehru University, New Delhi.

Facts

The appellant challenged the decision of the Government to renew the iron ore mining lease of the Kudremukh Iron Ore Company Ltd (KIOCL) for a further period of twenty years by filing an interlocutory application before the Indian Supreme Court. The mining site was located within and at the fringe of the designated area of the Kudremukh National Park, a park protected under the Wildlife (Protection) Act, 1972 (“1972 Act” hereinafter). The interlocutory application was filed in a pending 1995 case which sought to challenge the decision of the Government in allowing mining and other developmental activities within national parks and game sanctuaries. While considering this application, the Supreme Court also referred to an Expert Committee constituted in 1996 under section 3 of the Environment (Protection) Act, 1986 (hereinafter referred to as “Environment Act”). Considering the rich biodiversity of the area and investment made by the KIOCL, this Committee had suggested that the mining operations should be wound up within a period of five years or on the exhaustion of the oxidized weathered secondary ore, whichever is earlier. This Committee had, furthermore, laid down certain conditions for the KIOCL to follow during the five-year winding up period. The question also remained as to from when this five-year winding up period should start. The KIOCL, on the other hand, had contended that there was no violation of any law relating to forests and the environment while renewing the mining lease as *per* the provisions of the Mines and Minerals (Regulation and Development) Act, 1957 which, *inter alia*, provided that notwithstanding anything provided under the Act, the 1972 Act, or the Environment Act, on an application being made, the mineral lease was to be renewed for twenty years. The KIOCL, accordingly, argued that: “Since there was an existing legal right to get a renewal, which had already accrued, there was no question of any embargo on the renewal of the mining lease”. Reference was also made to the subsisting contracts with foreign buyers and the large financial implications on account of the impossibility of performing the contracts.

Reasoning of the Court

The seminal issue, according to the Court, was whether the approach should be “dollar friendly” or “eco-friendly”.

The first issue concerned the definition of the word “environment”. The Court noted that the forests located in the Kudremukh National Park were among 18 immediately recognized “hot spots” for bio-diversity conservation in the world. The Court, while conceding that it would be difficult to define this expression, stated that, “Its normal meaning relates to the surroundings, but obviously it is a concept which is relatable to whatever object it is which is surrounded”.

The Court referred to Principle No. 1 of the Stockholm Declaration of the United Nations on Human Environment, 1972, i.e., “Man has the fundamental right to freedom, equality, and adequate conditions of life in an environment of equality that permits a life of dignity and well being and he bears a solemn responsibility to protect

and improve the environment for present and future generations”. In this context the Court further observed;

“The declaration, therefore, says that for the developing countries, most of the environmental problems are caused by underdevelopment. The Declaration suggests safe actions with prudent care for economic and social balance. It is necessary to avoid massive and irreversible harm to the earthly environment and strive for achieving for the present generation and the posterity a better life in an environment more in keeping with their needs and hopes. In this context, what immediately comes to mind are the words of Pythagoras who said: ‘[F]or so long as man continues to be the ruthless destroyer of lower living beings, he will never know health or peace. For so long as men massacre animals, they will kill each other. Indeed, they who sow the seeds of murder and pain cannot reap joy and love.’”⁹

The Court once again referred to the 1972 Stockholm Declaration, which states:

Man is both creature and molder of his environment which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth. In the long and tortuous evolution of the human race on this planet, a stage has been reached when, through the rapid acceleration of science and technology, man has acquired the power to transform his environment in countless ways and on an unprecedented scale. Both aspects of man’s environment, the natural and the man made, are essential to his well being and to the enjoyment of basic human rights, the right to life itself.

The protection and improvement of the human environment is a major issue which affects the well being of peoples and economic development throughout the world; it is the urgent desire of the peoples of the whole world and the duty of all Governments.

⁹ The Court makes this observation while referring to the Indian Constitutional requirements, such as Article 48-A which states “State[s] shall endeavor to protect and improve the environment and to safeguard the forests and wild life of the country”; Article 51-A (g) imposes a fundamental duty on every citizen of India to protect and improve the natural “environment” including forests, lakes, rivers and wild life and to have compassion for living creatures; Article 21 protects right to life as a fundamental right. Enjoyment of life and its attainment including the right to life with human dignity encompasses within its ambit the protection and preservation of the environment, ecological balance free from pollution of air and water, sanitation without which life cannot be enjoyed. The Court also makes a brief survey of the existing and evolving nature of Indian environmental laws in the context of changing times. It states, “... Nature and history are two components of the environment in which we live, move and prove ourselves. This Court in *Sachindanand Pandey* and another v. *State of West Bengal* and others (AIR 1987 SC 1109) and *Virender Gaur v. State of Haryana*, (1995 AIR SCW 306) has highlighted these aspects”.

The Court further noted,

At the global level, the right to life is now recognized as a fundamental right to an environment adequate for health and well being of human beings. (*See* World Commission on Environment and Development – Our Common Future (1987.)) To commemorate the tenth anniversary of the Stockholm Conference, the World Community of States assembled in Nairobi (May 10-18, 1982) to review the action taken to implement the Stockholm Declaration. It expressed serious concern about the state of the environment world wide and recognized the urgent need of intensifying the effort at the global, regional and national levels to protect and improve it.¹⁰

The Court also referred to the balance which needs to be struck between public interest and private gain. It stated, “It cannot be disputed that no development is possible without some adverse effect on the ecology and environment and the projects of public utility cannot be abandoned and it is necessary to adjust the interest of the people as well as the necessity to maintain the environment”. Against this background, the Court noted that Environmental Impact Assessment Reports were of great importance. While on this issue, the Court made a reference to the objectives of such assessment set out in the Directive of the Council of the European Economic Community to its Member States.¹¹ The Court also referred to the Preamble and Articles 1, 6, 7, and 14 (a) of the Convention on Biological Diversity which, *inter alia*, provided the basis for the balancing of environmental concerns with particular emphasis on the sustainable use of biological resources.¹² In the words of the Court,¹³

¹⁰ The Court also noted in Para 32 “The United Nations General Assembly adopted on October 29, 1982, World Charter for Nature. The chapter declares on the awareness that: ‘(a) mankind is a part of nature and life depends on the uninterrupted functioning of natural systems which ensure the supply of energy and nutrients. (b) Civilization is rooted in nature which has shaped human culture and influenced all artistic and scientific achievement and living in harmony with nature gives mankind the best opportunities for the development of his creativity, and for rest and recreation’. On the application of Public Trust Doctrine as enunciated by the Indian Supreme Court in *M.C. Mehta v. Kamal Nath and others* (1997 (1) SCC 388), the Court stated, ‘...our legal system based on English Common Law includes the public trust doctrine as part of its jurisprudence. The State is the trustee of all natural resources which are by nature meant for public use and enjoyment. [The] public at large is the beneficiary of the sea-shore, running waters, airs, forests and ecologically fragile lands. The State as a trustee is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership’”.

¹¹ The Court quoted in full the objectives of the Directive which, *inter alia*, stated that the effect of a project on the environment must be assessed in order to take into account various concerns, such as health, and to contribute to the quality of life and to the maintenance of the diversity of life, and to maintain the reproductive capacity of the eco-system.

¹² India is party to the Convention on Biological Diversity, 1992. India has now also enacted an implementing legislation, namely, The Biological Diversity Act, 2002. While Article 1 outlines the objectives of the Convention, Article 6 refers to the General Measures for Conservation and Sustainable Use. Article 7 is with regard to identification and monitoring of the components of biological diversity important for its conservation and sustainable use. Article 14 (a) deals with “Impact Assessment and Minimizing Adverse Impacts”.

Sustainable development is essentially a policy and strategy for continued economic and social development without detriment to the environment and natural resources on the quality of which continued activity and further development depend. Therefore, while thinking of developmental measures, the needs of the present and the ability of the future to meet its own needs and requirements have to be kept in view.

The Court concluded by casting a duty on the Government under Article 21 of the Constitution of India to protect the environment and by referring to two salutary principles of the law of the environment – (i) the principle of sustainable development, and (ii) the precautionary principle. The Court observed:

It needs to be highlighted that the Convention on Biological Diversity has been acceded to by our country and, therefore, it has to implement the same. As was observed by this Court in *Vishaka and others v. State of Rajasthan and others* ((1997) 6 SCC 241), in the absence of any inconsistency between the domestic law and international conventions, the rule of judicial construction is that regard must be had to international convention and norms even in construing domestic law. It is, therefore, necessary for the Government to keep in view international obligations while exercising discretionary powers under the Conservation Act unless there are compelling reasons to depart therefrom.

The Court, while disposing of the interlocutory application, upheld the time period fixed by the Expert Committee constituted under section 3 of the Conservation Act. That means, the Court concluded, mining should be allowed until the end of 2005 by which time the weathered secondary ore available in the already broken area should be exhausted. This was, the Court further noted, subject to fulfilment of the recommendations made by the Expert Committee on ecological and other aspects.

Implementing the United Nations Convention on Privileges and Immunities through domestic legislation – Scope of judicial scrutiny or review by municipal courts

G. BASI REDDY ETC. v. INTERNATIONAL CROP RESEARCH INSTITUTE AND ANOTHER

Supreme Court of India, February 14, 2003
AIR 2003 Supreme Court 1764

Facts

The Appellant was an employee of the International Crops Research Institute (ICRISAT), an international organization located in Hyderabad, India. ICRISAT was

¹³ Para 45. The observations of the Court touch some ideas relating to the principles of intergenerational equity.

set up by the Consultative Group on International Agricultural Research (CGIAR), an informal association of about fifty Governments and non-government bodies. The Food and Agricultural Organization (FAO), United Nations Development Programme (UNDP), United Nations Environmental Programme (UNEP), and the World Bank were the co-sponsors of CGIAR, which eventually set up ICRISAT.

The Appellant's services were terminated by the ICRISAT and this termination was challenged by the Appellant's invoking the writ jurisdiction of the High Court of Karnataka under Article 226 of the Indian Constitution.¹⁴ The High Court of Karnataka dismissed Appellant's writ petition on the ground that ICRISAT was an international organization and was immune from being sued because of a Notification issued in 1972 under the United Nations (Privileges and Immunities) Act, 1947. This 1947 enactment provided for the implementation of the United Nations Convention on Privileges and Immunities. The UN Convention appeared as a Schedule in the 1947 enactment and the Convention was applied by India with suitable modifications by issuing Notifications from time to time. Accordingly, both the UN agencies and other international organizations were granted certain privileges and immunities. While section 2 of the enactment dealt with UN agencies specifically, section 3 of the enactment covered what was termed as "other international organizations". Section 3 was to become operational only upon an agreement or a Memorandum of Understanding (MOU) between India (the host country) and the international organization (in the present case, ICRISAT).

Such a MOU was concluded between India and ICRISAT on 28 March 1972 which, *inter alia*, provided for the grant of certain privileges and immunities to the ICRISAT and its personnel, applying, with modifications, the provisions of the UN Convention on Privileges and Immunities. ICRISAT undertook within the framework of the MOU to put in place an employment policy and conditions for the local employees. The appellant contended before the Supreme Court that "prohibition on the employees to take recourse to Municipal Courts in connection with the settlement of disputes relating to employment would not come within the ambit of that immunity nor could immunity be granted against the power of judicial review".¹⁵ He also argued that "the Government could neither enter into a treaty or any international agreement nor issue a notification pursuant thereto which may have the effect of infringing the fundamental or constitutional rights of the citizens in derogation of Constitutional provisions".

Reasoning of the Court

The Court, while defining the legal character of an international organization (in the present case, ICRISAT), noted:

¹⁴ Article 226 of the Indian Constitution confers authority on the High Courts to issue writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto*, and *certiorari*, or any of them, for the enforcement of any of the rights conferred by Part III of the Indian Constitution (which relates to Fundamental Rights) and "for any other purpose".

¹⁵ Para 22.

ICRISAT has not been set up by a statute nor are its activities statutorily controlled. Although it is not easy to define what a public function or public duty is, it can reasonably be said that such functions are similar to or closely related to those performable by the State in its sovereign capacity. The primary activity of ICRISAT is to conduct research and training programmes in the sphere of agriculture purely on a voluntary basis. A service voluntarily undertaken cannot be said to be a public duty. Besides, ICRISAT has a role which extends beyond the territorial boundaries of India and its activities are designed to benefit people from all over the world. While the Indian public may be the beneficiary of the activities of the Institute, it certainly cannot be said that the ICRISAT owes a duty to the Indian public to provide research and training facilities.¹⁶

On the issue of judicial scrutiny or review of the MOU concluded between India and the ICRISAT, the Court, referring to its earlier jurisprudence and distinguishing it from the present case, pointed out:

Furthermore, it is doubtful whether the agreement between the Indian Government and ICRISAT is specifically enforceable as such in domestic courts, particularly when the agreement does not form part of any domestic legislation. The case of *Dadu v. State of Maharashtra* (AIR 2000 Supreme Court 3203) relied upon by the appellant has no bearing on the issues which arise for consideration in the case before us. In that case, the constitutional validity of section 32-A of the Narcotics Drugs and Psychotropic Substances Act, 1985 which prohibited appellate Courts from suspending sentence despite the appeal being admitted was questioned. The impugned section clearly ran contrary to the provisions of the Criminal Procedure Code which allowed the appellate courts discretionary powers to suspend sentences. One of the arguments raised by the Respondent-State to justify this apparent contradiction was that the section had been enacted in discharge of the Government of India's international obligations under the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988. The Court held that the Convention clearly and unambiguously showed that the Convention was made subject to 'constitutional principles and the basic concept of the legal system prevalent in the polity of the member country'. The State's argument was rejected as it was found as a fact that there was no international agreement which obliged countries, notwithstanding the constitutional principles and basic concept of its legal system, to put a blanket ban on the power of the Court to suspend the sentence awarded to a criminal under the Act. There was no conflict between the Government's international obligation and the domestic law. In the present case there is no question of any conflict. What is sought for, on the other hand, is an enforcement of a clause in an international agreement.

¹⁶ The Court, accordingly, held that the writ petition of the Appellant was not maintainable against ICRISAT.

The Court, while dismissing the Appellant's case, held that it did not find the Personnel Policy Statement framed by ICRISAT for dealing with internal discipline in any way violating the terms of the agreement between India and ICRISAT.

Balancing environment and development – Disclosures, transparency and compensation in environmentally sensitive projects – Precautionary principle – Principle of “harm”

M.C. MEHTA v. UNION OF INDIA AND OTHERS

Supreme Court of India, 18 March 2003
AIR 2004 Supreme Court 4016

Facts

Mining activity was being carried out in the vicinity of Delhi which was on the periphery of Aravalli hills, an environmentally sensitive zone. Accordingly, certain norms and guidelines were framed by the State Pollution Control Boards of Delhi and Haryana to regulate and monitor the mining activity. These norms and guidelines were set by the State Pollution Control Boards pursuant to an earlier order of the Supreme Court of India on 20 November 1995. Despite this, indiscriminate mining activity was going on. An Expert Committee technically assessed the status and impact of the mining activity within this zone. The Supreme Court of India relied heavily on this report and the recommendations to assess the rate of compliance on a case-by-case basis. The decision of the Supreme Court primarily looked at the compliance standards pursuant to its earlier order, as mentioned above. Each mining unit was examined on a case-by-case basis taking into account the stipulated conditions. The Court also established a continuing monitoring mechanism and stated, “Violation of any of the conditions would entail the risk of cancellation of mining lease. The mining activity shall continue only on strict compliance of the stipulated conditions”. The Court also decided to continue to hear the case again after receiving the reports of the Monitoring Committee.

Reasoning of the Court

While listing the legal parameters, the Court referred to both the Constitutional requirement¹⁷ and India's international obligations under various international con-

¹⁷ See paras 45, 46, and 47. Article 48-A of the Constitution of India stipulates that the State shall endeavour to protect and improve the environment and to safeguard the forest and wildlife of the country; Article 51-A, *inter alia*, provides that it shall be the duty of every citizen of India to protect and improve the natural environment including forest, lakes, rivers and wildlife and to have compassion for living creatures. Article 21 providing for the “right to life” also includes provision for the most vital necessities, namely, air, water, and soil.

ventions. The Court also laid emphasis on the strict compliance with statutory norms. The Court noted:

“The definition of ‘sustainable development’ which Brundtland gave more than three decades back still holds good. The phrase covers the development that meets the needs of the present without compromising the ability of the future generation to meet their own needs. In *Narmada Bachao Andolan v. Union of India and others* (AIR 2000 Supreme Court 3751) this Court observed that sustainable development means the type or extent of development that can take place and which can be sustained by nature/ecology with or without mitigation. In these matters, the required standard now is that the risk of harm to the environment or to human health is to be decided in [the] public interest, according to a ‘reasonable person’s’ test.”

There are a number of key components of the strict compliance standard in the field of environment, particularly in mining activity. These, as listed and analyzed by the Court, are “transparency”, “good faith”, “accountability”, “restoration”, and “compensation”.

The Court referred to the “environment and development” debate and pointed out that they were “not enemies”. It noted:

If, without degrading the environment or minimizing adverse effects thereupon by applying stringent safeguards, it is possible to carry on development activity applying the principles of sustainable development, in that eventuality, the development has to go on because one cannot lose sight of the need for development of industries, irrigation resources and power projects etc., including the need to improve employment opportunities and the generation of revenue. A balance has to be struck.

The Court, however, observed:

[...] Principle 15 of the Rio Conference of 1992 relating to the applicability of the precautionary principle which stipulates that where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for proposing effective measures to prevent environmental degradation is required to be kept in view. In such matters, many a time, the option to be adopted is not very easy or in a straitjacket. If an activity is allowed to go ahead, there may be irreparable damage to the environment and if it is stopped, there may be irreparable damage to the economic interest. In case of doubt, however, protection of [the] environment would have precedence over the economic interest. [The] [p]recautionary principle requires anticipatory action to be taken to prevent harm. The harm can be prevented

even on a reasonable suspicion. It is not always necessary that there should be direct evidence of harm to the environment.¹⁸

Scope and application of the concept of double taxation avoidance agreements

COMMISSIONER OF INCOME TAX v. P.V.A.L. KULANDAGAN CHETTIAR

Supreme Court of India, 26 May 2004

AIR 2004 Supreme Court 3411

Facts

The Respondent, a resident of India, owned immovable properties in Malaysia. During the course of the income-tax assessment year, the respondent earned income from these Malaysian properties and also earned short-term capital gains by selling part of his immovable property located in Malaysia. Both these incomes of the respondent were assessed as taxable in India by the Income Tax Officer. The respondent filed an appeal before the Commissioner of Income Tax challenging the decision of the Income Tax Officer. The Commissioner held that under Article 7(1) of the Agreement between the Government of India and the Government of Malaysia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income¹⁹ (hereinafter “Double Taxation Avoidance Agreement”), unless the respondent had a permanent establishment of the business in India, such a business income in Malaysia could not be included in the total income of the respondent assessee and, therefore, no part of the capital gains arising to the respondent in the foreign country could be taxed in India.²⁰ Both the Income Tax Tribunal and the High Court upheld the view taken by the Commissioner of Income

¹⁸ It may be noted that from the “precautionary principle” the Court had moved towards the question of “harm”. It did not go into the definitional aspects of “harm”, i.e., whether it should be “significant” harm, “grave” harm or an “irreversible” harm. The legal analysis of “harm” has been extensively debated within international law, in particular within the International Law Commission (ILC); see the ILC’s commentary to its 1994 draft articles on *International Liability for Injurious Consequences arising out of Acts Not Prohibited by International Law*, Yearbook of International Law Commission, 1994, Vol.2, pt.2; also refer to the ILC’s commentary on the draft article 7 of the *Law of the Non-Navigational Uses of the International Watercourses*, Yearbook of International Law Commission, 1994, vol.2, pt.2.

¹⁹ The Treaty was signed in October 1976 and became operational from the fiscal year 1 April 1977. See Para 12 which incorporated the arguments of the respondent.

²⁰ The Income Tax Department had argued that wherever the enabling words such as “may be taxed” were used there was no prohibition or embargo upon the authorities exercising powers under the Indian Income Tax Act, 1961 from assessing the category or class of income concerned. In support of this view, the Department had referred to the commentaries on the Articles of the Model Convention of 1977 on Avoidance of Double Taxation presented by the Organization for Economic Co-operation and Development (OECD). The Madras High Court had rejected this reference, stating that it would not be a safe or acceptable guide or aid for such construction.

Tax on the ground that the provisions of the Double Taxation Avoidance Agreement would alone determine the issue. The Income Tax Department appealed to the Supreme Court of India pointing out that the Double Taxation Avoidance Agreement provided enough flexibility to tax the respondent's income from an immovable property located in Malaysia. The case brought into focus, within the framework of the bilateral agreement, two different methods of avoidance of double taxation in two different jurisdictions, namely, (a) the credit method and (b) the avoidance method.²¹ While the Income Tax Department continued to hold the view that both methods are incorporated in the Agreement, the respondent emphasized in the plea that the Agreement provided exclusively for the "avoidance" method. The Supreme Court of India upheld the respondent's view and dismissed the Department's case.

Reasoning of the Court

The first question posed by the Court was regarding the nature of the principle forming the basis for the functioning of the Double Taxation Avoidance Agreement. The Court referred to the traditional view with regard to the concept of "double taxation", i.e., wherein "two or more taxes must be (1) imposed on the same property (2) by the same State or Government (3) during the same taxing period, and (4) for the same purpose. There is no double taxation strictly speaking where (a) the taxes are imposed by different States (b) one of the impositions is not a tax (c) one tax is against property and the other is not a property tax, or (d) the double taxation is indirect rather than direct." The Court noted that the Indian law on the subject had travelled very far from this traditional stage of double taxation avoidance framework.

It further noted that section 90 of the Indian Income Tax Act, 1961 (hereinafter "Income-tax Act") provided for "Agreement with foreign countries" in cases where (a) for granting of relief in respect of income on which both income tax under the Act and income tax in that country have been paid, or (b) for the avoidance of double taxation of income under the Act and under the corresponding law in force in that country, or (c) for exchange of information for the prevention of evasion or avoidance of income tax chargeable under the Act or under the corresponding law in force in that country, or investigation of a case of such evasion or avoidance, or (d) for recovery of income tax under the Act and under the corresponding law in force in that country. Section 90(2) also provided that where such agreement has been entered into for granting relief from tax, or as the case may be, avoidance of double taxation, then in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent that they are more beneficial to that assessee. In

²¹ See Para 9; The Court noted the argument of the Income Tax Department (through the Attorney General) that these two methods would have to be decided with reference to the provisions in the Agreement; "that wherever the expression used in the Treaty is 'income shall be taxable only in' or 'shall not be taxed in' or 'shall be exempt from tax in' what is contemplated is the avoidance method; that, on the other hand, whenever the expression used is 'income may be taxed' what is contemplated is the relief or the credit method. However, the Court pointed out that 'Art. XXII (2) of the Indo-Malaysian Treaty also indicates that the said Treaty contemplated the credit method'."

other words, in a given case, the Agreement would prevail over the provisions of the Income-tax Act. The Court clarified the legal position between the Income Tax Act and the Agreement in the following way:²²

Where liability to tax arises under the local enactment provisions of sections 4 and 5 of the Act which provide for taxation of the global income of an assessee chargeable to tax thereunder, the liability is subject to the provisions of the agreement entered into between the Central Government and the Government of a foreign country for avoidance of double taxation as envisaged under section 90 to the contrary, if any, and such an agreement will act as an exception to or modification of sections 4 and 5 of the Income Tax Act ... In case of any conflict between the provisions of the Agreement and the Act, the provisions of the Agreement would prevail over the provisions of the Act, as is clear from the provisions of section 90 (2) of the Act.²³

The Court had to deal with some of the basic principles relating to international taxation, in particular on capital gains. While noting the arguments that “tax actually paid” and “tax payable” were two different concepts, the Court noted:

[...] [T]hat under the principles of international law, the fiscal jurisdiction of a State to tax any form of income generally arises from either the location of the source of income within its territory or by virtue of the residence of the assessee within its territory. However, in contrast to the State where income is sourced, the country residence is entitled to tax the assessee on its global income and, in other words, the assessee is subject to unlimited fiscal liability in the State of residence ... Thus, the State of which the assessee is a resident has inherent jurisdiction to tax the assessee’s income from property situated in another State.

The Court, while dismissing the appeals, stated:²⁴

Taxation policy is within the power of the Government and section 90 of the Income Tax Act enables the Government to formulate its policy through treaties entered into by it and even such treaty treats the fiscal domicile in one State or the other and, thus, prevails over the other provisions of the Income Tax Act. It would be un-

²² See Para 8.

²³ See Para 9. The Agreement would not prevail in all cases. The forms of income could vary and may not otherwise be specified in the Treaty. Accordingly, it was argued, “... Art. XXII (2) is not a residuary article in respect of forms of income not otherwise specified in the Treaty; that wherever it was intended that there should be a residuary clause, it has been specifically so provided in various other Treaties, most Treaties, including the OECD Model Treaty and the Indo-Mauritius Treaty, have specifically residuary clauses in addition to the Art. XXII (2) where it is stated that subject to the provisions of paragraph 2 of Article XXII items of income of a resident of a contracting State, wherever arising, which are not expressly dealt with the foregoing articles of this Convention, shall be taxable only in that Contracting State”.

²⁴ See Paras 21 and 22.

necessary to refer to the terms addressed in OECD or in any of the decisions of foreign jurisdiction or in any other agreements.

Privileges and immunities of an international organization – whether International Development Association amenable to writ jurisdiction of municipal courts?

TRACTOR & FARM EQUIPMENT LTD. v. SECRETARY TO GOVERNMENT OF ASSAM, DEPARTMENT OF AGRICULTURE, GAUHATI AND OTHERS

**High Court of Gauhati, Assam (India), 22 January 2004
AIR 2004 Gauhati 73**

Facts

The issue related to the award of a contract for the supply of 449 tractors to the Department of Agriculture, Government of the State of Assam to be procured by the Government of Assam on funds being made available to it, on credit by the International Development Association (IDA). This credit was being made available under a tripartite agreement between the Government of India, the Government of the State of Assam, and the IDA.

At the tendering stage, dispute arose among some bidders as regards the specification of the tractors to be supplied. One of the bidders filed a writ petition in the Gauhati High Court. The legal issue was whether the IDA, being an international organization and with certain privileges and immunities under the International Development Association (Status, Immunities and Privileges) Act, 1960, would be amenable to the writ jurisdiction under Article 226 of the Indian Constitution.

Reasoning of the Court

The Court, *inter alia*, while tracing the origin and scope of work of the IDA, i.e., to assist developing countries in various project and developmental activities by providing credit, considered the legal issue as to whether it was immune from the judicial process of India. While on this aspect, the Court noted:²⁵

[...] [I]t is pertinent to note that immunity from judicial process for an independent sovereign State rests on the principles of international law. Such immunity is granted on the ground that the exercise of jurisdiction of a Court over the sovereign independent State would be incompatible with the dignity and independence of the superior authority enjoyed by every sovereign State. This principle is not founded on any technical rules of law, but upon broad considerations of public policy, inter-

²⁵ See Para 81. The Court, on a conceptual note, stated, “Thus, no activities carried out, in India, by a foreign State or international body is wholly immune from the judicial process of this country except to the extent as the law enacted in this behalf may, otherwise, indicate”. See Para 86.

national law and comity. Unlike English Courts, where immunity is primarily based on convention and is almost absolute in nature, such immunity is governed, in India, by the provisions of the law enacted by Parliament in terms of the provisions of the Constitution. It is Article 253 which forms, in India, the basis for grant of such immunity. According to this Article, Parliament has the power to make law for the whole or any part of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body. Except limited immunity, which the Constitution of India gives to its own heads of the State, no other immunity can be given to any one including an independent sovereign State without an Act of the Parliament framed in terms of Article 253. No wonder, therefore, that for the purpose of giving immunity to various organizations of the United Nations Organisation, the United Nations (Privileges and Immunities) Act, 1947, exists.

The Court, after examining the International Development Association (Status, Immunities and Privileges) Act, 1960, pointed out that “This Act confers some status, immunities and privileges on the IDA, its officers and employees. Certain immunities will naturally mean that the immunity of the IDA is not absolute. In other words, it is, indeed, subject to the judicial process of this country and except in respect of the immunities, which have been granted under the said Act, the IDA cannot claim any other immunity.”²⁶

While looking at the role of the IDA in the whole transaction in question, the Court stated:²⁷

In the case at hand, the supply of tractors is not a mere commercial transaction. It is the State which has floated the tender inviting bids. The IDA does not remain as a mere financier or provider of funds. It, rather, intrinsically involves itself in the selection of the bidders and the material supplied. In a situation, such as this, when the provider of funds involves itself so deeply in the activities of the State or associates itself inseparably with the whole selection process of the State, it cannot be said that such activities of [the] IDA will not be amenable to the writ jurisdiction under Article 226. By involving itself in the whole selection process, the IDA cannot be regarded as a person not amenable to the writ jurisdiction under Article 226.

²⁶ See Para 87.

²⁷ Para 101. The Court also clarified that “We wish to make it clear, while deciding the question of immunities of the IDA from the writ jurisdiction of the High Court under Art. 226, that this decision of ours is for the limited purpose of the facts of the present case and neither our observations made herein above nor our decision should be regarded as a law having been laid down that the IDA, in all cases, will be regarded as a person within the meaning of Article 226”. See Para 107.

OTHER RELEVANT STATE PRACTICE

Measures to Eliminate International Terrorism

Indian Statement to the *Ad Hoc* Committee established by General Assembly Resolution 51/210 of 17 December 1996 at the Sixth Committee of the United Nations General Assembly on 31 March 2003

India, while making a statement in the Sixth Committee, referred to the steps taken by it within the legal framework to tackle International Terrorism. It stated:

The international community has recognized the need for cooperation among all States in the efforts to eliminate the scourge of terrorism. Toward this end, member States under the aegis of the United Nations have so far successfully developed a legal framework of twelve International Conventions to address specific aspects of international terrorism. India is a party to all these Conventions. The Government of India has also decided very recently to ratify the International Convention for Suppression of the Financing of Terrorism.

As regards India's position on the Comprehensive Convention against International Terrorism, while noting that the *Ad Hoc* Committee had been successful in reaching agreement on most of the provisions of the text of the draft Convention, it stated:

Yet, some important provisions, namely Article 2 on definitions, Article 2 bis on the scope of the Convention and Article 18 on exclusion of security forces are still outstanding. A review of the outstanding issues done in the last *Ad Hoc* Committee session was very helpful in identifying issues that requires compromises.

On the issue of the relationship of the Comprehensive Convention with earlier Conventions, the Indian position was stated thus:

On the question of relationship with earlier conventions there appears to be a general agreement that the Comprehensive Convention should not supersede or override, but should add value to and supplement the sectoral conventions. We are supportive of this approach.

Children and Armed Conflict

Indian Statement at the Security Council on 20 January 2004 (responding to the Report of the Special Representative of the Secretary General for Children and Armed Conflict)

The Indian statement, *inter alia*, referred to certain international legal issues, with particular reference to "monitoring and reporting". It stated:

In the sub-section on monitoring and reporting, there is a conclusion that a body of standards constitutes the basis for monitoring. The list consists of a number of instruments that do not command universal acceptance or adherence. How does the Special Representative expect to deal with monitoring the situation of a Member State that is not Party to the Optional Protocol, or the Statute of the International Criminal Court or the ILO Convention No. 182? The Member State in question, while otherwise committed to the norms and commitments concerning the promotion and protection of the rights of children, would be right in maintaining that it would not be bound by any instrument to which it is not a Party. The Special Representative must recognize that neither he, nor anyone else for that matter, can seek to impose on the Member States the standards derived from these non-universal instruments.

We would like to voice one more concern about the agenda for monitoring and reporting. There is a well-established machinery for dealing with alleged violations of human rights by the government of a State which is Party to a specific human rights instrument. The procedures in this respect are well-known and time honoured. The likely interface between this procedure and the monitoring-reporting mechanism that would come into existence as a result of the Special Representatives recommendations is not at all clear to us. Moreover, the treaty bodies have their own system of dealing with non-compliance by parties of their treaty obligations. There is this ever-present danger of duplication and overlap.

Justice and the Rule of Law: Role of the United Nations

Indian Statement at the Security Council on 6 October 2004

The Indian statement was made in the open meeting of the Security Council on the topic “Justice and the Rule of Law: the United Nations Role”. This statement was made in the context of United Nations involvement in post-conflict peace-building exercise. India, while concurring with some aspects of the Secretary-General’s Report, stated:

We agree with the Secretary-General that the careful sequencing of activities relating to rule of law reforms and transitional justice with post-conflict elections is vital, not only to ensure their success and legitimacy but also to preserve the fragile peace processes in societies emerging from conflict. UN peace-keeping operations are envisaged as short-term interventions. While the idea of incorporating components of rule of law reforms and transitional justice activities in a UN Peace-keeping Operation may be unexceptional, we ought to remember that building the rule of law and fostering democracy are long-term processes. These are beyond the capability of personnel traditionally involved in peace-keeping operations. But they can lay a vital foundation if they embody, in their outlook and behavior, a long-standing democratic and multi-cultural tradition.

In the past decade, the UN has resorted increasingly to establishing a wide range of special criminal tribunals, including *ad hoc* criminal tribunals as subsidiary organs of the Security Council. Their track record has been mixed. In some cases they have succeeded in establishing accountability for perpetrators and instilling greater public confidence in post-conflict societies that have enabled these societies to move forward. The exact balance between retributive justice and an amnesty should not be determined *a priori* or ideologically, but strictly by pragmatic considerations of enduring peace.

International Convention against the Reproductive Cloning of Human Beings

Indian Statement in the Sixth Committee on 21 October 2004

While supporting the promotion of scientific and technological research in the fields of biology and genetics, India supported the idea of banning cloning. It stated thus:

[...] [R]eproductive cloning is [so] unethical, morally unacceptable and contrary to due respect for the human person that it cannot be justified or acceptable. For this reason, India, through a set of ethical guidelines on biomedical research, had banned [the] reproductive cloning of human beings through nuclear transplantation since 1997. We are convinced of the urgent necessity to elaborate an International Convention banning reproductive cloning, for which consensus already exists in the General Assembly.

On the issue of transfer of technology and research in certain vital areas such as stem cells, India stated:

We live in an era where transfer of technology from the developed to the developing countries has become increasingly difficult to accomplish. Developing countries, especially those of which have a strong scientific and industrial base, have been facing ever-increasing overt and covert restrictions on their technological research in certain vital areas. For these reasons, we do not agree with the view that research should be allowed only on certain stem cells and not on another category of stem cells. Researchers must have all options and science must decide the relative efficacies of different kinds of stem cells. We believe that every country has a right to choose appropriate technological methods and procedures as long as those are in tune with universally accepted standards of human dignity.

India, while reiterating its legal and ethical position on cloning, concluded:

We would like to reiterate our position that different forms and methods of cloning other than reproductive cloning can be regulated by national legislation with stringent conditions and regulatory approvals on a case by case basis.

Convention on Jurisdictional Immunities of States and Their Property

Indian Statement in the Sixth Committee on 25 October 2004

While supporting the adoption of the Convention on Jurisdictional Immunities of States and their Property, India stated thus:

This draft Convention represents a fair and delicate balance between the concerns expressed by Member States. The draft Convention does not give complete satisfaction to every Member State; yet it satisfies, at a broader level, every State as it has been evolved on consensus. My delegation recognizes that difficult concessions have been made by Member States in arriving at consensus. The draft convention is, by no means, perfect; yet we can live with it.

India favoured the adoption of the draft articles on Jurisdictional Immunities in the form of a Convention. It noted:

[...] [W]e believe that the rules can be stipulated with clarity, uniformity and certainty in a Convention. We also believe that a binding legal instrument on Jurisdictional Immunities of States and Their Property would clarify the scope and nature of immunities of States and their property with regard to legal proceedings concerning their commercial activities. Such a an instrument will be a significant contribution to the development of international law, keeping in view the interest of the developing countries.

IRAN²⁸

JUDICIAL DECISIONS

Use of force – Right of self-defence – Armed attack – Necessity – Proportionality – Legitimate military target – Freedom of commerce and navigation – Reparation

CASE CONCERNING OIL PLATFORMS (IRAN v. THE UNITED STATES)²⁹

International Court of Justice Judgment of 6 November 2003

Facts

On 2 November 1992, Iran instituted proceedings against the United States in respect of a dispute arising out of the attack on and destruction of three offshore

²⁸ Contributed by Jamal Seifi, Faculty of Law of Shahid Beheshti (National) University of Iran.

²⁹ <<http://www.icj-cij.org/icjwww/idocket/iop/iopframe.htm>>

oil production complexes, owned and operated for commercial purposes by the National Iranian Oil Company, by several warships of the United States Navy on 19 October 1987 and 18 April 1988, respectively.

In its Application, Iran contended that these acts constituted a “fundamental breach” of various provisions of the Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran, which was signed in Tehran on 15 August 1955 and entered into force on 16 June 1957 (hereinafter “the 1955 Treaty”). The Application invoked, as a basis for the Court’s jurisdiction, Article XXI, paragraph 2, of the 1955 Treaty, which provided: “Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means.”

The United States raised a preliminary objection to the jurisdiction of the Court. By a Judgment dated 12 December 1996 the Court rejected the preliminary objection of the United States according to which the 1955 Treaty did not provide any basis for the jurisdiction of the Court and found that it had jurisdiction, on the basis of Article XXI, paragraph 2, of the 1955 Treaty, to entertain the claims made by Iran under Article X, paragraph 1, of that Treaty but not on the basis of Articles 1 and IV (1), as originally contended by Iran. Article X (1) provided: “Between the territories of the two High Contracting Parties, there shall be freedom of commerce and navigation.”

Subsequently, the United States raised a counter-claim concerning Iran’s actions in the Persian Gulf during 1987-88 which, among other things, involved mining and other attacks on US flag or US owned vessels, which the Court declared admissible.

Subsequent to the Court’s judgment of 1996 on jurisdiction, Iran limited its claim and contended that in attacking and destroying the oil platforms on 19 October 1987 and 18 April 1988, the United States breached its obligations to Iran under Article X, paragraph 1, of the Treaty of Amity, and that the United States bore responsibility for the attacks; and that the United States was under an obligation to make full reparation to Iran for the violation of its international legal obligations and the injury thus caused.

As a counter-claim, the United States contended that, in attacking vessels in the Persian Gulf with mines and missiles and otherwise engaging in military actions that were dangerous and detrimental to commerce and navigation between the territories of the United States and the Islamic Republic of Iran, the latter breached its obligations to the United States under Article X, paragraph 1, of the 1955 Treaty; and that it was under an obligation to make full reparation to the United States for its breach of the 1955 Treaty.

The Court pointed out that both Iran’s claim and the counter-claim of the United States could be upheld only so far as a breach or breaches of Article X, paragraph 1, of the 1955 Treaty might be shown, even though other provisions of the Treaty may be relevant to the interpretation of that paragraph.

Factually, the dispute related to a period in the Iran-Iraq war which later became known as the “Tanker War”. In the period between 1984 and 1988, a number of

commercial vessels and warships of various nationalities, including neutral vessels, were attacked by aircraft, helicopters, missiles, or warships, or struck mines in the waters of the Persian Gulf. Naval forces of both belligerent parties were operating in the region, but Iran had denied responsibility for any actions other than incidents involving vessels refusing a proper request for stop and search. The United States attributed responsibility for certain incidents to Iran, whereas Iran suggested that Iraq was responsible for them.

Two specific attacks on shipping were of particular relevance in this case. On 16 October 1987, the Kuwaiti tanker *Sea Isle City*, reflagged to the United States, was hit by a missile near the Kuwait harbour. The United States attributed this attack to Iran, and three days later, on 19 October 1987, it attacked two Iranian offshore oil production installations in the Reshadat ["Rostam"] complex. On 14 April 1988, the warship USS *Samuel B. Roberts* struck a mine in international waters near Bahrain while returning from an escort mission; four days later the United States employed its naval forces to attack and destroy simultaneously the Nasr ["Sirri"] and Salman ["Sassan"] complexes.

These attacks by United States forces on the Iranian oil platforms were claimed by Iran to constitute breaches of the 1955 Treaty; and the attacks on the *Sea Isle City* and the USS *Samuel B. Roberts* were invoked in support of the United States' claim to act in self-defence.

Application of Article XX, paragraph 1 (d), of the 1955 Treaty

The United States had relied on Article XX, paragraph 1(d), of the Treaty as determinative of the question of the existence of a breach of its obligations under Article X. The paragraph provided that:

The present Treaty shall not preclude the application of measures:
... (d) necessary to fulfil the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests.

Although the Court considered that Article XX, paragraph 1(d), could constitute a possible defence on the merits, i.e., whether the United States actions were justified in protecting the essential security interests of the United States, it began by an inquiry into the content and application of this paragraph, even before examining whether the United States had committed a breach of Article X(1) of the Treaty in the first place. The Court explained its reversal of the logical sequence of consideration of the matter on the ground that:

- The original dispute between the Parties related to the legality of the actions of the United States, in the light of international law on the use of force; and
- The importance of such matters to the international community was obvious (Paras. 37-38).

The Court held that its jurisdiction under Article XXI, paragraph 2, of the 1955 Treaty to decide any question of interpretation or application of, *inter alia*,

Article XX, paragraph 1(d) of that Treaty extended, where appropriate, to the determination as to whether the action alleged to be justified under that paragraph was or was not an unlawful use of force, by reference to international law applicable to this question, that is to say, to the provisions of the Charter of the United Nations and customary international law (Paras. 40-41).

The Court therefore first examined the application of Article XX, paragraph 1(d), of the 1955 Treaty which, in the circumstances of this case, involved the principle of the prohibition in international law of the use of force, and the qualification to it constituted by the right of self-defence. The Court stated that on the basis of that provision, a party to the Treaty may be justified in taking certain measures which it considered to be “necessary” for the protection of its essential security interests. The Court, however, stated that in the case in dispute, the question whether the measures taken were “necessary” overlapped with the question of their validity as acts of self-defence. This reasoning provided an opportunity for the Court to examine whether the United States’ actions in attacking Iranian Oil Platforms in the Persian Gulf constituted an act of self-defence. If not, the United States’ actions would be an unlawful use of force and unjustified by Article XX.1 (d) of the Treaty (Para. 43).

Attack of 19 October 1987 on Reshadat

The first installation attacked, on 19 October 1987, was the Reshadat complex, which was also connected by submarine pipeline to another complex, named Resalat. At the time of the United States attacks, these complexes were not producing oil due to damage inflicted by prior Iraqi attacks. Iran had maintained that repair work on the platforms was close to completion in October 1987. The United States had, however, challenged this assertion. As a result of the attack, one platform was almost completely destroyed and another was severely damaged and, according to Iran, production from the Reshadat and Resalat complexes was interrupted for several years.

In its communication to the Security Council at the time of the attack, the United States explained its attack as a consequence of “a series of unlawful armed attacks by Iranian forces against the United States, including laying mines in international waters for the purpose of sinking or damaging United States flag ships, and firing on United States aircraft without provocation”; it referred in particular to a missile attack on the *Sea Isle City* as being the specific incident that led to the attack on the Iranian platforms. Before the Court, it had based its arguments specifically on the attack on the *Sea Isle City*, but had continued to assert the relevance of the other attacks.

The Court pointed out that in order to establish that it was legally justified in attacking the Iranian platforms in exercise of the right of individual self-defence, the United States had to show that “attacks had been made upon it for which Iran was responsible; and that those attacks were of such a nature as to be qualified as ‘armed attacks’ within the meaning of that expression in Article 51 of the United Nations Charter, and as understood in customary law on the use of force. The United States must also show that its actions were necessary and proportional to the armed

attack made on it, and that the platforms were a legitimate military target open to attack in the exercise of self-defence.” (Para 51)

Having examined with great care the evidence and arguments presented on each side, the Court found that the evidence indicative of Iranian responsibility for the attack on the *Sea Isle City*, either individually or taken cumulatively with other attacks on the shipping in the region, was not sufficient to support the contentions of the United States. Thus, the Court concluded that the burden of proof of the existence of an armed attack by Iran on the United States, in the form of the missile attack on the *Sea Isle City*, had not been discharged (Para. 61).

Attacks of 18 April 1988 on Nasr and Salman and “Operation Praying Mantis”

The second occasion on which Iranian oil installations were attacked was on 18 April 1988, with the attacks on the Salman and Nasr complexes. Iran stated that the attacks caused severe damage to the production facilities of the platforms; that the activities of the Salman complex were totally interrupted for four years, its regular production being resumed only in September 1992, and reaching a normal level in 1993; and that activities in the whole Nasr complex were interrupted and did not resume until nearly four years later.

The nature of the attacks on the Salman and Nasr complexes, and their alleged justification, was presented by the United States to the United Nations Security Council in a letter from the United States Permanent Representative of 18 April 1988, which stated, *inter alia*, that the United States had “exercised their inherent right of self-defence under international law by taking defensive action in response to an attack by the Islamic Republic of Iran against a United States naval vessel in international waters of the Persian Gulf”, namely, the mining of the USS *Samuel B. Roberts*. According to the United States, “This [was] but the latest in a series of offensive attacks and provocations Iranian naval forces have taken against neutral shipping in the international waters of the Persian Gulf” (Para. 67).

The Court noted that the attacks on the Salman and Nasr platforms were not an isolated operation aimed simply at the oil installations, as had been the case with the attacks of 19 October 1987; they formed part of a much more extensive military action, designated “Operation Praying Mantis”, conducted by the United States against what it regarded as “legitimate military targets”. Armed force was used, and damage done to a number of targets, including the destruction of two Iranian frigates and other Iranian naval vessels and aircraft (Para. 68).

The Court examined whether the United States had discharged the burden of proof that the USS *Samuel B. Roberts* was the victim of a mine laid by Iran. The Court noted that mines were being laid at the time by both belligerents in the Iran-Iraq war, so that evidence of other mine-laying operations by Iran was not conclusive as to the responsibility of Iran for this particular mine. The main evidence that the mine struck by the USS *Samuel B. Roberts* was laid by Iran was the discovery of moored mines in the same area, bearing serial numbers matching other Iranian mines, in particular those found aboard the vessel *Iran Ajr*. This evidence was regarded by the Courts as highly suggestive, but not conclusive (Para. 71).

The main question for the Court was whether that incident sufficed in itself to justify action in self-defence, as amounting to an “armed attack”. The Court stated that it did not “exclude the possibility that the mining of a single military vessel might be sufficient to bring into play the ‘inherent right of self-defence’; but in view of all the circumstances, including the inconclusiveness of the evidence of Iran’s responsibility for the mining of the USS *Samuel B. Roberts*, the Court is unable to hold that the attacks on the Salman and Nasr platforms have been shown to have been justifiably made in response to an ‘armed attack’ on the United States by Iran, in the form of the mining of the USS *Samuel B. Roberts*” (Para. 72).

Criteria of necessity and proportionality

Further, the Court pointed out that in the present case a question of whether certain action is “necessary” arises both as an element of international law relating to self-defence and on the basis of the actual terms of Article XX, paragraph 1(d), of the 1955 Treaty, whereby the Treaty does “not preclude ... measures ... necessary to protect [the] essential security interests” of either party. The Court, therefore, turned to the criteria of necessity and proportionality in the context of the international law on self-defence.

The Court indicated that it was not convinced that the evidence available supported the contentions of the United States as to the significance of the military presence and activity on the Reshadat oil platforms. In any case, the Court held that as regards the attack on the *Sea Isle City* and the mining of the USS *Samuel B. Roberts*, it was not satisfied that the attacks on the platforms were necessary to respond to these incidents.

As to the requirement of proportionality, the Court found that as a response to the mining, by an unidentified agency, of a single United States warship, which was severely damaged but not sunk, and without loss of life, neither “Operation Praying Mantis” as a whole, nor even that part of it that destroyed the Salman and Nasr platforms, could be regarded, in the circumstances of this case, as a proportionate use of force in self-defence.

Thus, the Court concluded that the actions carried out by United States forces against Iranian oil installations on 19 October 1987 and 18 April 1988 could not be justified, under Article XX, paragraph 1(d), of the 1955 Treaty, as being measures necessary to protect the essential security interests of the United States, since those actions constituted recourse to armed force not qualifying, under international law on the question, as acts of self-defence, and thus did not fall within the category of measures contemplated, upon its correct interpretation, by that provision of the Treaty (Paras. 76-77).

Iran’s claim under Article X, paragraph 1 of the 1955 Treaty

After considering the United States’ justifications, the Court considered Iran’s claim as to whether the United States had breached its obligations under Article X

(1) of the Treaty, disrupting freedom of commerce between the territories of the two Parties, by attacking the oil platforms. The Court had to decide that:

- The platforms were engaged in commerce;
- The United States' attacks took place against commercial facilities;
- The attacks disrupted the platforms' commercial activities; and
- As a result, freedom of commerce between the territories of Iran and the US was disrupted as guaranteed by Article X (1) of the Treaty.

The Court concluded that:

- The word 'commerce' in Article X, paragraph 1 of the Treaty of 1955 included commercial activities in general and not merely the immediate act of purchase and sale, but also the ancillary activities integrally related to commerce;
- The protection of Article X (1), however, embraced the *freedom of commerce* but was limited by the phrase 'between the territories of the two High Contracting Parties';
- Acts entailing the destruction of goods destined to be exported, or capable of affecting their transport and storage with a view to export should be regarded as disrupting freedom of commerce;
- The activities of the platforms should be regarded, in general, as commercial in nature; it did not, however, necessarily follow that any interference with such activities involved an impact on the freedom of commerce between the territories of Iran and the United States;
- Where a State destroys another State's means of production and transport of goods destined for export, or means ancillary or pertaining to such production or transport, there is in principle an interference with the freedom of international commerce. In destroying the platforms, whose function, taken as a whole, was precisely to produce and transport oil, the military actions made commerce in oil, at that time and from that source, impossible, and to that extent prejudiced freedom of commerce. While the oil, when it left the platform complexes, was not yet in a state to be safely exported, the fact remains that it could be already at that stage destined for export, and the destruction of the platform prevented further treatment necessary for export;
- The Court, therefore, found that the protection of freedom of commerce under Article X, paragraph 1 of the 1955 Treaty applied to the platforms attacked by the United States, and the attacks, thus, impeded Iran's freedom of commerce (Paras. 79-89).

However, on consideration of the question of interference with freedom of commerce "between the territories of the High Contracting Parties", the Court held that no such interference took place, because:

- At the time of the attack of 19 October 1987 no oil whatsoever was being produced or processed by the Reshadat and Resalat platforms, since these had been put out of commission by earlier Iraqi attacks; and
- The embargo imposed by Executive Order 12613 was already in force when the attacks on the Salman and Nasr platforms were carried out; and that it had not been shown that the Reshadat and Resalat platforms would, had it not been for the attack of 19 October 1987, have resumed production before the embargo was imposed (Paras. 91-92)

The Court, thus, concluded that:

[W]ith regard to the attack of October 19, 1987 on the Reshadat platforms, that there was at the time of those attacks no commerce between the territories of Iran and the United States in respect of oil produced by those platforms and the Resalat platforms, inasmuch as the platforms were under repair and inoperative; and that the attacks cannot therefore be said to have infringed the freedom of commerce in oil between the territories of the High Contracting Parties protected by Article X, paragraph 1 of the 1955 Treaty, particularly taking into account the date of entry into force of the embargo effected by Executive Order 12613. The Court notes further that, at the time of the attacks of April 18, 1988 on the Salman and Nasr platforms, all commerce in crude oil between the territories of Iran and the United States had been suspended by that Executive Order, so that those attacks also cannot be said to have infringed the rights of Iran under Article X, paragraph 1, of the 1955 Treaty.

The Court is therefore unable to uphold the submissions of Iran that in carrying out those attacks the United States breached its obligations to Iran under Article X, paragraph 1, of the 1955 Treaty. In view of this conclusion, the Iranian claim for reparation cannot be upheld. (Para. 98)

United States' Counter-Claim

In the view of the Court, the United States had to show that: (a) its freedom of commerce or freedom of navigation between the territories of the High Contracting Parties to the 1955 Treaty was impaired; and that (b) the acts which allegedly impaired one or both of those freedoms are attributable to Iran. The Court noted that the provision of Article X (1) contained an important territorial limitation: "In order to enjoy the protection provided by that text, the commerce or the navigation is to be *between the territories* of the United States and Iran. The United States bore the burden of proof that the vessels which were attacked were engaged in commerce or navigation between the territories of the United States and Iran."

The Court then examined each of Iran's alleged attacks from the standpoint of this requirement of the 1955 Treaty and concluded that none of the vessels described by the United States as being damaged by Iran's alleged attacks was engaged in commerce or navigation "between the territories of the two High Contracting Parties". Therefore, the Court concluded that there had been no breach of Article X, para-

graph 1, of the 1955 Treaty in any of the specific incidents involving the ships referred to in the United States pleadings.

The United States had also presented its claim in a generic sense. It had asserted that as a result of the attacks on US and other vessels, laying mines, and otherwise engaging in military actions in the Persian Gulf, Iran rendered the Gulf unsafe and, thus, breached its obligation with respect to freedom of commerce and freedom of navigation which the United States should have enjoyed under Article X, paragraph 1, of the 1955 Treaty. The Court observed:

[...] While it is a matter of public record that as a result of the Iran-Iraq war, navigation in the Persian Gulf involved much higher risks, that alone is not sufficient for the Court to decide that Article X, paragraph 1, was breached by Iran. It is for the United States to show that there was an *actual impediment* to commerce or navigation *between* the territories of the two High Contracting Parties. However, the United States has not demonstrated that the alleged acts of Iran actually infringed the freedom of commerce or of navigation between the territories of the United States and Iran. The Court also notes that the examination above of specific incidents shows that none of them individually involved any interference with the commerce and navigation protected by the 1955 Treaty; accordingly the generic claim of the United States cannot be upheld. (Para. 123)

The Court, thus, found that the counter-claim of the United States concerning the breach by Iran of its obligations to the United States under Article X, paragraph 1, of the 1955 Treaty, whether based on the specific incidents listed or as a generic claim, must be rejected.

Interestingly, while rejecting the claim of Iran and the counter-claim of the United States, the Operative Paragraph of the Judgment included the following finding, which was not specifically included in the relief sought by Iran:

[The Court] finds that the actions of the United States of America against Iranian oil platforms on October 19, 1987 and April 18, 1988 cannot be justified as measures necessary to protect the essential security interests of the United States of America under Article XX, paragraph 1 (d), of the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States of America and Iran, as interpreted in the light of international law on the use of force; finds further that the Court cannot, however, uphold the submission of the Islamic Republic of Iran that those actions constitute a breach of the obligations of the United States of America under Article X, paragraph 1, of that Treaty, regarding freedom of commerce between the territories of the parties, and that, accordingly, the claim of the Islamic Republic of Iran for reparation also cannot be upheld... (Para. 125, Emphasis added)

Implementation of international treaties in domestic law

THE EFFECTS OF SECURITY COUNCIL RESOLUTIONS IN NATIONAL LAW

Judgement of November 2002 of Branch 213 of the Tehran Court

Introduction

Principles 77 and 125 of the Constitution of the Islamic Republic of Iran require that international treaties must be ratified by the Parliament and signed by the President. At the same time, Article 9 of the Civil Code of Iran provides that treaties duly ratified by Iran shall have the force of law. However, the place of treaties within the legal system of Iran is very much in need of theoretical and judicial exploration and pronouncements. From a domestic law point of view, it is clear that treaties do not have the force of higher laws such as the Constitution. However, the force of treaties in the event of conflict with ordinary laws, i.e., parliamentary legislation, is not well developed. Further, the extent to which courts are to apply international law other than treaties that have been ratified by Iran is uncertain.

The Judgment

In a case decided by Branch 213 of Tehran court³⁰ in 2002, it was held that the obligations arising from binding resolutions of the Security Council of the United Nations constituted binding international obligations applicable in the judicial proceedings before Iranian courts. The dispute, *inter alia*, concerned the propriety of the expropriation of a vessel by a UAE court pursuant to the UNSC resolutions relating to the Iraqi oil embargos and the subsequent transfer of its ownership to an Iranian party. The court held that the seizure of the vessel was done pursuant to Article 24(1) of the Charter of the UN. Further, in accordance with Article 25 of the Charter, all members of the UN, including Iran, were bound by the resolutions of the Security Council. Thus, the court affirmed that the seizure and confiscation was made in accordance with the UN Charter and should, therefore, be respected by an Iranian court.

³⁰ Unpublished. Information concerning this case is taken from the following article: "Nader Saed, National Enforcement of International Obligations and the Role of Iranian Court" (in Persian), *Journal of Legal Research*, Vol. 6 (2004), pp. 118-122).

NATIONAL LAWS ON INTERNATIONAL LAW MATTERS

**Promotion and Protection of International Investment
Foreign Investment Promotion and Protection Act (FIPPA 2002)**

In recent years the Iranian government has embarked upon certain legislative reforms aimed at facilitating foreign investment. An aspect of this reform was the revision of the existing law governing foreign direct investment that resulted in the enactment of the Foreign Investment Promotion and Protection Act (FIPPA) by the Expediency Council in May 2002. The legislation provides an enhanced institutional and procedural framework for dealing with various matters concerning foreign investment.

The Institutional and Procedural Framework

The Act has established a single institution for the admission and supervision of foreign investment. The Act has created “the Organization for Investment and Economic and Technical Assistance of Iran (OIETAI) as the sole official authority for the promotion of foreign investment in the country and for the investigation of all issues pertaining to foreign investment” (Article 5). The OIETAI is run by a Foreign Investment Board (“the Board”) for the purpose of receiving and processing applications for foreign investment. The chairman of the Board is the President of OIETA, who is, *ex officio*, the Deputy Minister of Economic Affairs and Finance. Other members of the Board include the Deputy Minister of Foreign Affairs, the Deputy President of the State Management and Planning Organization, the Deputy Governor of the Central Bank, and the Deputy Ministers of relevant ministries, as the case may require (Article 6).

The timetable for review of the foreign investment applications by the Secretariat of the OIETAI is 15 days, during which it will have to conduct a preliminary review, and then send the application and its own recommendations to the Board (note to Article 6). The Board has one month to review the application and notify the applicant of its final decision.

Within the OIETAI, the Act has set up “the Centre for Foreign Investment Services” (hereinafter the “Centre”). In order to “facilitate and expedite issues related to the admission and activity of Foreign Investment in the country, all relevant agencies are required to designate a fully authorized representative to the Organization by the highest authority of the agency. The representatives shall act as the liaison for all issues related to their respective agency vis-à-vis the Organization” (Article 7). The Centre, *inter alia*, is responsible for the provision of information and advice to foreign investors; coordination required with regard to securing necessary licenses and permits; issuance of visas and work permits; issues such as registration of joint venture companies; the importation and repatriation of capital; customs and tax affairs; coordination among different departments of the agencies represented in the Centre, and finally, monitoring the performance of the decisions made with regard to the

foreign investment (Chapter 4 of the Implementing Regulations (hereinafter “Imp. Reg.”), Articles 16 and 20).

The Organization is required “to ensure the access of the general public to all information related to investments, foreign investors, investment opportunities, Iranian partners, fields of activity and other information available to the Organization” (Article 21). For this purpose, all ministries, organizations, state-owned enterprises, and other public institutions should provide the Organization with reports on foreign investments implemented, as well as the information required for foreign investors (Article 22).

Investment

Foreign capital is classified as cash, machinery, and equipment, intangibles such as patents and trademarks, the transferable profits of foreign investors in Iran, and other items approved by the Council of Ministers (Article 1). There are two main categories of foreign investment: foreign direct investment (FDI), on the one hand, and all non-direct forms of investment including contractual partnership, buy-back agreements, and turn-key contracts, such as Build-Operate-Transfer (BOT) contracts, in which the profits are solely the result of the economic performance of the project, and do not depend on government or bank guarantees, on the other (Article. 3.b).

Conditions for Admission of Foreign Investment

The foreign investment must satisfy certain conditions before it can enter the country. First, the foreign investment should be useful “for the purpose of development and promotion of productive activities, including industry, mining, agriculture and services.” Second, the foreign investment should result in economic growth, technological improvement, the enhancement of manufacturing quality, an increase in employment opportunities, and an increase in exports. Third, the foreign investment must not threaten national security and public interest, damage the environment, disrupt the national economy, or hurt the production by domestic investments. Fourth, the investment should not result in concessionary rights to the foreigner³¹ (Article 2(a), (b) and (c)).

Further, the Act sets certain limitations on the market share of foreign investment at the time of issuance of the licence. The Act provides:

The ratio of value of the goods and services produced by the foreign investments, contemplated in this Act, to the value of the goods and services supplied to the local market, at the time of issuance of the Investment License, shall not exceed 25 per cent in each economic sector and 35 per cent in each field (sub-sector). The fields and extent of investment in each field shall be determined in the by-law to be approved by the Council of Ministers. Foreign Investment for the production of goods

³¹ Article 81 of the Constitution of the Islamic Republic of Iran expressly prohibits the granting of concessionary rights to foreigners.

and services for export purposes, other than crude oil, shall be exempt from the aforementioned ratios. (Article 2(d) of the Act)

Guarantees

A. *Transfer of Capital and Profits*

Foreign investors are allowed to transfer abroad the principal of their capital (Article 13), the profits derived from their investment (Article 14), and the payments of instalments for expenses such as patent rights and trademarks (Article 15). For all types of transfer, the approval of the Board and the confirmation of the Minister of Economic Affairs and Finance are required. The foreign currency required for the transfer of profits or the principal of the capital or other payments can be either directly purchased from the banking system, or obtained by exporting manufactured products, services or other goods (Article. 17).

The Act also provides guarantees against the political risk of adverse legislation concerning non-direct investments, contractual partnership, buy-back, and BOT contracts: If “as a result of promulgation of legislation or Government decrees, the execution of the financial agreements is prohibited or interrupted, the resulting losses, up to the maximum of instalments at maturity, shall be provided for and paid by the Government” (Article 17.2 and Imp. Reg. Art. 30).

B. *Guarantees against Expropriation*

The Act provides guarantees against expropriation (Articles 8 and 9). Article 8 contains the principle of “national treatment” and provides that “foreign investment under the Act shall enjoy all rights, protections and facilities available to local investment.” Article 9 states the main guarantees against expropriation:

Foreign Investments shall not be subject to expropriation and nationalization, unless for public interests, by means of legal process, in a non-discriminatory manner, and against payment of appropriate compensation on the basis of the real value of the investment immediately before the expropriation.

Also, the Act provides for guarantee of purchase and states that in BOT and joint venture contracts, if the governmental agency which is party to the contract is the sole purchaser of the goods and services, or if it supplies those goods and services to the public at subsidized rates, under the applicable regulations, the purchase is guaranteed (Article 4.B.22).

Regional arbitration

The Law on the Establishment of the Tehran Regional Arbitration Centre

This Single Act, enacted by the Expediency Council in May 2003,³² is in pursuance of ratification of the Agreement between Iran and the Asia-Africa Legal Consultative Organisation (AALCO) concerning the establishment of the Tehran Regional Arbitration Centre (TRAC). The Act provides that Iran shall provide facilities for the establishment of TRAC, which will be based in Tehran. TRAC is to:

- Promote international commercial arbitration in the region;
- Cooperate and coordinate with arbitration institutions in the region;
- Facilitate arbitration under its auspices;
- Assist in enforcement of arbitral awards;
- Assist *ad hoc* arbitrations especially if conducted under UNCITRAL Arbitration Rules.

TRAC will function in accordance with its Arbitration and Administration Rules to be prepared by its Director and approved by the Secretary-General of the AALCO.³³ TRAC has legal personality under Iranian laws and enjoys privileges and immunities close to the immunity accorded to international organizations and their staff. TRAC is administered by a Director who shall have Iranian nationality.

³² In case of disagreement between the Parliament (the Majlis) and the Guardian Council, which supervises the constitutionality of the Majlis' legislation, the Expediency arbitrates and makes the legislation when necessary to resolve the disagreement.

³³ We understand that it has so been adopted.

JAPAN

JUDICIAL DECISIONS³⁴**Refusal of Loan to Non-Permanent Foreign Residents – Meaning of “Racial Discrimination” in the International Convention on the Elimination of Racial Discrimination (CERD)**

S. H. v. ASAHI BANK LTD.

**Tokyo District Court, 12 November 2001
Hanrei Jihou [Judicial Reports] No. 1789 (2002) 96**

The plaintiff, a journalist and citizen of the United States, had stayed in Japan since June, 1990 as a resident “journalist”. He cohabited with a Japanese woman and became a parent in August, 1998. In June, 1999, wishing to settle in Japan and to buy an apartment, he applied for a housing loan to the respondent. The respondent rejected his application, because he was not a permanent resident.

The plaintiff claimed an indemnity, arguing that the respondent’s act constituted a tort. The Tokyo District Court rejected his claim.

The Court held that the respondent’s act was based on reasonable grounds, pointing out that non-permanent foreign residents were not guaranteed permission to stay in Japan after a maximum period of three years. The repayment period of the housing loan was considerably longer and the huge cost of recovery of the loan would have to be borne if the applicant was compelled to leave Japan. It also held that the respondent’s act was not contrary to Article 26 of the International Covenant on Civil and Political Rights (ICCPR), taking these circumstances into consideration.

Concerning compatibility with the CERD, the Court held that the respondent’s act did not constitute “racial discrimination”, because it was based on the status of residence under the Immigration Control and Refugee Recognition Act. It quoted a provision of the Convention, which provides for its non-applicability to “distinction ... between citizens and non-citizens” (Article 1(2)). In this context, the Court defined “race” and “colour” as group of persons sharing certain biological characteristics, “national or ethnic origin” as group of persons sharing certain cultural characteristics, and “descent” as ancestors’ race, colour, or national or ethnic origin.

The plaintiff appealed to the Tokyo High Court.

³⁴ Contributed by Obata Kaoru, Faculty of Law, Nagoya University, Japan; member of the Study Group on Decision of Japanese Courts Relating to International Law.

Tokyo High Court, 29 August 2002**Kinyu Shoji Hanrei [Financial and Commercial Law Reports] No.1150 (2002)
20**

The Tokyo High Court rejected the appeal on substantially the same grounds as those of the District Court's judgment. The plaintiff has appealed to the Supreme Court.

Use of Leather Handcuffs as Disciplinary Equipment against a Prisoner – International Standards for Treatment of Prisoners

X. v. THE STATE OF JAPAN

Chiba District Court, 7 February 1996**Shomu Geppo [Monthly Reports of Judicial Matters] Vol.48 (2002), 2086**

The plaintiff was allegedly ill-treated by prison officers when he was detained as an accused at the Chiba prison. "Leather handcuffs" and "metal handcuffs" were put on him while he was confined in a protection cell. "Leather handcuffs" consist of a leather belt with two wrist-bands by which both wrists are tied on the back or belly. Protection cells are solid rooms in prison for the isolation of problem prisoners, permanently supervised by video camera. The plaintiff claimed damages. The Chiba District Court accepted a part of his claim.

The Court did not find the fact of ill-treatment and also did not recognize the illegality of the confinement in the protection cell.

Responding to the plaintiff's invocation of the Standard Minimum Rules for the Treatment of Prisoners (SMRTP),³⁵ which prohibits the application of a "handcuff" as a punishment (para. 33), the Court found no binding nature of the Rules, nor identified the "leather handcuffs" as "handcuff" under the Rules.

The Court, pointing out that the Prison Act and the Regulation for Implement of the Prison Act permits the application of a leather or metal handcuff as far as necessary to prevent outrage, escape or suicide, held that these provisions in themselves were not contrary to the Constitution nor the ICCPR,³⁶ although Articles 7 and 10 (1) of the latter were regarded as self-executing. The Court, however, keeping Article 18³⁷ of the Constitution and the above Articles of the ICCPR in

³⁵ Adopted by the First United Nations Congress on the Prevention of Crime and Treatment of Offender, held at Geneva in 1955, and approved by the Economic and Social Council resolutions 633 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

³⁶ The Human Rights Committee, the supervisory body of CCPR, expressed its specific concern over frequent use of protective measures such as leather handcuffs in Japanese prisons. *See Concluding Observations of the Human Rights Committee: Japan, 19/11/98*, U.N. Doc. CCPR/C/79/Add.102, para. 27 (f).

³⁷ "No person shall be held in bondage of any kind. Involuntary servitude, except as punishment for crime, is prohibited."

mind, held that use of leather handcuffs and other disciplinary equipment should be kept to the bare minimum, and that application of leather handcuffs during confinement in a protection cell should be “permitted for the strictly limited cases where, for example, the prisoner is expected to commit suicide or self-laceration.” The Court found that there was no such necessity and, therefore, the simultaneous use of two handcuffs was illegal in this case.

The respondent appealed to the Tokyo High Court.

Tokyo High Court, 15 February 2001

Shomu Geppo [Monthly Reports on Judicial Matters] Vol. 48 (2002) 2075

In the appeal, the Tokyo High Court maintained the holdings of the Chiba District Court as far as they concerned the existence of the alleged ill-treatment, the legality of the confinement in a protection cell, and the compatibility with the SMRTP.

The Tokyo High Court, pointing out the difference between requirements for the confinement in a protection cell and the application of handcuffs, found no special prohibition for simultaneous use of them. According to the Court, such interpretation was not contrary to the Constitution or the ICCPR.

The Court, therefore, cancelled that part of the Chiba District Court judgment in which it found illegality of simultaneous use, and rejected the plaintiff’s claim.

No appeal was made, and the Tokyo High Court’s judgment became final.

Compatibility of the Civil Registration Clause in the Act for Relief for Wounded Soldiers and Families of Killed Soldiers with the Principle of Non-discrimination

SEOK SEONG GI AND SUCCESSORS OF LATE JIN SEOK IL v. THE MINISTER OF HEALTH AND LABOUR

Supreme Court, First Petty Bench, 5 April 2001

Shomu Geppo [Monthly Reports on Judicial Matters] Vol. 49 (2003) 1500

The appellant Seok and Mr. Jin were Koreans, and were severely wounded when they served as soldiers or paramilitary personnel in the Japanese military during World War II. They claimed for the cancellation of the decision by the Minister of Health to reject their applications for a disability pension under the Act for Relief for Wounded Soldiers and Families of Killed Soldiers. The Minister had applied the civil registration clause which excludes the persons to whom the Civil Registration Act is not applicable. The Supreme Court, sustaining the judgments of the Tokyo District Court and Tokyo High Court, unanimously rejected the appeal.

The Supreme Court, pointing out that the Peace Treaty with Japan³⁸ identified claims by Koreans as the subject for special arrangements between Japan and Korea

³⁸ 136 *UNTS*, at 45.

(Article 4, paragraph (a)), found that compensation to former Korean soldiers or paramilitary personnel was to be settled by diplomatic negotiation. Under these circumstances, according to the Court, the civil registration clause was not unreasonable and, therefore, not unconstitutional.³⁹

Even after the conclusion of the Agreement on the Settlement of the Problems concerning Properties and Claims, and the Economic Cooperation between Japan and Korea⁴⁰ in 1965, both governments considered that compensation to Korean residents in Japan was a matter of the other government's responsibility.

As a result of this gap in interpretation between Japan and Korea, the Court recognized a discriminatory situation between the wounded Koreans resident in Japan and those Japanese under similar circumstances. However, it denied the unconstitutionality of the situation. Referring to its own case law, according to which a wide margin of appreciation should be recognized for legislation on the matter of compensation for war damage,⁴¹ the Supreme Court found that the question as to whether or not similar relief be extended to Koreans resident in Japan was a matter of a highly political and diplomatic nature for which complicated and highly policy-related considerations and judgment would be necessary. The margin for the legislature was not overstepped, and to maintain the civil registration clause was, therefore, not contrary to Article 14⁴² of the Constitution.

Justice Fukusawa Takehisa appended a concurring opinion, in which he found the discriminatory situation almost contrary to equality under the law, and wished on humanitarian grounds for a clearer legal solution for wounded former soldiers and paramilitary personnel.

NATIONAL LAWS ON INTERNATIONAL LAW MATTERS⁴³

Passive Personal Jurisdiction

Amendment of the Penal Code to Reintroduce Passive Personal Jurisdiction

On 7 August 2003, the amended Penal Code entered into force, which revives passive personal jurisdiction that is provided for as follows:

³⁹ The Supreme Court referred to its judgment of 28 April 1992, 38 *Shomu Geppo* [Monthly Reports on Judicial Matters] (1992), at 2579, concerning similar claims by Taiwanese; reported in 36 *Japanese Annual of International Law* (1994), at 182.

⁴⁰ 583 UNTS, at 173.

⁴¹ Supreme Court (in full bench) judgment of 27 November 1968, 22 *Minshu* [Supreme Court Reports: Civil Cases] (1968), at 2808; an unofficial English translation, last visited on 21 May 2005, is provided at: <http://courtdomino2.courts.go.jp/promjudg.nsf?OpenDatabase&Start=676>; reported in 13 *Japanese Annual of International Law* (1969), at 121.

⁴² "All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin..."

⁴³ Contributed by Aoki Takashi, Faculty of Law, Seiwa University, Chiba, Japan.

Article 3bis: The Code shall apply to those who are not Japanese nationals that commit any of the following crimes outside Japan against Japanese nationals:

- (1) Crimes specified in Articles 176 through 179 (forcible indecency, rape, quasi-forcible indecency, quasi-rape, and their attempt) and Article 181 (forcible indecency, etc. resulting in death or bodily injury);
- (2) Crimes specified in Article 199 (murder) and their attempt;
- (3) Crimes specified in Article 204 (injury) and Article 205 (injury resulting in death);
- (4) Crimes specified in Article 220 (arrest and detention) and Article 221 (arrest, etc. resulting in death or injury);
- (5) Crimes specified in Articles 224 through 228 (abduction and kidnapping of the minor, abduction and kidnapping for commercial and like purposes, abduction, etc. for ransom, abduction, etc. for the purpose of transporting the abducted person to foreign countries, reception, etc. of an abducted person, and such attempt); and
- (6) Crimes specified in Article 236 (robbery) and Article 238 through Article 241 (constructive robbery, robbery through causing unconsciousness, robbery resulting in death or bodily injury, rape on the occasion of robbery and rape on the occasion of robbery resulting in death) and attempt of these crimes.⁴⁴

A clause in the original Penal Code of 1907 that had similar provisions based upon the principle of passive personal jurisdiction was deleted in 1947. During the Diet discussion on the present amendment, a government official explained that the deletion of the clause was justified “in view of the legislation of some other countries and the principle of international faith as enshrined in the new Constitution of Japan (of 1947), or of the domestic social conditions and international situation surrounding Japan at that time.” The reason for its revival was that “nowadays, an increasing number of countries have enacted legislation to punish foreigners who have committed certain crimes against their nationals abroad, because these individuals have more chances to fall victim to such crimes outside their home country as international migration of people becomes extensive”.⁴⁵

An immediate motive for the recent amendment was the *Tajima* incident that occurred in April 2002. A Japanese officer was killed by two Philippine members of the crew on board the *Tajima*, an oil tanker operated by a Japanese shipping company under the Panamanian flag, on the high seas. The vessel put in at Himeji in the Inland Sea, with Japan Coast Guard officers aboard with the consent of the Philippine government. She was scheduled to leave Himeji two days after her stay at that port. Panama, the flag State, was the only State that could exercise its criminal jurisdiction over the incident because the Japanese Penal Code did not apply to a case where a crime was committed by an alien on a foreign ship on the high seas,

⁴⁴ Unofficial translation. See <<http://homepage2.nifty.com/paper/lawcollection.htm#collection1>>.

⁴⁵ *Minutes of the Diet, the House of the Representatives, Committee on Judicial Affairs, No.12*, 13 May 2003, the 156th Session of National Diet, at 7.

and the Philippine law does not provide for its criminal jurisdiction over its national who commits homicide abroad.

Moreover, the Japanese legal system requires the flag State to request extradition in order to take forcible measures such as arrest and detention. More than a month elapsed before the Japanese authorities received the Panamanian request for detention on 14 May and arrested the suspected Filipinos the following day. Pending the receipt of the request, the *Tajima* was obliged to stay at the port to enable her master to keep the suspects in confinement in the exercise of his authority to maintain good order inside the vessel.

The embargo on the *Tajima* caused a hindrance to its satisfactory operation and an intolerable financial loss. Concern that similar incidents might frequently occur in view of a large number of merchant ships under flags of convenience operated in Japanese interests was shared by the government departments and companies concerned. Nevertheless, it would seem that the amendment was intended to improve the protection of Japanese nationals abroad – not only Japanese seamen on “flag of convenience” ships, but also Japanese nationals in general – by incorporating into the law the possibility of the punishment of criminals irrespective of their nationality.

OTHER RELEVANT STATE PRACTICE⁴⁶

Inviolability of consular premises

Incident at the Japanese Consulate General in Shenyang, People’s Republic of China

At about 2:00 p.m. on 8 May 2002 (local time), five people attempted to enter the premises of the Consulate General of Japan in Shenyang, People’s Republic of China. As similar incidents involving North Korean asylum-seekers had frequently occurred in China, the five people were suspected of being North Korean nationals; they engaged in a struggle with armed Chinese police officers who were on duty around the front gate area. Of these five, two men rushed into the premises of the Consulate General. Two women and a girl also entered the premises, but were soon dragged out of it by the police. Minutes later the armed police entered the premises in an attempt to apprehend the two men and eventually took all of the five people to the Chinese public security department.

The Government of Japan expressed its view that the action of the Chinese side was extremely questionable in the light of the relevant rules of international law and as a matter of humanitarian concern, and regarded it as highly regrettable. It claimed, *inter alia*, that the fact that the police entered the premises of the Consulate General without its head’s consent constituted a gross violation of the inviolability of consular premises as stipulated in Article 31 of the Vienna Convention on Consular Relations

⁴⁶ Contributed by Aoki Takashi, Faculty of Law, Seiwa University, Chiba, Japan.

of 1963, declaring it unacceptable in view of the circumstances at the time of the incident.⁴⁷

Based on this view, the Government of Japan made repeated high-level demands to China both in Beijing and Tokyo following the incident, and lodged a strong formal protest with the Government of China on the breach of the inviolability of the consular premises, requesting the immediate handover of the five people forcibly taken away from the premises of the Consulate General.

On the other hand, the Chinese side, while identifying those five individuals, claimed that the measures it took in this matter were in accord with the Vienna Convention, and that they were taken away to ensure the Consulate General of safety.

A few days later, the Chinese Government publicly admitted the incident and published the result of its inquiry thereinto, alleging that the Chinese police entered the premises after they obtained the consent of one of the Vice-Consuls, that another official of the Consulate agreed to the apprehension of the persons concerned when he was told of the circumstances, and that the same official expressed his appreciation to the armed police officers.

The Government of Japan was unable to accept this explanation and published an outline of the facts established by an inquiry of the Foreign Ministry: the Japanese Vice-Consul gave his consent neither to the armed Chinese policemen entering the premises, nor to their forcibly apprehending the two men.⁴⁸

Disagreement between the two governments affected the treatment of the five persons. China took the position that it was a matter of priority to ascertain the facts and that Japan should not concern itself with the five persons' departure to a third country. On the other hand, Japan, while maintaining the importance of a humanitarian resolution of their fate, requested China to apologize for the alleged illegal intrusion and to provide the Japanese side with an opportunity to hold a hearing direct with the detained people about their identity and their intended destination.

The conflicting positions concerning the facts and the legality of the Chinese policemen's conduct remained unsettled, although the five persons were eventually allowed to leave China for the Republic of Korea *via* the Philippines two weeks later. The day after their arrest, the Chinese side reportedly confirmed their North Korean nationality officially and stated that China was not required to consult any other country about their departure as it was a matter within its sovereign jurisdiction; further, that China's decision was made in accordance with international law, domestic law, and humanitarian principles based on the will of the individuals concerned.

At a meeting held in Thailand on 19 June 2002, the foreign ministers of the two countries, while repeating their respective positions, agreed to commence consultations for a treaty or agreement on cooperation in consular matters to prevent a recurrence of such incidents. At the first meeting of consultation on the framework of consular cooperation held in the summer, the Chinese side disclosed its perception that both

⁴⁷ *Minutes of the Diet, the House of the Representatives, the Special Committee on Responses to Armed Attacks, No.5*, 9 May 2002, the 154th Session of National Diet, at 6.

⁴⁸ Official position of the government and a summary of the facts, dated 13 May 2002, can be obtained from <<http://www.mofa.go.jp/region/asia-paci/china/shengyang.html>>.

sides were responsible for the Shenyang incident, thus changing its position to accept its responsibility for the incident. As at the end of 2004 no consular treaty has been concluded.

Right of passage in the territorial sea Intrusion into the Territorial Sea by an Unidentified Submarine

Early on the morning of 10 November 2004, an unidentified submarine briefly entered Japan's territorial waters off Okinawa Islands. More than two and a half hours later, Maritime Self-Defence Force patrol aircraft were despatched to track it down on an order for a maritime security operation under Article 82 of the Self-Defence Force Law, which provides that the Director General of the Defence Agency has the authority to send MSDF troops on a patrol "to maintain security on the sea".

The issuance of the order was unduly delayed; it was criticized in certain quarters, concerned about the Chinese Navy's increasing build-up and extensive activities including marine scientific research, resource explorations in the seas around Japan, etc. However, the government denied there was a problem with the measures it had taken, stating that it had followed standard procedures.⁴⁹

In 1996, upon the ratification of the UN Convention on the Law of the Sea, the Cabinet approved a guideline that allows the Self-Defence Agency's head to dispense with the normal procedure of convening a Cabinet meeting to mobilize the Self-Defence Forces to chase in Japan's territorial waters a foreign submarine that submerges and does not fly a flag.⁵⁰ This is the first time that the guideline has ever been applied.

The government of Japan confirmed on the same day that the submarine was cruising submerged in Japan's territorial sea near the Sakishima Archipelago, some 400 kms south-west of the main island of Okinawa. The Government, having identified its type and nationality as a Chinese nuclear-powered one, lodged a strong protest with China and demanded an apology for the roughly two-hour territorial sea intrusion.⁵¹

On 16 November China, after admitting that one of its submarines had intruded into Japan's territorial waters, reportedly expressed its regret, attributing the incident to "technical errors" during "the process of normal training". The Japanese Government interpreted it as an apology,⁵² and at a meeting of the Foreign Ministers of the two countries that took place on the occasion of the APEC Ministerial Meeting in late November, the Japanese foreign minister stressed the necessity for preventing

⁴⁹ *Minutes of the Diet, the House of the Representatives, Committee on Judicial Affairs, No.4, 12 November, the 161st Session of National Diet*, at 2.

⁵⁰ *1997 Bouei Hakusho* [Security of Japan] 181.

⁵¹ Press Conference by the Foreign Minister, 12 November 2004. Only the Japanese version is made public at present, see <http://www.mofa.go.jp/mofaj/press/kaiken/gaisho/g_0411.html#5-A>.

⁵² Press Conference by the Foreign Minister, 16 November 2004. Only the Japanese version is made public at present, see <http://www.mofa.go.jp/mofaj/press/kaiken/gaisho/g_0411.html#7-A>.

reoccurrence of such intrusions, and the Chinese counterpart accepted the protest and agreed on such necessity.⁵³

KOREA⁵⁴

JUDICIAL DECISIONS

Copyright

COPYRIGHT PROTECTION OF NORTH KOREAN PUBLICATIONS

The Seoul District Court, 2001GaHap173, 16 January 2004

In December 1993, Yun Jeong Ae, the representative of the Science Encyclopedia Publishing Group in North Korea, licensed Lee Sun Dong, the plaintiff, to reproduce copies of Donguibogam (Renowned Oriental Medicine Textbook) in South Korea for fifteen years in return for US\$10,000. On 10 May 1994, the plaintiff, the representative of the Yeo Gang Press, published the translated edition of Donguibogam after revising the North Korean dialects.

In 1997, Kim Yong Tae, an oriental medicine student in the Kyung Hee University, offered Kim Geun Jung to publish the Chinese-Korean edition of Donguibogam from Yeo Gang Press. The edition had been prepared by Kim Yong Tae and his colleagues by incorporating and editing the Chinese edition and its translation. Being aware of the fact, Kim Geun Jung, the representative of the Bubin Publishers Co., published the Bubin edition of Donguibogam after revision by Chinese-Korean translators. The plaintiff filed the case against the representative of the Bubin Publishers Co. and the Chinese-Korean translators for compensation of damages suffered from the infringement of the copyright.

The defendants alleged that the licensing contract between the Science Encyclopedia Publishing Group in North Korea and the plaintiff constituted a “Cooperative Project” under Articles 2 and 4 of the Interchange and Cooperation Act between North and South Korea, and that the said licensing contract was void since it failed to obtain approval from the Minister of Unification and the Minister of Culture and Tourism as required by the same Act.

The Court held that the requirement of approval from the Ministers did not affect the effectiveness of the contract and dismissed the defendants’ claim. Therefore, on 16 January 2004, the Seoul District Court held that Kim Geun Jung and Kim Yong

⁵³ *APEC Kakuryohkaigi ni okeru Nicchu Gaishokaidan (Gaiyoh)* [Summary of Meeting of Foreign Ministers of China and Japan at the 16th APEC Ministerial Meeting]. Only the Japanese version is made public at present, see <http://www.mofa.go.jp/mofaj/kaidan/g_machimura/apec_g8_04/j_china_gh.html>

⁵⁴ Contributed by Eric Yong-Joong Lee, Professor of International Law, Dongguk University College of Law, Korea

Tae, the defendants, had infringed the copyright of the plaintiff. Accordingly, the Court decided that the defendants and the translators shall compensate the damages suffered through the infringement.

Freedom of Information Act

SHIN CHEON SU AND 98 OTHERS V. THE MINISTER OF FOREIGN AFFAIRS AND TRADE

The Seoul Administration Court, 2002 Ku Hap 33943, 13 February 2004

The case related to compensation for damages suffered from forced engagement in labour during the Japanese occupation of Korea. The petitioners requested the Ministry of Foreign Affairs and Trade to disclose the diplomatic document written during the Korea-Japan talk in 1965 to find out whether their claim had been nullified by the agreement. However, the Ministry had refused to disclose the same document.

The Court said:

(1) The Freedom of Information Act gives people a general right of access to information held and managed by public authorities. The respondent asserts that the document contains the records of the decision making process to reach the final decision by the two nations and that the document is being reviewed by the respondent. However, it does not constitute a reasonable ground for rejecting disclosure of the document. In addition, the document is essential for interpretation of the talk.

The people who suffered damages that resulted from the Japanese colonial rule have not been fully compensated by the Government in accordance with the Compensation Act. Furthermore, failure to claim the damages within the specified period or the fact that the types of damages suffered are not classified in the Act concerned does not constitute reasonable ground for depriving them of the right to claim compensation for damages.

It may be argued that the document meets the confidentiality requirements specified in Clause 2 of Section 1 of Article 7 of the Freedom of Information Act. However, enforcement of the regulation must not limit the public's constitutional "right to know". The materials provided in the Korea-Japan talks would be reliable for determining the right to claim.

The Court also held:

(1) the time remaining for the petitioners to determine such right is limited considering their age; and (2) the need to keep the information confidential has been largely diminished because 30 years has passed since the document was produced. The

diplomatic inconvenience that may arise due to disclosure of the document could be acceptable in the light of the past history of Korea and Japan.

The benefits of disclosing both document Number 36 which contains the provisions on the right to claim agreed in the Korea-Japan talk and documents Numbers 48, 55, 56, and 57 are exceptional and specific. On the other hand, the public interests to be protected by not disclosing such documents are inconsequential compared to those benefits to be held by the petitioners. Therefore, the Government shall disclose the document in accordance with Article 12 of the Freedom of Information Act.

Suffrage

SUFFRAGE FOR OVERSEAS CITIZENS

The Seoul District Court, 2003Na12524, 5 September 2003

The phrase “overseas citizens” refers to those who have Korean citizenship, but have emigrated and have been granted permanent resident status in other countries or have been staying abroad for an extended period of time. Section 2 of Article II of the Constitution states: “The nation shall protect the overseas citizens as specified by law.”

The case revolves around the suffrage of Korean residents in Japan whose right to vote has been denied by the Government of Korea.

It may be noted that the offspring of Koreans who had been compelled to move to Japan since the forced affiliation between Korea and Japan in 1910 are no longer treated as foreigners by the Government of Japan. However, their legal rights are not considered to be equal to those of native Japanese. The plaintiffs were permanent residents in Japan of Korean nationality aged 20 and over.

The plaintiffs’ position was that pursuant to Articles 2 and 10, Section 1 of Article 11, Articles 24 and 25, Section 1 of Article 41, and Section 1 of Article 67 of the Constitution, the plaintiffs have the right of suffrage and the Government has a duty to enact and enforce legislation for protection of such right. Whereas the registered residents in Korea are governed by the “Election Law”, there is no governing law on the absentee voting procedure for the overseas citizens.

The absence of any legislation or inadequate legislation for such procedure constitutes an illegal act of the Government which infringes the equal rights and suffrage rights of the plaintiffs.

The Court ruled that the grounds of denying the suffrage right of overseas citizens are summarized as follows: (1) since suffrage is associated with national obligations such as military service, tax payment, etc, it cannot be granted to overseas citizens who do not fulfil those obligations; (2) since the election campaign overseas cannot be controlled as strictly as in Korea, fairness in the election process is hard to achieve; (3) the entire absentee voting process for overseas citizens including the nomination of candidates, election campaigning, and sending and collecting ballots overseas is not sufficiently practicable to be performed, and (4) considering the reality of Korea’s

being divided, granting suffrage to overseas citizens will motivate some parties to influence the result in favour of their interests in North Korea by casting votes to close the marginal gap in the number of ballots.

Limiting the suffrage to overseas citizens is not only legitimate for the purpose of legislation, but also balanced between the public requirements to be protected, on the one hand, and protection of the constitutional rights against invasion, on the other.

Furthermore, it does not invade the constitutional rights beyond the limitation of Section 2 of Article 37 of the Constitution, nor it can be concluded as a violation of law or lack of objective justice. Therefore, limiting suffrage to overseas citizens is not unlawful to the plaintiffs.

The Appellate Court affirmed the trial court's ruling and dismissed the plaintiffs' appeal for lack of reasons.

NEPAL⁵⁵

JUDICIAL DECISIONS

Border dispute between two neighbouring countries are the subject matter of diplomatic relations

ADVOCATE RAMJI BISTA v. HIS MAJESTY'S GOVERNMENT, COUNCIL OF MINISTERS AND OTHERS

Decided by Special Bench of the Supreme Court of Nepal, led by Hon. Hari Prasad Sharma, J and Hon. Dillip Kumar Poudya & Hon. Khil Raj Regmi JJ. decided on 25 July 2003, reported in 45 Nepal Kanoon Patrika 11-12, pp. 890-907 (2003)

The writ petitioner Advocate Ramji Bista had raised the issue of cession of Nepalese territory by His Majesty's Government in favour of the Government of India contravening the Sugauli Treaty of 1815 between India and Nepal and also in contravention of the Constitution of the Kingdom of Nepal, 1990.⁵⁶ Mr. Bista had specifically challenged the act of cession at Jhapa, one of the districts in the eastern part of Nepal, claiming that the act of shifting the *Junge Pillars*⁵⁷ from their original place by the Chief District Officer (CDO) of Jhapa under the direction of the Indo-Nepal Joint Technical and Border Determination Committee was unconstitu-

⁵⁵ Contributed by Surendra Bhandari, Ph. D., Executive Director of Law Associates Nepal. Email: lan@lawassociatesnepal.com

⁵⁶ The Treaty of Peace between the Honourable East India Company and Maha Rajah Bikram Sah of Nepal concluded on 2nd December 1815 is known as the Sugauli Treaty.

⁵⁷ *Junge Pillars* are the signposts of the Indo-Nepal border. The masonry pillars were erected to mark the boundary of the two States after the 1860 Treaty between India and Nepal.

tional as well as inconsistent with the Sugauli Treaty. He had further claimed that due to the act of cession by the CDO, 800 hectares of Nepalese territory had been annexed to India.

One of the respondents in the case, His Majesty's Government, Council of Ministers had responded before the Supreme Court that there had been no agreements concluded between India and Nepal after the commencement of the Constitution of the Kingdom of Nepal, 1990. The Indo-Nepal border was determined based on the Sugauli Treaty of 1816 and the Land Survey of 1974-75. Based on the Treaty and the Survey, the middle point of the Mechi River was accepted as the Indo-Nepal border at Jhapa, where the stream of the Mechi River was annually being changed due to the state of the watercourse of the River. In view of the frequent changes of watercourse, the original boundary could not be identified. Therefore, to determine the border between India and Nepal at Jhapa, an Indo-Nepal Joint Technical and Border Determination Committee had decided to follow the Fixed Boundary Principle for determining the boundary as agreed under the 1988 Understanding between Nepal and India. As *per* the decision of the Committee, the CDO from Nepal and the District Magistrate from India had established temporary pillars as signposts of the border, which had contravened neither the Constitution nor the Sugauli Treaty.

Furthermore, the Ministry of Land Reform and Management, another respondent, had expressed that by renewing the border between India and Nepal, some of the pieces of lands surveyed during the Land Survey of 1965 at Jhapa have now become part of Indian territory and that the Government of Nepal cannot claim such territory as an inalienable part of Nepal. There is a problem on the issue of determination of the border between Nepal and India, yet it is a common problem of both the countries that needs to be addressed not by a judicial determination of the court, but by the mutual cooperation and understanding between India and Nepal.

The Supreme Court discussed many issues. Among them, it delved into the issue as to whether, as the result of shifting the original *Junge Pillars*, the land of Nepal had been ceded, and whether the Nepalese citizens (400 families) who have inhabited Nepal for centuries had been transferred into the territorial jurisdiction of India. The Supreme Court observed that His Majesty's Government of Nepal had accepted the recommendations of the Tenth Meeting of the Indo-Nepal Joint Technical and Border Determination Committee held in Kathmandu in 1988 for determining the Indo-Nepal border based on the Fixed Boundary Principle. Nepal and India have a 1778-km open border. Of that, 565 kms consists of river border, which is not fixed and frequently changing. Against this backdrop, the Committee had recommended for the Fixed Boundary Principle and both governments are working under the agreed Understanding of 1988.

Further, the Court observed that changes in the watercourse of a boundary river undoubtedly create problems for both of the countries. The problem can be addressed either on the basis of the record of the original watercourse signpost, or on the mid-stream signpost of the river when it slowly and gradually changes its watercourse. A record is necessary on both of these situations. Where there is a lack of record it creates problems; disputes may arise in determining the border. Therefore, in such a situation it seems wise to accept the fixed boundary principle. However, it is a

subject matter of policy or of diplomatic relations between the two countries as to whether they adopt a River Boundary Principle or Fixed Boundary Principle in determining their boundary based on principles of international law, customary practice, and tradition.

Moreover, the Court observed that the Court may exercise its authority of judicial review under the Constitution to test and examine the acts of government that are permanent in nature. The issue of shifting the *Junge Pillars* was not a permanent decision of the government; it was merely a temporary measure. It becomes final or permanent when both governments ratify the recommendation of the Joint Committee under the domestic laws of the respective countries. In such a situation, the Court could not intervene in the temporary acts of the government. However, the Court directed the government not to take any decision on changing the original boundary in contravention of the Constitution.

Detention – Right to life – Detainee has been detained by the government

MS. ANU PRADHAN ON BEHALF OF DETAINEE CHETNATH DHUNGANA
v. HIS MAJESTY'S GOVERNMENT, MINISTRY OF DEFENCE AND OTHERS

Decided by Division Bench led by Hon. Govinda B. Shrestha, J. and Hon. Khil Raj Regmi, J. decided on 10 December 2003, reported in 45 Nepal Kanoon Patrika 7-8, pp. 603-607 (2003)

This case involved a *habeas corpus* writ petition. The petitioner had claimed before the court to issue an order to release her husband from illegal detention. Her husband, Mr. Chetnath Dhungana, was arrested by security personnel in civil clothes without their showing a warrant, an arrest order, or any notice of detention. Nobody, including the petitioner, was informed about Mr. Dhungana's whereabouts. The writ petitioner tried to obtain information on the whereabouts of her husband, but the government provided no information. In such a situation she approached the Supreme Court of Nepal.

In the writ petition, the petitioner had claimed that the detention of her husband was unconstitutional as it had contravened Articles 11 (1), 11 (2), 12 (2), 14(5), and 14 (6); also, that it had violated Articles 1, 3, 5, 7, 9, 18, and 19 of the Universal Declaration of Human Rights, Articles 6 (1), 7, and 9 of the International Covenant on Civil and Political Rights, and Articles 1 and 2 of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984.

The Supreme Court in its decision made no reference to the rights and provisions under the international human rights instruments as claimed by the petitioner. Rather, the Court rejected the writ petition on the ground that court could not enforce the right to life when it is not known as to where the detainee had been detained by the government. It gave immunity to the government from its responsibility to provide the whereabouts of its citizens, especially under detention.

Maternity leave as a fundamental or human right

ADVOCATE PRAKASH MANI SHARMA v. HIS MAJESTY'S GOVERNMENT, MINISTRY OF WOMEN, CHILDREN AND SOCIAL WELFARE AND OTHERS

Decided by Special Bench led by Hon. Krishna Kumar Verma, J. and Hon. Harischandra P. Upadhyaya and Hon. Khil Raj Regmi, J. decided on 11 September 2003, reported in 45 Nepal Kanoon Patrika 9-10, pp. 726-737 (2004)

The writ petitioner had asked the court to issue an order of *mandamus* for providing maternity leave to a female worker as *per* international standards, practices in neighbouring countries, including India, and as prescribed by the ILO Convention Concerning Maternity Protection, 2000. It was also claimed that the existing laws of the Kingdom of Nepal do not have uniform provisions on the issue of maternity leave and are discriminatory. Some laws provide maternity leave for sixty days, some for fifty-two days, and some for forty-five days. These inconsistent provisions also defy the equality provisions under the Constitution of the Kingdom of Nepal 1990 and Articles 3 and 11 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1979, and, therefore, the petitioner asked the Court to declare these laws *ultra vires* the Constitution.

The writ petitioner had also specifically asked the court to issue an order against the government for making the necessary provisions towards providing fourteen weeks' maternity leave for women workers working in all types of offices or enterprises without any discrimination.

His Majesty's Government, Council of Ministers, one of the respondents, in its response, mentioned that the issue of maternity leave made a distinction between the female workers working in government offices, on the one hand, and non-government offices, on the other. The government was not responsible for enacting laws to remove these distinctions. It was the responsibility of the Parliament and, therefore, a writ petition should not be issued against the government.

The court concluded that the distinctions in different laws of the country on maternity leave are not tantamount to discrimination, as maternity leave is not a statutory right of the female worker, but is merely a contractual one. Therefore, the differences in maternity leave provisions could not be a ground for holding the existing laws to be *ultra vires* the Constitution on the ground of equality. All types of leaves, including maternity leave, are not the statutory rights of the recipient and, therefore, there could be no obligation on the state to enact a law for providing a similar type of maternity leave for women workers working in all types of services. The court further emphasized that providing statutory protection for maternity leave contravenes the established principle of law that "leave is not a subject matter of right but a facility"

International humanitarian law – Scope of the Geneva Convention

ADVOCATE RAJARAM DHAKAL AND OTHERS v. RT. HON. PRIME MINISTER AND OTHERS

Decided by Division Bench led by Hon. Hari Prasad Sharma, J. and Hon. Khil Raj Regmi, J. decided on 9 January 2004, reported in 45 Nepal Kanoon Patrika 9-10, pp. 782-737 (2004)

The writ petitioners had asked the Supreme Court to issue an order of *mandamus* and/or a *certiorari* to give effect to the Geneva Convention. The petitioners had claimed that since 1996, due to Maoist insurgency in the country, armed conflict between the Maoists and the State had escalated, killing thousands of innocent civilians. This had also been reported in the reports of the Amnesty International, in the monitoring reports of the Human Rights Commission of Nepal, and in the reports of other civil society organisations that were working in the area of human rights. Nepal had ratified the Geneva Convention on 7 February 1964, but had done nothing to give effect to the Geneva Convention. Under section 9 of the Treaty Act, 1991 of the Kingdom of Nepal, the government was responsible for developing the necessary mechanism to give effect to international law including by enacting necessary and appropriate laws. Therefore, the petitioners had asked the court to direct the government to make necessary and appropriate laws to give effect to the Geneva Convention.

The Office of the Prime Minister, in its response to the Supreme Court, had mentioned that His Majesty's Government of Nepal had already enacted the Human Rights Commission Act, 1997 and that the National Human Rights Commission was also established under the Act. In that context, His Majesty's Government of Nepal had fulfilled its commitment arising from the international human rights instruments and the Geneva Conventions. Therefore, a writ should not to be issued against the government.

The Council of State (Upper House), one of the respondents in the case, had responded that it was not the responsibility of Parliament to decide about what kinds of laws were required as it was the responsibility of the government to produce Bills in the Parliament. The treaty responsibility belongs to the executive body and, therefore, it was also the responsibility of the executive body to assess the need for the requirement of appropriate laws and bring Bills in the Parliament. Therefore, the writ petition should not be issued.

The Court decided that under Article 2 of all four Geneva Conventions, the Conventions apply only between the warring High Contracting Parties. The Conventions are humanitarian laws. Humanitarian laws apply only when there is a war or armed conflict between two or more High Contracting Parties. Human rights laws apply both in war and in peace. Therefore, the nature and condition of human rights laws and humanitarian laws are different. The Court declined to give effect to the Geneva Conventions stating that "the present situation of Nepal is not a condition of war between High Contracting Parties".

The Court further referred to Article 49 of the First Convention, Article 50 of the Second Convention, Article 129 of the Third Convention, and Article 146 of the Fourth Convention; it ordered the government to undertake responsibility for enacting necessary legislation to provide effective penal sanctions against those committing or ordering commission of any grave breaches of the Conventions.

PAKISTAN⁵⁸

JUDICIAL DECISIONS

Protection of Fundamental Rights

ALL PAKISTAN NEWSPAPER SOCIETY (PETITIONERS) v. FEDERATION OF PAKISTAN (RESPONDENTS)

Constitutional Petition No. 35 of 2002, date of hearing 5-8 April 2004, decided 8 April 2004

The case arose from a dispute between the Newspaper Society and the Government of Pakistan over the award of wages for employees in the newspaper industry. On 8 July 2000, the Government of Pakistan set up the Seventh Wage Board under the Newspapers Employees (Conditions of Service) Act (LVIII) of 1973 for the purposes of determining the remuneration and wages paid to the employees in the newspaper industry. The Board, comprised of ten members (representing in equal number the employers and employees), under the chairmanship of Mr Justice Raja Afrasiab Khan, Retd. Judge of the Supreme Court of Pakistan, made the pronouncement of the award on 25 October 2001. The substance of this award was unacceptable to the owners of the newspaper agencies, and a number of representations were made on their behalf to the Government of Pakistan through the Secretary, Information and Media Development, and the Secretary, Labour Manpower and Overseas Pakistanis. Upon the failure to obtain any relief through informal measures, the petitioners instituted judicial proceedings invoking the original jurisdiction of the Supreme Court. The petitioners challenged, *inter alia*, the constitutionality of the Newspapers Employees (Conditions of Service) Act 1973 as being violative of the fundamental rights of the petitioners and *ultra vires* the Constitution (the Constitution of the Islamic Republic of Pakistan 1973, as amended) and the award being void *ab initio* and with no legal effect and consequences.

The Registrar of the Supreme Court refused to entertain the petition and made the following pronouncement:

⁵⁸ Contributed by Javaid Rehman, Professor of International Law and Human Rights, Brunel University, United Kingdom.

Take notice that the above cited Constitutional Petition filed by you is not entertainable as it relates to the grievance of a section of the people and not the whole of the nation; as such, it does not come within the ambit of Article 184(3) of the Constitution of the Islamic Republic of Pakistan, 1973 as held by this Court in its judgment titled as *Syed Mehdi v. PLA & another*, reported as 1998 SCMR 793.⁵⁹

An appeal Civil Misc. Appeal No 23/2002 was launched against the Registrar's order before a Judge in Chamber under Order V, Rule 3 of the Supreme Court Rules, 1980. In reversing the Registrar's order and allowing the appeal for the petition to be heard by the Supreme Court, the Judge made the order that:

In view of the rule laid down in the judgment dated 9.10.1996 passed in Constitutional Petition No.30 of 1996, *Civil Aviation Authority, Islamabad and others v. Union of Civil Aviation Employees and another* (PLD 1997 SC 781) and a number of other cases relied upon by the learned counsel for the appellant, this civil misc. appeal is accepted, order dated 8.7.2002 of the Registrar set-aside and the office is directed to entertain the constitutional petition, register it and fix before the Bench.⁶⁰

In the course of the hearing, the Supreme Court had to make the preliminary ruling as to whether the Single Judge was correct in allowing the appeal and in regarding the present petition as an application for enforcement of Fundamental Rights under Article 184(3) of the Constitution of the Islamic Republic of Pakistan 1973 (as amended).

Article 184(3) of the Constitution provides:

... [T]he Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter I of Part II is involved, have the power to make an order of the nature mentioned in the said Article.

The Apex Court dismissed the petition and took the position, *inter alia*, that the relevant matter was not one of public importance. It was, therefore, inappropriate to place reliance on the Court's original jurisdiction for seeking remedial action. In its examination of the meaning and substance of "a question of public importance", the Court noted that:

It is to be observed that a number of judgments were cited at the bar by both the sides to elucidate as to what is the definition of public importance. Mr. Abid Hassan Minto, learned counsel, emphasized that the basic judgment in this behalf is in the case of *Manzoor Elahi v. Federation of Pakistan* (PLD 1975 SC 66). The relevant paragraph there from reads as under thus:-

⁵⁹ *All Pakistan Newspaper Society (Petitioners) v. Federation of Pakistan (Respondents)*, Constitutional Petition No. 35 of 2002, Date of hearing April 5-8, 2004; Decided April 8, 2004 para. 4.

⁶⁰ *Ibid.*

'Now, what is meant by a question of public importance. The term "public" is invariably employed in contradistinction to the terms private or individual, and connotes, as an adjective, something pertaining to, or belonging to the people, relating to a nation, State or community. In other words, it refers to something which is to be shared or participated in or enjoyed by the public at large, and is not limited or restricted to any particular class of the community. As observed by the Judicial Committee of the Privy Council in *Hamabai Framjee Petit v. Secretary for India-in-Council* (ILR 39 Bom 279), while construing the words "public purpose", such a phrase, whatever else it may mean – "must include a purpose, that is an object or aim, in which the general interest of the community, as opposed to the particular interest of individuals, is directly and vitally concerned". This definition appears to me to be equally applicable to the phrase "public importance".'⁶¹

Raja Muhammad Akram, learned ASC, contended that after the pronouncement of the above judgment, a good number of cases have been decided by this Court involving the question of life and liberty of a citizen, but in none of the cases the controversy relating to a dispute of the payment of wages between the employer and an employee has been considered to be a question of public importance. We may observe that as far as the petitioners are concerned, they have got a fundamental right to establish the business of newspapers but it is not their fundamental right as to the freedom of managing finances to run the business, which also includes payment of wages to its/their employees because if he/they have no finances, then his/their business is bound to collapse and mere non-availability of the funds would not involve fundamental rights of the petitioners nor will it give rise to a question of public importance because if this argument is accepted then in respect of every industrial dispute between employers and employees relating to the payment of wages, either of them would be filing a petition under Article 184(3) of the Constitution without considering whether such dispute has given rise to the question of public importance or not.⁶²

Thus, we feel no hesitation in holding that each case put up before the Court under Article 184(3) of the Constitution has to be determined on its own merits, as it has been observed in the case of *Benazir Bhutto (ibid)*, relevant paragraph there from is reproduced herein below:

Having regard to the connotation of the words 'public importance' it will be for the Supreme Court to consider in each case whether the element of 'public importance' is involved in the enforcement of the Fundamental Rights irrespective of the individual's violations of the infractions of a group or a class of persons.⁶³

⁶¹ *Id.* para. 19.

⁶² *Id.* para. 20.

⁶³ *Id.* para. 21.

OTHER RELEVANT STATE PRACTICE

Rights of the Child

**Pakistan's Second Periodic Report to the Committee on the Rights of the Child
CRC/C/65/Add.21, April 2003**

The second periodic report from Pakistan was presented to the Committee on the Rights of the Child. The report provides substantial information, *inter alia*, on measures to harmonize national law and policy with the provisions of the Convention, e.g., the National Commission for Child Welfare and Development (NCCWD); the review of national legislation; legal aid; mechanisms for coordinating policies relating to children and for monitoring the implementation of the Convention, e.g., a child labour survey; the National Project for Rehabilitation of Child Labour; an awareness campaign for the elimination of child labour; the National Code Committee; National Expert Committees on Priority Areas; the District Based Monitoring System (DBMS), and measures to develop awareness of the Convention.

The report also provides information regarding, *inter alia*, the definition of the child (within various contexts); the mechanisms developed for protecting the civil and political rights of the child; protection of the child from abuse and neglect; the position of children with disabilities, and the mechanisms that are being envisaged or adopted for children belonging to religious minorities or those from tribal populations.

In its consideration of the report,⁶⁴ the Committee notes with appreciation the following developments, *inter alia*, Pakistan's withdrawal (on 23 July 1997) of the general reservation to the Convention,⁶⁵ Pakistan's ratification of the ILO No. 182 on the Worst Forms of Child Labour Convention 2001 (No. 182),⁶⁶ the formulation of a revised National Plan of Action and of the Code of Ethics for Media on Reporting of Children's Issues, the adoption in 2002 of the Ordinance for the Prevention and Control of Human Trafficking and the Protection of Breastfeeding and Child Nutrition Ordinance, the Juvenile Justice System Ordinance in 2000, and the 1995 Compulsory Primary Education Act.⁶⁷

The Committee notes a range of factors and difficulties obstructing the implementation of the Convention. Amongst the more significant ones have been the socio-economic challenges, population growth, armed conflict in many parts of the region, and the substantial number of refugees entering into Pakistan from Afghanistan.⁶⁸

The Committee expresses its concern on a number of issues, the most salient ones amongst these being:

⁶⁴ Committee on the Rights of the Child, Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, CRC/C/15/Add.217 (27 October 2003).

⁶⁵ *Id.* B (3).

⁶⁶ *Id.* B (4).

⁶⁷ *Id.* B (5).

⁶⁸ *Id.* C (6).

- (a) Legislative changes are not being fully implemented and recognized within the State party and that some existing laws may still need to be reviewed;⁶⁹
- (b) Laws implementing the Convention on the Rights of the Child are not *de facto* applied in the Northern Tribal Territories and, therefore, children living in these territories do not fully enjoy their rights under the Convention;⁷⁰
- (c) The Zina and Hadood Ordinances are in conflict with the principles and provisions of the Convention.⁷¹

The Committee makes a number of recommendations. Among the most significant ones are:

- To scrutinize existing legislative and administrative measures at Federal and Provincial Levels to ensure the implementation of the Convention.⁷²
- A review and revision of the Zina and Hadood Ordinances to ensure their compatibility with the Convention.⁷³
- Adopting measures to ensure that the Pakistan Commission for the Welfare and Protection of the Rights of the Child is provided with adequate financial and human resources.⁷⁴
- According a priority to increasing budgetary allocation for children, particularly towards their health and educational development.⁷⁵
- Making all possible efforts to ensure the enjoyment of the rights in the Convention without discrimination, in particular, on the basis of gender, religion or disabilities.⁷⁶
- Ensuring that the best interest of the child is appropriately integrated into all legislation, and judicial and administrative decisions.⁷⁷

⁶⁹ *Id.* paragraph 9 (a).

⁷⁰ *Id.* paragraph 9 (b).

⁷¹ *Id.* paragraph 9 (c).

⁷² *Id.* paragraph 10.

⁷³ *Ibid.*

⁷⁴ *Id.* paragraph 12 (a).

⁷⁵ *Id.* paragraph 21.

⁷⁶ *Id.* paragraph 30.

⁷⁷ *Id.* paragraph 33.

- Promoting and facilitating the views of children and ensuring their participation in all matters affecting them in all spheres of the society.⁷⁸
- Allocation of appropriate resources for the health, development, educational, leisure and cultural activities of children.⁷⁹
- Assessing the reasons and scope of violence against children, in particular, violence against girls.⁸⁰
- Continuing and strengthening efforts to integrate children with disabilities into educational and recreational programmes used by children without disabilities, in particular, through improvement in physical access of disabled children to public service buildings, including schools.⁸¹
- Making all possible efforts to improve the living conditions (in particular health and education) of refugee children and those children who have been internally displaced.⁸²

PHILIPPINES⁸³

JUDICIAL DECISIONS

State immunity from suit – By whom and when it can be availed

KHOSROW MINUCHER v. HON. COURT OF APPEALS AND ARTHUR SCALZO
[G.R. No. 142396, 11 February 2003]

The Supreme Court denied the motion of the petitioner to reverse the ruling of the Court of Appeals which held that the private respondent Scalzo is sufficiently clothed with diplomatic immunity during his term of duty and thereby immune from the criminal and civil jurisdiction of the “Receiving State” pursuant to the terms of the Vienna Convention. Minucher was charged with violation of RA 6425 otherwise known as the Dangerous Drugs Act of 1972 after a “buy-bust operation” which was initiated by Scalzo. At that time, Scalzo was a special agent of the US Drug Enforcement Agency assigned to the US Embassy in Manila. After Minucher was acquitted

⁷⁸ *Id.* paragraph 37(a)(c).

⁷⁹ *Id.* paragraph 52.

⁸⁰ *Id.* paragraph 41.

⁸¹ *Id.* paragraph 51.

⁸² *Id.* paragraphs 66 (a)–(e).

⁸³ Contributed by Harry Roque Jr, Faculty Member, College of Law, University of Philippines, Diliman, Quezon City.

from the charges, he sued Arthur Scalzo for damages for what he claimed to have been trumped-up charges of drug trafficking.

Scalzo contended that the Vienna Convention on Diplomatic Relations, to which the Philippines is a signatory, granted him absolute immunity from the suit. The Supreme Court held that the Vienna Convention on Diplomatic Relations was a codification of centuries-old customary law and, by the time of its ratification on 18 April 1961, its rules of law had long become stable. However, it clarified that although the Vienna Convention on Diplomatic Relations provides for immunity to the members of diplomatic missions, it does so, nevertheless, with an understanding that the same be restrictively applied. Only “diplomatic agents” under the terms of the Convention are vested with blanket diplomatic immunity from civil and criminal suits. The Convention defines “diplomatic agents” as the heads of missions or members of the diplomatic staff, thus by implication withholding the same privileges from all others. The Supreme Court held that “the main yardstick in ascertaining whether a person is a diplomat entitled to immunity is the determination of whether or not he performs duties of diplomatic nature”. The Court went on to say that an Assistant Attaché to the United States diplomatic mission, the position that Scalzo was occupying, is not generally regarded as a member of the diplomatic mission and is, therefore, not granted diplomatic immunity. However, the Court conceded that the act of vesting a person with diplomatic immunity is a prerogative of the executive branch. In *World Health Organization v. Aquino*, the Court has recognized that, in such matters, the hands of the courts are virtually tied.

Even though the diplomatic immunity of Scalzo was still contentious, the Court decided to resolve the petition under the related doctrine of State immunity from suit. The Court held that the “precept that a State cannot be sued in the courts of a foreign state” is a long-standing rule of customary international law then closely identified with the personal immunity of a foreign sovereign from suit and, with the emergence of democratic states, made to attach not just to the person of the head of state, or his representative, but also distinctly to the state itself in its sovereign capacity. If the acts giving rise to a suit are those of a foreign government done by its foreign agent, although not necessarily a diplomatic personage, but acting in his official capacity, the complaint could be barred by the immunity of the foreign sovereign from suit without its consent. Suing a representative of a state is believed to be, in effect, suing the state itself. The proscription is not accorded for the benefit of an individual, but for the State in whose service he is, under the maxim – *par in parem, non habet imperium* – that all states are sovereign equals and cannot assert jurisdiction over one another.

A foreign agent, operating within a territory, can be cloaked with immunity from suit, but only as long as it can be established that he is acting within the directives of the sending state. The consent of the host state is an indispensable requirement of basic courtesy between the two sovereigns. The consent or *imprimatur* of the Philippine government to the activities of the United States Drug Enforcement Agency, however, can be gleaned from the official exchanges of communication between agencies of the government of the two countries, certifications from officials of both the Philippine Department of Foreign Affairs and the United States Embassy,

as well as the participation of members of the Philippine Narcotics Command in the “buy-bust operation” conducted at the residence of Minucher at the behest of Scalzo. Thus, the Court held that Scalzo, an agent of the United States Drug Enforcement Agency allowed by the Philippine government to conduct activities in the country to help contain the problem on the drug traffic, is entitled to the defence of state immunity from suit.

Waiver of Sovereign Immunity from suit

THE REPUBLIC OF INDONESIA, HIS EXCELLENCY AMBASSADOR SOERATMIN, AND MINISTER COUNSELLOR AZHARI KASIM v. JAMES VINZON, DOING BUSINESS UNDER THE NAME AND STYLE OF VINZON TRADE AND SERVICES

[G.R. No. 154705. 26 June 2003]

The Republic of Indonesia, represented by its Counsellor, Siti Partinah, entered into a Maintenance Agreement in August 1995 with respondent James Vinzon, sole proprietor of Vinzon Trade and Services. The Maintenance Agreement stated that respondent shall, for a consideration, maintain specified equipment at the Indonesian Embassy and at the Wisma Duta, the official residence of the petitioner Ambassador Soeratmin. After the petitioner decided to terminate the agreement, the respondent filed a complaint claiming that the termination was arbitrary and unlawful. The petitioner claimed that that the Republic of Indonesia, as a foreign sovereign State, has sovereign immunity from suit and cannot be sued as a party-defendant in Philippines. The respondent alleged that the Republic of Indonesia has expressly waived its immunity from suit, basing this claim upon the following provision in the Maintenance Agreement:

Any legal action arising out of this Maintenance Agreement shall be settled according to the laws of the Philippines and by the proper court of Makati City, Philippines.

The Court stated that International law is founded largely upon the principles of reciprocity, comity, independence, and equality of States which were adopted as part of the law of our land under Article II, Section 2 of the 1987 Constitution.⁸⁴ The rule that a State may not be sued without its consent is a necessary consequence of the principles of independence and equality of States.⁸⁵

The Court, however, acknowledged that the rules of International Law are neither unyielding nor impervious to change. The increasing need of sovereign States to enter into purely commercial activities remotely connected with the discharge of their governmental functions brought about a new concept of sovereign immunity. This concept, the restrictive theory, holds that the immunity of the sovereign is recognized

⁸⁴ *United States of America v. Guinto*, 182 SCRA 644, 653 (1990).

⁸⁵ *United States of America, et al v. Ruiz*, 136 SCRA 487 (1987).

only with regard to public acts or acts *jure imperii*, but not with regard to private acts or acts *jure gestionis*.⁸⁶ The Court held that the mere entering into a contract by a foreign State with a private party cannot be construed as the ultimate test of whether or not it is an act *jure imperii* or *jure gestionis*. If the foreign State is not engaged regularly in a business or commercial activity, and in this case it has not been shown to be so engaged, the particular act or transaction must then be tested by its nature. If the act is in pursuit of a sovereign activity, or an incident thereof, then it is an act *jure imperii*.⁸⁷

The Court then stated that the existence alone of a paragraph in a contract stating that any legal action arising out of the agreement shall be settled according to the laws of Philippines and by a specified court of Philippines is not necessarily a waiver of sovereign immunity from suit. It held that the aforesaid provision contains language not necessarily inconsistent with sovereign immunity. On the other hand, such provision may also be meant to apply where the sovereign party elects to sue in the local courts, or otherwise waives its immunity by any subsequent act. Submission by a foreign state to local jurisdiction must be clear and unequivocal. It must be given explicitly or by necessary implication.

The Court then held that the establishment of a diplomatic mission is an act *jure imperii* and that the establishment of a diplomatic mission encompasses its maintenance and upkeep. States may enter into contracts with private entities to maintain the premises, furnishings and equipment of the embassy, and the living quarters of its agents and officials.

Compliance with international law required even from revolutionary governments

REPUBLIC OF THE PHILIPPINES v. SANDIGANBAYAN, MAJOR GENERAL JOSEPHUS Q. RAMAS AND ELIZABETH DIMAANO

[G.R. No. 104768. 21 July 2003]

The Republic of the Philippines, represented by the Presidential Commission on Good Government (PCGG), questioned the decision of the Sandiganbayan declaring that the properties confiscated from Elizabeth Dimaano's house as illegally seized and, therefore, inadmissible in evidence. The search and seizure was conducted by the Constabulary on 3 March 1986 or five days after the successful EDSA (*Epi-fanio de los Santos Avenue*) revolution. Petitioner argues that a revolutionary government was operative at that time and that it effectively withheld the operation of the 1973 Constitution which guaranteed the private respondent's exclusionary right.

The court held that during the interregnum, that is, *after* the actual and effective takeover of power by the revolutionary government following the cessation of resistance by loyalist forces *up to* 24 March 1986 (immediately before the adoption

⁸⁶ *The Holy See v. Rosario, et. al.*, 238 SCRA 524 (1994).

⁸⁷ *United States v. Rodrigo*, 182 SCRA 644 (1990).

of the Provisional Constitution), the Bill of Rights of the 1973 Constitution was not in force. As was succinctly stated in President Aquino's Proclamation No. 3 dated 25 March 1986, the EDSA Revolution was "done in defiance of the provisions of the 1973 Constitution."⁸⁸ The resulting government was indisputably a revolutionary government bound by no constitution or legal limitations except treaty obligations that the revolutionary government, as the *de jure* government in the Philippines, assumed under international law. However, the court held that the rights found in the Bill of Rights of the 1973 Constitution were almost the same as those found in the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights. It further held that the revolutionary government, after installing itself as the *de jure* government, assumed responsibility for the State's good faith compliance with the Covenant⁸⁹ to which Philippines was a signatory. The Court also interpreted the Universal Declaration of Human Rights, adopted by Philippines, as part of the generally accepted principles of international law and binding on the

⁸⁸ Proclamation No. 3, "Provisional Constitution of the Republic of the Philippines," provides: WHEREAS, the new government under President Corazon C. Aquino was installed through a direct exercise of the power of the Filipino people assisted by units of the New Armed Forces of the Philippines;

WHEREAS, the heroic action of the people was done in *defiance of the provisions of the 1973 Constitution*, as amended...

⁸⁹ Among the rights of individuals recognized in the Covenant are: (1) No one shall be arbitrarily deprived of his life [Article 6(1)]; (2) No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. [Article 7]; (3) Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release [Article 9(1 and 3)]; (4) Anyone who is arrested shall be informed, at the time of the arrest, of the reasons for his arrest and shall be promptly informed of the charges against him [Article 9(2)]; (5) Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. Everyone shall be free to leave any country, including his own. No one shall be arbitrarily deprived of the right to enter his own country [Article 12(1, 2 and 3)]; (6) Everyone charged with a criminal offense shall have the right to be presumed innocent until proved guilty according to law [Article 14(2)]; (7) Everyone shall have the right of freedom of thought, conscience and religion [Article 18(1)]; (8) Everyone shall have the right to hold opinions without interference. Everyone shall have the right to freedom of expression [Article 19(1 and 2)]; (9) The right of peaceful assembly shall be recognized [Article 21]; (10) Everyone shall have the right of freedom of association with others [Article 22(1)]; (11) All persons are equal before the law and are entitled without any discrimination to the equal protection of the law [Article 26].

State.⁹⁰ Thus, the revolutionary government was also obligated under international law to observe the rights of individuals under the Declaration.⁹¹

The fact is that the revolutionary government did not repudiate the Covenant or the Declaration in the same way it repudiated the 1973 Constitution. As the *de jure* government, the revolutionary government could not escape responsibility for the State's good faith compliance with its treaty obligations under international law. During the interregnum, when no constitution or Bill of Rights existed, directives and orders issued by government officers were valid so long as these officers did not exceed the authority granted to them by the revolutionary government. However, the directives and orders should have also not violated the Covenant or the Declaration.

NATIONAL LAWS ON INTERNATIONAL LAW MATTERS

Restoration of citizenship

Republic Act No. 9225 "Citizenship Retention and Re-acquisition Act of 2003"

Signed into law by the President of the Philippines on 29 August 2003, the Citizenship Retention and Re-acquisition Act of 2003 intends to restore Philippine citizenship to natural-born citizens who lost their Philippine citizenship by reason of their naturalization as citizens of a foreign country. The law also intends for natural born citizens of the Philippines who become citizens of a foreign country after the implementation of the Act to retain their Philippine citizenship upon taking of an oath.

Under this law, those who retain or re-acquire Philippine citizenship will be able to enjoy full civil and political rights and will be subject to all attendant liabilities and responsibilities under existing laws of the Philippines on the following conditions:

- (1) Those intending to exercise their right of suffrage must meet the requirements under Section 1, Article V of the Constitution, Republic Act No. 9189, otherwise known as "The Overseas Absentee Voting Act of 2003" and other existing laws;
- (2) Those seeking to hold elective public office in the Philippines shall meet the qualification for holding such public office as required by the Constitution and existing laws and, at the time of the filing of the certificate of candidacy, make

⁹⁰ *Andreu v. Commissioner of Immigration*, 90 Phil. 347 (1951); *Chirskoff v. Commissioner of Immigration*, 90 Phil. 256 (1951); *Borovsky v. Commissioner of Immigration*, 90 Phil. 107 (1951); *Mejoff v. Director of Prisons*, 90 Phil. 70 (1951).

⁹¹ Among the rights enshrined in the Declaration are: (1) Everyone has the right to own property alone or in association with others [Article 17(1)]; (2) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives [Article 21(1)]; (3) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment [Article 23(1)].

- a personal and sworn renunciation of any and all foreign citizenship before any public officer authorized to administer an oath;
- (3) Those appointed to any public office shall subscribe and swear to an oath of allegiance to the Republic of the Philippines and its duly constituted authorities prior to their assumption of office: *Provided*, that they renounce their oath of allegiance to the country where they took that oath;
 - (4) Those intending to practice their profession in the Philippines shall apply with the proper authority for a license or permit to engage in such practice; and
 - (5) That right to vote or be elected or appointed to any public office in the Philippines cannot be exercised by, or extended to, those who:
 - (a) are candidates for or are occupying any public office in the country of which they are naturalized citizens; and/or
 - (b) are in active service as commissioned or non-commissioned officers in the armed forces of the country of which they are naturalized citizens.

Anti-money laundering legislation

Republic Act No. 9194 “Amendment of Anti-Money Laundering Act Of 2001”

Signed into law by the President of the Philippines on 7 March 2003 was the Amendment of Anti-Money Laundering Act of 2001. The new legislation addresses the main legal deficiencies in the Philippines anti-money laundering regime previously identified by the Financial Action Task Force (FATF).⁹² Because of this, members of the FATF have decided not to apply any countermeasures⁹³ to the Philippines in addition to Recommendation 21.⁹⁴

Under RA 9194, money laundering is defined as a crime whereby the proceeds of an unlawful activity are transacted, making them appear to have originated from legitimate sources. Under the law, it is committed by the following:

⁹² The FATF is an independent international body whose Secretariat is housed at the OECD. The twenty-nine member countries and governments of the FATF are: Argentina; Australia; Austria; Belgium; Brazil; Canada; Denmark; Finland; France; Germany; Greece; Hong Kong, China; Iceland; Ireland; Italy; Japan; Luxembourg; Mexico; the Kingdom of the Netherlands; New Zealand; Norway; Portugal; Singapore; Spain; Sweden; Switzerland; Turkey; the United Kingdom, and the United States. Two international organizations are also members of the FATF: the European Commission and the Gulf Co-operation Council. South Africa and Russia are observer countries.

⁹³ The counter-measures agreed in June 2001 are contained in the FATF Review to Identify Non-Cooperative Countries or Territories: Increasing the Worldwide Effectiveness of Anti-Money Laundering Measures (22 June 2001) at: www.fatf-gafi.org/NCCT_en.htm.

⁹⁴ Recommendation 21 applies to all countries on the Non-Cooperative Countries and Territories list and states that “Financial institutions should give special attention to business relations and transactions with persons, including companies and financial institutions, from countries which do not or insufficiently apply these Recommendations. Whenever these transactions have no apparent economic or visible lawful purpose, their background and purpose should, as far as possible, be examined, the findings established in writing, and be available to help supervisors, auditors and law enforcement agencies.”

- (a) Any person knowing that any monetary instrument or property represents, involves, or relates to, the proceeds of any unlawful activity, transacts or attempts to transact said monetary instrument or property.
- (b) Any person knowing that any monetary instrument or property involves the proceeds of any unlawful activity performs or fails to perform any act as a result of which he facilitates the offence of money laundering referred to in paragraph (a) above.
- (c) Any person knowing that any monetary instrument or property is required under this Act to be disclosed and filed with the Anti-Money Laundering Council (AMLC), fails to do so.

Under RA 9194, the AMLC will be composed of the Governor of the Bangko Sentral ng Pilipinas as Chairman, the Commissioner of the Insurance Commission and the Chairman of the Securities and Exchange Commission as members. Under the law, the functions of the AMLC are as follows:

- (1) to require and receive covered or suspicious transaction reports from covered institutions;
- (2) to issue orders addressed to the appropriate Supervising Authority or the covered institutions to determine the true identity of the owner of any monetary instrument or property subject of a covered transaction or suspicious transaction report or request for assistance from a foreign State, or believed by the Council, on the basis of substantial evidence, to be, in whole or in part, wherever located, representing, involving, or related directly or indirectly, in any manner or by any means to the proceeds of an unlawful activity.
- (3) to institute civil forfeiture proceedings and all other remedial proceedings through the Office of the Solicitor General;
- (4) to cause the filing of complaints with the Department of Justice or the Ombudsman for the prosecution of money laundering offences;
- (5) to investigate suspicious transactions and covered transactions deemed suspicious after an investigation by AMLC, money laundering activities and other violations of this Act;
- (6) to apply before the Court of Appeals, *ex parte*, for the freezing of any monetary instrument or property alleged to be the proceeds of any unlawful activity as defined in Section 3(I) hereof;
- (7) to implement such measures as may be necessary and justified under this Act to counteract money laundering;
- (8) to receive and take action in respect of, any request from foreign states for assistance in their own anti-money laundering operations provided in this Act;
- (9) to develop educational programmes on the pernicious effects of money laundering, the methods and techniques used in the money laundering, the viable means of preventing money laundering and the effective ways of prosecuting and punishing offenders;
- (10) to enlist the assistance of any branch, department, bureau, office, agency, or instrumentality of the government, including government-owned and govern-

- ment-controlled corporations, in undertaking any and all anti-money laundering operations, which may include the use of its personnel, facilities and resources for the more resolute prevention, detection, and investigation of money laundering offences and prosecution of offenders; and
- (11) to impose administrative sanctions for the violation of laws, rules, regulations, and orders and resolutions issued pursuant thereto.

Under the law, the AMLC is also given the authority to inquire into or examine any particular deposit or investment with any banking institution or non-bank financial institution upon order of any competent court in cases of violation of this Act, when it has been established that there is probable cause that the deposits or investments are related to an unlawful activity as defined in Section 3(I) hereof or a money laundering offence under Section 4 hereof, except that no court order shall be required in cases involving unlawful activities defined in Sections 3(I)1, (2) and (12). This is notwithstanding the provisions of Republic Act No. 1405, as amended, Republic Act No. 6426, as amended, Republic Act No. 8791, and other laws. Also, the Bangko Sentral ng Pilipinas (BSP) is given the authority to inquire into or examine any deposit or investment with any banking institution or non-bank financial institution when the examination is made in the course of a periodic or special examination, in accordance with the rules of examination of the BSP.

Anti-trafficking in persons legislation

Republic Act No. 9208 “Anti-Trafficking in Persons Act of 2003”

Signed into law by the President of the Philippines on March 26, 2003, the Anti-Trafficking in Persons Act of 2003⁹⁵ intends to promote human dignity, protect the people from any threat of violence and exploitation, eliminate trafficking in persons, and mitigate pressures for involuntary migration and servitude of persons, not only to support trafficked persons, but more importantly, to ensure their recovery, rehabilitation, and reintegration into the mainstream of society.

The law is in accordance with the State policy to recognize the equal rights and inherent human dignity of women and men as enshrined in the United Nations Universal Declaration on Human Rights, United Nations Convention on the Rights of the Child, United Nations Convention on the Protection of Migrant Workers and their Families, United Nations Convention Against Transnational Organized Crime including its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Es-

⁹⁵ Providing a strong framework for the anti-trafficking law are universally accepted instruments and conventions to which the Philippines is a signatory, among which are: the United Nations Universal Declaration on Human Rights; United Nations Convention on the Rights of the Child; United Nations Convention on the Protection of Migrant Workers and Their Families; United Nations Convention Against Transnational Organized Crime including its Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children; and the Convention on the Elimination of All Forms of Discrimination Against Women.

pecially Women and Children, and all other relevant and universally accepted human rights instruments and other international conventions to which the Philippines is a signatory.

Under Section 3 of the law, trafficking in persons refers to the recruitment, transportation, transfer or harbouring, or receipt of persons with or without the victim's consent or knowledge, within or across national borders by means of threat or use of force, or other forms of coercion, abduction, fraud, deception, abuse of power or of position, taking advantage of the vulnerability of the person, or, the giving or receiving of payments or benefits to achieve the consent of a person having control over another person for the purpose of exploitation which includes at a minimum, the exploitation or the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery, servitude, or the removal or sale of organs.

The law also states that recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall also be considered as "trafficking in persons" even if it does not involve any of the means set forth in the first paragraph of Section 3.

Under Section 4 of the law, it shall be unlawful for any person, natural or juridical, to commit any of the following acts of "trafficking in persons":

- (a) To recruit, transport, transfer; harbour, provide, or receive a person by any means, including those done under the pretext of domestic or overseas employment or training or apprenticeship, for the purpose of prostitution, pornography, sexual exploitation, forced labour, slavery, involuntary servitude, or debt bondage;
- (b) To introduce or match for money, profit, or material, economic or other consideration, any person or, as provided for under Republic Act No. 6955, any Filipino woman to a foreign national, for marriage for the purpose of acquiring, buying, offering, selling or trading him/her to engage in prostitution, pornography, sexual exploitation, forced labour, slavery, involuntary servitude, or debt bondage;
- (c) To offer or contract marriage, real or simulated, for the purpose of acquiring, buying, offering, selling, or trading any person to engage in prostitution, pornography, sexual exploitation, forced labour or slavery, involuntary servitude, or debt bondage;
- (d) To undertake or organize tours and travel plans consisting of tourism packages or activities for the purpose of utilizing and offering persons for prostitution, pornography, or sexual exploitation;
- (e) To maintain or hire a person to engage in prostitution or pornography;
- (f) To adopt or facilitate the adoption of persons for the purpose of prostitution, pornography, sexual exploitation, forced labour, slavery, involuntary servitude, or debt bondage;
- (g) To recruit, hire, adopt, transport or abduct a person, by means of threat or use of force, fraud, deceit, violence, coercion, or intimidation for the purpose of removal or sale of organs of said person; and
- (h) To recruit, transport or adopt a child to engage in armed activities in Philippines or abroad.

Under Section 5 of the law, the following acts which promote or facilitate trafficking in persons shall be unlawful:

- (a) To knowingly lease or sublease, use, or allow to be used any house, building or establishment for the purpose of promoting trafficking in persons;
- (b) To produce, print and issue or distribute unissued, tampered or fake counselling certificates, registration stickers, and certificates of any government agency which issues these certificates and stickers as proof of compliance with government regulatory and pre-departure requirements for the purpose of promoting trafficking in persons;
- (c) To advertize, publish, print, broadcast or distribute, or cause the advertisement, publication, printing, broadcasting, or distribution by any means, including the use of information technology and the internet, of any brochure, flyer, or any propaganda material that promotes trafficking in persons;
- (d) To assist in the conduct of misrepresentation or fraud for purposes of facilitating the acquisition of clearances and necessary exit documents from government agencies that are mandated to provide pre-departure registration and services for departing persons for the purpose of promoting trafficking in persons;
- (e) To facilitate, assist or help in the exit and entry of persons from/to the country at international and local airports, territorial boundaries and seaports who are in possession of unissued, tampered or fraudulent travel documents for the purpose of promoting trafficking in persons;
- (f) To confiscate, conceal, or destroy the passport, travel documents, or personal documents or belongings of trafficked persons in furtherance of trafficking or to prevent them from leaving the country or seeking redress from the government or appropriate agencies; and
- (g) To knowingly benefit from, financial or otherwise, or make use of, the labour or services of a person held in a condition of involuntary servitude, forced labour, or slavery.

Section 6 of the law also enumerates the following which are considered as qualified trafficking:

- (a) When the trafficked person is a child;
- (b) When the adoption is effected through Republic Act No. 8043, otherwise known as the "Inter-Country Adoption Act of 1995" and said adoption is for the purpose of prostitution, pornography, sexual exploitation, forced labour, slavery, involuntary servitude or debt bondage;
- (c) When the crime is committed by a syndicate, or in large scale. Trafficking is deemed committed by a syndicate if carried out by a group of three or more persons conspiring or confederating with one another. It is deemed committed in large scale if committed against three or more persons, individually or as a group;

- (d) When the offender is an ascendant, parent, sibling, guardian or a person who exercises authority over the trafficked person or when the offence is committed by a public officer or employee;
- (e) When the trafficked person is recruited to engage in prostitution with any member of the military or law enforcement agencies;
- (f) When the offender is a member of the military or law enforcement agencies; and
- (g) When by reason or on occasion of the act of trafficking in persons, the offended party dies, becomes insane, suffers mutilation, or is afflicted with Human Immuno-deficiency Virus (HIV) or the Acquired Immune Deficiency Syndrome (AIDS).

Under Section 8 of the law, the complainant for trafficking should be any person who has personal knowledge of the commission of any offence under Republic Act No. 9208, the trafficked person, the parents, spouse, siblings, children, or legal guardian may file a complaint for trafficking.

The criminal action covered by Republic Act No. 9208 shall be filed where the offence was committed, or where any of its elements occurred, or where the trafficked person actually resided at the time of the commission of the offence: *Provided*, that the court where the criminal action is first filed shall acquire jurisdiction to the exclusion of other courts.

The following penalties and sanctions are imposed under Section 10 for the offences enumerated in the law:

- (a) Any person found guilty of committing any of the acts enumerated in Section 4 shall suffer the penalty of imprisonment of twenty years and a fine of not less than One million pesos but not more than Two million pesos;
- (b) Any person found guilty of committing any of the acts enumerated in Section 5 shall suffer the penalty of imprisonment of fifteen years and a fine of not less than Five hundred thousand pesos but not more than One million pesos;
- (c) Any person found guilty of qualified trafficking under Section 6 shall suffer the penalty of life imprisonment and a fine of not less than Two million pesos but not more than Five million pesos;
- (d) Any person who violates Section 7 hereof shall suffer the penalty of imprisonment of six years and a fine of not less than Five hundred thousand peso but not more than One million pesos;
- (e) If the offender is a corporation, partnership, association, club, establishment or any juridical person, the penalty shall be imposed upon the owner, president, partner, manager, and/or any responsible officer who participated in the commission of the crime or who shall have knowingly permitted or failed to prevent its commission;
- (f) The registration with the Securities and Exchange Commission (SEC) and license of the erring agency, corporation, association, religious group, tour or travel agent, club or establishment, or any place of entertainment to operate shall be cancelled

- and revoked permanently. The owner, president, partner or manager thereof shall not be allowed to operate similar establishments in a different name;
- (g) If the offender is a foreigner, he shall be immediately deported after serving his sentence and be barred permanently from entering the country;
 - (h) Any employee or official of government agencies who shall issue or approve the issuance of travel exit clearances, passports, registration certificates, counselling certificates, marriage license, and other similar documents to persons, whether juridical or natural, recruitment agencies, establishments or other individuals or groups, who fail to observe the prescribed procedures and the requirement as provided for by laws, rules and regulations, shall be held administratively liable, without prejudice to criminal liability under this Act. The concerned government official or employee shall, upon conviction, be dismissed from service and be barred permanently from holding public office. His/her retirement and other benefits shall likewise be forfeited; and
 - (i) Conviction by final judgment of the adopter for any offence under this Act shall result in the immediate rescission of the decree of adoption.

Section 11 penalizes any person who buys or engages the services of trafficked persons for prostitution as follows:

- (a) First offence – six months of community service as may be determined by the court and a fine of Fifty thousand pesos; and
- (b) Second and subsequent offences – imprisonment of one year and a fine of One hundred thousand pesos.

Trafficking cases shall prescribe in ten years though trafficking cases committed by a syndicate or in a large scale as defined under Section 6 shall prescribe in twenty years. The prescriptive period shall commence to run from the day on which the trafficked person is delivered or released from the conditions of bondage and shall be interrupted by the filing of the complaint or information, and shall commence to run again when such proceedings terminate without the accused being convicted or acquitted or are unjustifiably stopped for any reason not imputable to the accused.

Trafficked persons who institute a separate civil action for the recovery of civil damages shall be exempt from the payment of filing fees.

The court shall order the confiscation and forfeiture, in favour of the government, of all the proceeds and properties derived from the commission of the crime, unless they are the property of a third person not liable for the unlawful act in addition to the penalty imposed. However, all awards for damages shall be taken from the personal and separate properties of the offender. If such properties are insufficient, the balance shall be taken from the confiscated and forfeited properties.

When the proceeds, properties and instruments of the offence have been destroyed, diminished in value or otherwise rendered worthless by any act or omission, directly or indirectly, of the offender, or it has been concealed, removed, converted, or transferred to prevent the same from being found or to avoid forfeiture or confiscation,

the offender shall be ordered to pay the amount equal to the value of the proceeds, property or instruments of the offence.

All fines imposed under the law and the proceeds and properties forfeited and confiscated pursuant to it shall accrue to a Trust Fund to be administered and managed by the Council to be used exclusively for programmes that will prevent acts of trafficking and protect, rehabilitate, and reintegrate trafficked persons into the mainstream of society. Such programmes shall include, but not limited to, the following:

- (a) Provision for mandatory services set forth in Section 23 of this Act;
- (b) Sponsorship of a national research programme on trafficking and establishment of a data collection system for monitoring and evaluation purposes;
- (c) Provision of necessary technical and material support services to appropriate government agencies and non-government organizations (NGOs);
- (d) Sponsorship of conferences and seminars to provide venue for consensus building amongst the public, academia, government, NGOs, and international organizations; and
- (e) Promotion of information and education campaign on trafficking.

The law also enumerates government programs that establish and implement preventive, protective, and rehabilitative programs for trafficked persons. The following agencies are mandated to implement the identified programmes;

- (a) Department of Foreign Affairs (DFA) – shall make available its resources and facilities overseas for trafficked persons regardless of their manner of entry to the receiving country, and explore means to further enhance its assistance in eliminating trafficking activities through closer networking with government agencies in the country and overseas, particularly in the formulation of policies and implementation of relevant programmes.

The DFA shall take necessary measures for the efficient implementation of the Machine Readable Passports to protect the integrity of Philippine passports, visas and other travel documents to reduce the incidence of trafficking through the use of fraudulent identification documents.

It shall establish and implement a pre-marriage, on-site and pre-departure counselling programme on intermarriages.

- (b) Department of Social Welfare and Development (DSWD) – shall implement rehabilitative and protective programmes for trafficked persons. It shall provide counselling and temporary shelter to trafficked persons and develop a system for accreditation among NGOs for purposes of establishing centres and programmes for intervention in various levels of the community.
- (c) Department of Labour and Employment (DOLE) – shall ensure the strict implementation and compliance with the rules and guidelines relative to the employment of persons locally and overseas. It shall likewise monitor, document and report cases of trafficking in persons involving employers and labour recruiters.

- (d) Department of Justice (DOJ) – shall ensure the prosecution of persons accused of trafficking and designate and train special prosecutors who shall handle and prosecute cases of trafficking. It shall also establish a mechanism for free legal assistance for trafficked persons, in coordination with the DSWD, Integrated Bar of the Philippines (IBP) and other NGOs and volunteer groups.
- (e) National Commission on the Role of Filipino Women (NCRFW) – shall actively participate and coordinate in the formulation and monitoring of policies addressing the issue of trafficking in persons in coordination with relevant government agencies. It shall likewise advocate for the inclusion of the issue of trafficking in persons in both its local and international advocacy for women's issues.
- (f) Bureau of Immigration (BI) – shall strictly administer and enforce immigration and alien administration laws. It shall adopt measures for the apprehension of suspected traffickers both at the place of arrival and departure, and shall ensure compliance by the Filipino fiancés/fiancées and spouses of foreign nationals with the guidance and counselling requirements as provided for in this Act.
- (g) Philippine National Police (PNP) – shall be the primary law enforcement agency to undertake surveillance, investigation and arrest of individuals or persons suspected to be engaged in trafficking. It shall closely coordinate with various law enforcement agencies to secure concerted efforts for effective investigation and apprehension of suspected traffickers. It shall also establish a system to receive complaints and calls to assist trafficked persons and conduct rescue operations.
- (h) Philippine Overseas Employment Administration (POEA) – shall implement effective pre-employment orientation seminars and pre-departure counselling programmes to applicants for overseas employment. It shall likewise formulate a system of providing free legal assistance to trafficked persons.
- (i) Department of the Interior and Local Government (DILG) – shall institute a systematic information and prevention campaign and likewise maintain a databank for the effective monitoring, documentation, and prosecution of cases on trafficking in persons.
- (j) Local Government Units (LGUs) – shall monitor and document cases of trafficking in persons in their areas of jurisdiction, effect the cancellation of licenses of establishments which violate the provisions of this Act and ensure effective prosecution of such cases. They shall also undertake information campaigns against trafficking in persons through the establishment of the Migrants Advisory and Information Network (MAIN) desks in municipalities or provinces in coordination with the DILG, Philippine Information Agency (PIA), the Commission on Filipinos Overseas (CFO), NGOs, and other concerned agencies. They shall encourage and support community based initiatives which address the trafficking in persons.

In implementing this Act, the agencies concerned may seek and enlist the assistance of NGOs, people's organizations (Pos), civic organizations, and other volunteer groups.

Trafficked persons are recognized as victims of the act or acts of trafficking and as such shall not be penalized for crimes directly related to the acts of trafficking enumerated under this Act or for obeying the order made by the trafficker in relation thereto. The consent of a trafficked person to the intended exploitation set forth in this Act shall be irrelevant.

Trafficked person are entitled to the witness protection programme under Section 18 of the law.

Under Section 19, trafficked persons in the Philippines who are nationals of a foreign country shall also be entitled to appropriate protection, assistance and services available to trafficked persons under this law provided that they shall be permitted continued presence in the Philippines for a length of time prescribed by the Council as necessary to effect the prosecution of offenders.

Section 20 establishes an Inter-Agency Council Against Trafficking, to be composed of the Secretary of the Department of Justice as Chairperson and the Secretary of the Department of Social Welfare and Development as Co-Chairperson and shall have the following as members:

- (a) Secretary, Department of Foreign Affairs;
- (b) Secretary, Department of Labour and Employment;
- (c) Administrator, Philippine Overseas Employment Administration;
- (d) Commissioner, Bureau of Immigration;
- (e) Director-General, Philippines National Police;
- (f) Chairperson, National Commission on the Role of Filipino Women; and
- (g) Three representatives from NGOs, who shall be composed of one representative each from among the sectors representing women, overseas Filipino workers (OFWs) and children, with a proven record of involvement in the prevention and suppression of trafficking in persons. These representatives shall be nominated by the government agency representatives of the Council for appointment by the President for a term of three years.

The members of the Council may designate their permanent representatives who shall have a rank not lower than an assistant secretary or its equivalent to meetings, and shall receive emoluments as may be determined by the Council in accordance with the existing budget and accounting rules and regulations.

The Council shall have the following powers and functions according to Section 21:

- (a) Formulate a comprehensive and integrated program to prevent and suppress the trafficking in persons;
- (b) Promulgate rules and regulations as may be necessary for the effective implementation of this Act;
- (c) Monitor and oversee the strict implementation of this Act;
- (d) Coordinate the programs and projects of the various member agencies to effectively address the issues and problems attendant to trafficking in persons;

- (e) Coordinate the conduct of massive information dissemination and campaign on the existence of the law and the various issues and problems attendant to trafficking through the LGUs, concerned agencies, and NGOs;
- (f) Direct other agencies to immediately respond to the problems brought to their attention and report to the Council on action taken;
- (g) Assist in filing of cases against individuals, agencies, institutions or establishments that violate the provisions of this Act;
- (h) Formulate a program for the reintegration of trafficked persons in cooperation with DOLE, DSWD, Technical Education and Skills Development Authority (TESDA), Commission on Higher Education (CHED), LGUs and NGOs;
- (i) Secure from any department, bureau, office, agency, or instrumentality of the government or from NGOs and other civic organizations such assistance as may be needed to effectively implement this Act;
- (j) Complement the shared government information system for migration established under Republic Act No. 8042, otherwise known as the "Migrant Workers and Overseas Filipinos Act of 1995" with data on cases of trafficking in persons, and ensure that the proper agencies conduct a continuing research and study on the patterns and scheme of trafficking in persons which shall form the basis for policy formulation and programme direction;
- (k) Develop the mechanism to ensure the timely, coordinated, and effective response to cases of trafficking in persons;
- (l) Recommend measures to enhance cooperative efforts and mutual assistance among foreign countries through bilateral and/or multilateral arrangements to prevent and suppress international trafficking in persons;
- (m) Coordinate with the Department of Transportation and Communications (DOTC), Department of Trade and Industry (DTI), and other NGOs in monitoring the promotion of advertisement of trafficking in the internet;
- (n) Adopt measures and policies to protect the rights and needs of trafficked persons who are foreign nationals in the Philippines;
- (o) Initiate training programmes in identifying and providing the necessary intervention or assistance to trafficked persons; and
- (p) Exercise all powers and perform such other functions necessary to attain the purposes and objectives of this Act.

The law also aims to ensure recovery, rehabilitation and reintegration of trafficked persons into the mainstream society. Thus, concerned government agencies are required to render the following services to trafficked persons:

- (a) Emergency shelter or appropriate housing;
- (b) Counselling;
- (c) Free legal services which shall include information about the victims' rights and the procedure for filing complaints, claiming compensation and such other legal remedies available to them, in a language understood by the trafficked person;
- (d) Medical or psychological services;
- (e) Livelihood and skills training; and

- (f) Educational assistance to a trafficked child.

Sustained supervision and follow through mechanism that will track the progress of recovery, rehabilitation and reintegration of the trafficked persons shall be adopted and carried out.

Section 24 enumerates other services for trafficked persons and these are:

- (a) Legal Assistance. – Trafficked persons shall be considered under the category “Overseas Filipino in Distress” and may avail of the legal assistance created by Republic Act No. 8042, subject to the guidelines as provided by law.
- (b) Overseas Filipino Resource Centres. – The services available to overseas Filipinos as provided for by Republic Act No. 8042 shall also be extended to trafficked persons regardless of their immigration status in the host country.
- (c) The Country Team Approach. – The country team approach under Executive Order No. 74 of 1993 shall be the operational scheme under which Philippine embassies abroad shall provide protection to trafficked persons insofar as the promotion of their welfare, dignity, and fundamental rights are concerned.

The DFA, in coordination with DOLE and other appropriate agencies, shall have the primary responsibility for the repatriation of trafficked persons, regardless of whether they are documented or undocumented as stated under Section 25.

If, however, the repatriation of the trafficked persons shall expose the victims to greater risks, the DFA shall make representation with the host government for the extension of appropriate residency permits and protection, as may be legally permissible in the host country.

In order to have the sufficient funding in the implementation of the law under Section 28, heads of the departments and agencies concerned are supposed to include in their programs and issue such rules and regulations, the funding of which shall be included in the annual General Appropriations Act.

TAJIKISTAN⁹⁶JUDICIAL DECISIONS⁹⁷**Implementation of the law of terrorism by the Judiciary**

THE RESOLUTION⁹⁸ OF THE SUPREME COURT OF THE REPUBLIC OF TAJIKISTAN “ON THE PRACTICE OF IMPLEMENTATION OF THE LAW ON TERRORISM BY THE COURTS”⁹⁹

The Supreme Court of the Republic of Tajikistan
2 October 2003

“Terrorism is one of the most dangerous crimes of the present world of both national and international character. Terrorism is aimed at undermining state authority and at creating a sense of fear and helplessness among the population caused by organized and cruel violence committed by terrorists.”

In response to the many questions raised by the courts on the implementation of the law on terrorism, the Supreme Court of Tajikistan has determined:

1. Attention of the courts must be drawn to the nature of terrorism. Terrorism is one of the forms of criminal breach which is based on an intention of the perpetrator to spread fear and panic among others, paralyze social activities of citizens, and paralyze the normal functioning of state bodies with the aim of achieving anti-social objectives.
2. The Courts should recall that questions of suppression of terrorism are reflected not only in the Criminal Code of the Republic of Tajikistan, but also in the UN International Convention for the Suppression of Terrorist Bombing of 15 December 1997; the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23 September 1971; the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons of 14 December 1973, and the Law of the Republic of Tajikistan on “Suppression of Terrorism” of 16

⁹⁶ Contributed by Tahmina Karimova, Intern, International Criminal Court, The Hague.

⁹⁷ The Tajik Judicial System stands for a well structured and complex organization. The Constitutional Court, Supreme Court, and Supreme Economic Court are set at the top of the judicial hierarchy in accordance with the Constitution of Tajikistan. Each of the courts has its own place in the system and is endowed with competencies that are pertinent exclusively to it. [Article 1 of the Law “*On the Constitutional Court of Republic of Tajikistan*”, adopted 2 November 1995 Ahbori Majlisi Olii Jumhurii Tojikiston (Registry of the Tajik Parliament) Issue 21, p. 223].

⁹⁸ Provided by the Supreme Court of Tajikistan

⁹⁹ The text of the resolution reflected in the paper is not complete and does not correspond to the original, as some of the parts had to be shortened and summarized due to considerations of space.

November 1999. These normative acts define the basics for the suppression of terrorism in Republic of Tajikistan and the courts should be guided by these rules.

3. Generally, the term “terrorism” is understood to include explosion, arson, the firing of arms, and other acts that create the risk of casualties, cause considerable material loss, or other dangerous infringements upon public life with an intention to infringe upon public security, terrorize the population, or influence the decision making process of the authorities as well as the threat to commit these acts for the same purposes.

4. Terrorism is a multi-object crime [...] The frightening effect of terrorism is aimed, as a general rule, at an unidentified range of people (populations of entire cities, and districts, or specific officials).

5. Terrorism is committed through actions expressed in two forms. Firstly, explosions, arson, organization of accidents and devastations, the rendering out of order of vital objects, the utilization of radioactive and poisonous substances, or other acts that create risk of casualties, cause considerable material loss or other dangerous consequences and, secondly, terrorism can be expressed in the threat to commit the abovementioned acts.

Threat is an intention to commit an act of terrorism that is accompanied by a statement testifying to the actuality and seriousness of such an intention. The threat to commit any other action does not constitute the content of terrorism, but can constitute the content of other crimes (for instance, Article 120 of the Criminal Code of Tajikistan: the threat to commit homicide, or Article 328 of the same code: use of violence against an official).

6. Crime is deemed completed on the condition that the enumerated acts are committed and they create real danger; the real danger is evaluated on the basis of materials containing information about the time, place, circumstances, means, expert analysis, etc. The risk of casualties should be understood as the existence of a risk to the life of at least one person. As for the extent of material damage, it is assessed on the basis of the cost and importance of material valuables...

7. Qualified types of terrorism are provided by Article 179, parts 2 and 3, of the Criminal Code of the Republic of Tajikistan.

8. Any person of sound mind who by the time of the commission of crime has reached the age of 14 can be considered as a subject of terrorism. [...] The courts should take into account that persons who are not members of terrorist organization, but have committed the crime of terrorism on behalf of an organization or have participated in the establishment of an organization, or have provided finance, training, and arms, qualify nevertheless as members of a terrorist organization.

9. Terrorism is committed as a result of a direct intention to infringe upon public security, terrorize the population, or influence the decision making process of the authorities, or inflict physical harm on an official or a public person or any other representative of the authorities. The subjective element of terrorism that has caused the accidental death of a person or other heavy damage is qualified as double guilt, i.e., the direct intention to commit a terrorist act, and negligence (both thoughtless and careless) towards other consequences. Public security should be understood as a state of safety of vital interests of the society, i.e., a combination of needs, the satisfaction of which provides preservation and the progressive development of the society.

10. Commentaries to Article 179 of the Criminal Code refer to a norm of inducement that permits the release of a person who has participated in preparations of an act of terrorism from criminal responsibility, if he or she warns the authorities in a timely manner or has facilitated the prevention of an act of terrorism by other means on the condition that actions of this person do not constitute the content of another crime. Warning “in a timely manner” purports to represent the opportunity to prevent the terrorist act or consequences provided in Article 179 of the Code.

11. Terrorism differs from other crimes that are similar in their objective characteristics (Article 255 of the Criminal Code: the intentional destruction of and damage to property; Article 309: sabotage). The crime of terrorism does not contain the element of intent to damage the economic system of Tajikistan as in the case of sabotage (Article 309 of Criminal Code). [...] The difference between terrorism and a terrorist act (Article 310 of Criminal Code) lies in the direction of the intent, i.e., in the case of a terrorist act, an attempt on the life of the victim is committed as a consequence of his/her status as an official (a representative of authority) or in revenge for his/her activities. Terrorism creates danger to an unidentified section of the population and pursues the aim to violate public security, terrorize the population or influence the decision making process of the authorities.

12. The courts should consider that criminal cases of terrorist character as well as civil cases concerning reparations for damages caused as a result of terrorist activity may be heard in closed sessions in accordance with decision of the relevant court.

13. In each case of terrorism, the courts should clarify the causes and conditions that prompted the commission of such a crime and, in addition, find out shortcomings in preventive works, disclose violations in the preliminary investigation stage and react to such situations in accordance with Article 16 of Criminal Procedural Code.”

NATIONAL LAWS ON INTERNATIONAL LAW MATTERS

Suppression of extremism**The Law “On the Suppression of Extremism”¹⁰⁰****Adopted 8 December 2003**

The law establishes the legal and executive framework for the suppression of extremism in Tajikistan for the purposes of, *inter alia*, guaranteeing the respect of human rights and freedoms, ensuring the integrity and security of the state, and ensuring the compliance of Tajikistan with its obligations under international law in the area of suppression of extremism, etc. The Constitution, the Criminal Code, the present law, and international treaties recognized by Tajikistan constitute the legal basis for the suppression of extremism in the territory of the country.

The suppression of this phenomenon will be carried out on the basis of principles of recognition and respect for human rights and freedoms, principles of legality, the security of Tajikistan, the priority of measures aimed at preventing extremist activities, principles of cooperation, and the accountability of those responsible for acts of extremism.¹⁰¹ The law defines “extremism” as a manifestation of extreme forms of actions that bring about destabilization or a change in the constitutional system, the seizure of power, and incitement to racial, national, social, and religious hatred. Defining “extremist actions”, the relevant provision adds to the abovementioned list mass disturbances, acts of vandalism, and propaganda of the exclusiveness, superiority or inferiority of citizens on the ground of their attitude towards religion, or their belonging to a specific social, racial, or linguistic group. Additionally, public appeal to commit these acts and financing and other ways of supporting extremism constitute acts of extremism.¹⁰²

The suppression of extremism is mainly coordinated by the Ministry of Security, the Ministries of Foreign and Internal Affairs, the Ministry of Justice, the Committee on Protection of the State Border, and others.¹⁰³ Article 9 provides a number of measures that state agencies may undertake as a preventive action against extremism. The following acts against which preventive action can be taken are prohibited: the setting up of an extremist organization; conducting activities related to the propaganda of extremism including dissemination of extremist material; permitting entrance and/or exit and granting residence to persons involved in extremist activities, and holding meetings, demonstrations and any other public performances that violate the laws of Tajikistan. The list of prohibited acts may expand if obligations under international treaties to which Tajikistan is a party so require.

The legislation, in addition, regulates issues of the accountability of public associations, and religious and other non-commercial organizations responsible for conducting extremist activities. Dissemination of material of extremist content and

¹⁰⁰ The Law “On Suppression of Extremism” provided by the Encyclopaedia of Tajik Law *Adliya*.

¹⁰¹ *Ibid.* Article 4

¹⁰² *Ibid.* Article 3

¹⁰³ *Ibid.* Article 7

usage of the worldwide web and mass media for extremist purposes are also subject to the restrictions of this set of rules. A ban on public association, religious and other non-commercial organizations, the mass media, etc. as a result of the conduct of extremist activities can be appealed against in judicial bodies.

Free Economic Zones

The Law “On Free Economic Zones in the Republic of Tajikistan”¹⁰⁴ Adopted 29 April 2004

In general terms, the law “On Free Economic Zones in the Republic of Tajikistan” defines the organizational, legal, and economic framework that provides the basis for the setting up, functioning, and liquidation of free economic zones. According to the normative act, a free economic zone is a separate (limited) segment of the territory of Tajikistan that is ruled by a special fiscal regime and customs, affords the simplified entrance and exit of non-residents, and provides concessionary conditions on the use of natural resources.¹⁰⁵

Free economic zones are established to create favourable conditions to attract foreign investment, technology and managerial experience; to develop the perspectives of the region with the support of foreign investments using the material and financial means of domestic enterprises and organizations; to generate a modern social and industrial infrastructure; to enrich the domestic market with goods and products, and to enhance the level of employment as well as the standards of living of the population.¹⁰⁶

Free economic zones may take different functional structures. They may, among others, specialize in such areas as manufacturing, science and technology, export, import, trade, tourism, recreation, investment, stock-exchange, banking, and other areas as provided by law.¹⁰⁷ The law sets rules governing the borders, subjects of the free economic zones, and rules governing the registration procedure of the subjects.¹⁰⁸ The state guarantees the respect of rights and interests of all individuals and legal personalities functioning in the territory of the free economic zone.¹⁰⁹ An administration formed by the government of Tajikistan will be in charge of managing free economic zones. Functions of administration include working out programmes of development of free economic zones; the protection of the interests of producers and consumers; ensuring the integrity and effective functioning of the zones; creating necessary conditions to attract domestic and foreign investments, and

¹⁰⁴ The Law “On Free Economic Zones in the Republic of Tajikistan” provided by the Encyclopaedia of Tajik Law, *Adliya*.

¹⁰⁵ *Ibid.* Article 1

¹⁰⁶ *Ibid.* Article 2

¹⁰⁷ *Ibid.* Article 4

¹⁰⁸ *Ibid.* Articles 5,6,7

¹⁰⁹ *Ibid.* Article 8

controlling the implementation of the legal regime set in the free economic zone, etc.

As mentioned before, free economic zones imply special customs and fiscal regimes; under the former, the government affords full or partial abolition of customs tariffs on the import of goods, the simplified circulation of goods and vehicles, and cessation of non-tariff policy measures. The special fiscal regime means full or partial tax exemption for the activities carried out by subjects in free economic zones.¹¹⁰ The concluding provisions of the law set down rules to homogenize budgetary issues, employment, insurance and dispute settlement.

Anti-trafficking in Persons legislation

The Law “On the Suppression of the Traffic in Persons”¹¹¹ Adopted 30 June 2004

The Tajik legislation enacted the law “On the Suppression of the Traffic in Persons” on 30 June 2004 for the purpose of the implementation of state policy in the sphere of the suppression of the traffic in persons, for compliance with international obligations and to reduce the risk of persons of becoming victims of such a crime.¹¹² The law provides the definition of the “traffic in persons” and defines the latter as:

Sale of persons with or without their consent by means of deception, of recruitment, of transport, of harbouring, of transfer, of abduction, of fraud, of the abuse of power or of a position of vulnerability, or of giving and receiving payments or benefits to achieve the consent of a person having control over another person, and other forms of compulsion for the purpose of further sale, involvement in sexual and criminal activity, exploitation in armed conflicts, in pornographic business, forced labour or services, slavery or practices similar to slavery, servitude, debt bondage or adoption for commercial purposes.

In general terms, the definition above corresponds to a certain extent with the definition provided by the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children to the UN Convention against Transnational Organized Crime in terms of identifying some of the means of trafficking provided by international instruments (i.e., deception, abduction, fraud, etc.). The Tajik law in this regard avoids outlining “threat or use of force” as one of the means of trafficking; instead, the legislative act provides the more generalized term of “other forms of coercion”. While the definition given in the Protocol identifies the recruitment, transfer, harbouring, or receipt of persons as forms of trafficking, the Tajik

¹¹⁰ *Ibid.* Article 14

¹¹¹ The Law “On the Suppression of the Traffic in Persons” provided by the Encyclopaedia of Tajik Law *Adliya*.

¹¹² *Ibid.* Article 3

legislation categorizes the abovementioned as means of trafficking, along with deception, abduction and fraud.

The law covers all categories of trafficked people, i.e., not only women and children, but also men. The law additionally defines the terms “trafficker of persons”, “victim of trafficking”, “recruitment”, “exploitation”, “forced labour”, “slavery”, “debt bondage”, etc. It also provides the scope of offences that are connected to the traffic in persons and regulated in the criminal legislation of the Republic of Tajikistan.

According to this law, the legal sources for regulation of the suppression of the traffic in persons or, in other words, the normative framework of trafficking, are comprised in the Constitution as the primary source, the present law being analyzed and all international treaties recognized by Tajikistan.

According to the law on trafficking, legality, the responsibility of traffickers, non-discrimination against the victims of trafficking, the secure and just treatment of victims of trafficking, access to justice, and cooperation with NGOs and societies are the primary principles in the suppression of trafficking in persons.

Article 5 of the Law provides for the classification of the traffic of persons. The classification is based on two elements:

1. Means of coercion, and
2. Context of the exploitation of victims of traffic.

The law includes the following in the first category:

- physical coercion with the use of force and/or use of narcotic substances, alcohol, or medication;
- material coercion in the form of debt bondage or any other form of material dependence including slavery or conditions similar to slavery;
- psychological coercion by means of blackmail, deception, or threat of use of force;
- legal dependence due to adoption or guardianship, or due to marriage without the object of creating a family.

The second category – the context of exploitation of the victims of trafficking includes:

- exploitation of the physiological organs of a human being, namely, transplantation of organs and tissues, including the use of a woman as a surrogate mother;
- exploitation of labour in domestic and consumer service, in the field of production, in agricultural works, as well as in criminal business (participation in armed groups, in the domain of illicit goods production);
- exploitation for sexual purposes;
- exploitation of persons in armed conflicts.

Articles 6 through 10 develop provisions regarding the state agencies that represent the main actors in the suppression of traffic in persons; the provisions define

the scope of responsibility for each organ. The law specifically envisages that the state agencies participate in the suppression of the trafficking by means of the elaboration and realization of preventive, organizational, informational, and other measures to prevent, disclose, and suppress trafficking.

For the purpose of coordination, the law specifically sets the legal basis for the creation of the Interagency Commission on Suppression of Traffic in Persons. The Interagency Commission is in charge of framing the state policy regarding trafficking, conducting outreach campaigns on the suppression of traffic in persons, and is the focal point for gathering information regarding the scale and situation of trafficking. The Commission is also in charge of developing and participating in the development of international agreements concerning matters of trafficking.

The system of preventive measures provided under the law envisages among others the following activities:

- monitoring of problems of the traffic in persons;
- developing a programme encouraging employers to hire victims of traffic in persons;
- developing a programme directed towards the elimination of social problems that create conditions for traffickers to expand their activities;
- informing the population about dangerous situations that can bring about victimization, about the measures of protection provided by state agencies, and about measures taken by the state to suppress the traffic in persons.

In terms of addressing the needs of the victims of trafficking, the law has established the legal basis for the creation of specialized agencies and centres providing support for victims of trafficking. For this purpose the centres may provide accessible information on judicial and administrative procedures to defend victims' rights; provide qualified psychological and medical assistance; facilitate the reintegration of the victims into their families and society, and provide temporary shelter for the victims of trafficking.

Articles 16 and 17 of the Law on Suppression of Traffic in Persons regulate issues of the social rehabilitation of the victims of trafficking, and provide protection measures for victims. Protection measures include but are not limited to restriction of information available to the public about victims; prohibition of the dissemination of information about victims that may endanger their security; in cases where there is a threat to the life and the health of the victim, the victim may change his/her name and other personal data according to the procedure established by the law.

Article 19 of the law provides a number of guarantees to children who are victims of traffic in persons. Specifically, the provision provides that in the case of providing support and assistance to children, all necessary measures in the best interests of a child as provided by the Convention on the Rights of the Child should be taken. The legal provision, among other requirements, stipulates that children should be placed separately from the adults' premises and should be allowed to attend educational institutions.

Article 21 sets the framework for international cooperation in suppression of traffic in persons; in particular the provision provides that Tajikistan will cooperate with other countries and international organizations acting towards the suppression of trafficking in accordance with the principles set by international law.

Suspension of the Death Penalty

The Law “On the Suspension of the Death Penalty”¹¹³ Adopted 15 July 2004

This act was preceded by the law adopted on 1 August 2003 that has excluded the death penalty as a form of punishment from ten articles of the Tajik Criminal Code: Article 181 part 3 (hostage taking); Article 184 part 3 (hijacking); Article 186 parts 1 and 2 (gangsterism); Article 200 part 3 (the illicit distribution of drugs); Article 204 part 4 (the illicit cultivation of prohibited plants containing narcotic substances); Article 249 part 4 (robbery); Article 306 (the violent seizure of power or violent preservation of power); Article 310 (an attempt on the life of an official or public person); Article 395 part 2 (aggressive war), and Article 403 part 2 (a deliberate violation of the norms of international humanitarian law).

Subsequently, the death penalty as an exclusive form of punishment was still allowed under Article 104 part 2 (homicide); Article 138 part 3 (rape); Article 173 part 3 (terrorism); Article 398 (genocide), and Article 399 (biocide). However, the President of the country declared the suspension of the death penalty and this has resulted in the adoption of a relevant law in July of the same year. The death penalty has been replaced by 25 years of imprisonment.

¹¹³ The Law “On the Suspension of the Death Penalty” provided by the Encyclopaedia of Tajik Law *Adliya*.

THAILAND¹¹⁴

JUDICIAL DECISIONS

Extradition of foreign nationals – political offenceTHE PUBLIC PROSECUTOR v. TERM POMTAVEE AND OTHERS¹¹⁵**Court of Appeal, 18 November 2003 (BE 2546)****(Black Case No. 6872/2546, Red Case No. 9951/2546)****Chalermchai Jarupaiboon, Pornpet Vichithornlachai and Surasak Kittipongpattana JJ**

On 25 March 2002, the Ministry of Foreign Affairs of the Lao People's Democratic Republic (LPDR) sent a diplomatic note to the Ministry of Foreign Affairs of Thailand requesting the Thai Government provisionally to arrest and extradite seventeen Defendants, who were Laotian nationals, to the LPDR in accordance with Article 9 of the Treaty on Extradition between the Kingdom of Thailand and the Lao People's Democratic Republic of 1999.¹¹⁶ A warrant of arrest had been issued by the LPDR's Champasak Office of Public Prosecutors against the seventeen Defendants, charging them with gang robbery pursuant to the LPDR's Penal Code,¹¹⁷ punishable with imprisonment for more than a year. A brief chronology of events, as provided by the LPDR, is as follows.

¹¹⁴ Contributed by Mattanee Kaewpanya, Ministry of Foreign Affairs, Thailand.

¹¹⁵ There were 17 defendants, one of whom died during the extradition trial. The remaining 16 defendants with Laotian nationality in this case were: Mr. Vichai Chaiyajak, Mr. Suriya Samart, Mr. Seng Champa, Mr. Lom Chalikhorm, Mr. Napa Pobandith, Mr. Kaen Singkoomkrong, Mr. Kum Chaiyawong, Mr. Dorn Suriyachan, Mr. Som Chaiyawong, Mr. Pisan Linthang, Mr. Seng Chai-boonya, Mr. Boonrod Kensuwan, Mr. Tongdee Hormnol, Mr. Pairin Chaiboonya, Mr. Kaew Boatong, and Mr. Suage Sengsura.

¹¹⁶ The Treaty came into effect on 1 March 2001. Article 9 of the 1999 Treaty is about requesting a provisional arrest by one Contracting Party. In doing so, a Contracting Party has to submit a request in writing through diplomatic channels or through the International Criminal Police Organization (INTERPOL), which shall contain a description of the person sought; the location of that person, if known; a brief statement of the facts of the case; a statement of the existence of a warrant of arrest or judgment against that person, and a statement that a request for extradition of the person sought will follow.

¹¹⁷ This is similar to Section 340 of the Penal Code of Thailand, which reads:

"Whenever three or more persons participate in committing robbery, such persons are said to commit gang robbery and shall be punished with imprisonment of ten to fifteen years and a fine of twenty thousand to thirty thousand Baht.

If in the commission of the gang robbery any one of the offenders carries arms, the offenders shall be punished with imprisonment of twelve to twenty years and a fine of twenty-four thousand to forty thousand Baht..."

On 3 July 2000, at approximately 03.05 a.m., the seventeen Defendants and other accomplices¹¹⁸ armed themselves with firearms and illegally entered the Wang Tao Border Checkpoint, Ponethong District, Champasak Province, LPDR. They stole public property and the belongings of the local people by using violent force. Moreover, they started firing their weapons to threaten the public, and caused damage to an exchange bureau of the National Bank, an immigration office, a customs office, and shops, as well as a private company. They took the government officials and staff of the private company hostage to negotiate their own safe passage, along with the stolen valuables in their possession.

The Lao Army arrived at the scene to take control of the situation. However, this led to further gunfights between the two sides which resulted in the deaths of six men on the Defendants' side. Some survivors managed to escape and flee into Thailand, leaving behind some firearms and cash which were seized by the Lao authority and exhibited before the Court.

The seventeen Defendants were subsequently arrested by Thai police officers in Ubon Ratchathani Province, Thailand, and were brought to trial before the Ubon Ratchathani Provincial Court¹¹⁹ on the charges of 1) entering and leaving the Kingdom of Thailand without permission, and 2) staying in the Kingdom of Thailand without permission.¹²⁰ The Provincial Court rendered its judgment on 19 March 2002 in 'Criminal Case, Black Case No. 2482/2543 and Red Case No. 906/2545', sentencing the sixteen of the Defendants to one year and nine months of imprisonment, and the seventeenth defendant to three years and nine months of imprisonment.¹²¹

Acting upon the LPDR's extradition request, the Prosecutor petitioned the Criminal Court, requesting the arrest and extradition of the seventeen Defendants to stand trial before a court of competent jurisdiction in the LPDR. The Criminal Court rendered its decision on 11 June 2003 in 'Criminal Case, Black Case No. Phor 4/2545 and Red Case No. Phor 4/2546', denied the Prosecution's motion, and instead ordered the release of all of the seventeen Defendants after the completion of their aforesaid sentences in Thailand. Having examined witnesses and the evidence, the Criminal Court was of the opinion that the Defendants' acts were not for private purposes, but were intended forcibly to demand the Government of the LPDR to comply with their request to change the system of government from Communism to Democracy. Therefore, such acts were considered by the Criminal Court to be political in nature and thus were not extraditable under Section 13(3) of the Thailand's Extradition Act BE 2472 (see below). In addition, the witnesses' account and evidence presented

¹¹⁸ There were eleven accused accomplices with Thai nationality.

¹¹⁹ In Thailand, provincial courts have jurisdiction in both criminal and civil matters, and are identified by the name of the provinces where they are located.

¹²⁰ Sections 11, 18 (para. 2), 41, 58, 62 and 81 of the Thai Immigration Act B.E. 2472 (1929 A.D.).

¹²¹ This was due to the fact that the 17th defendant in that case had illegally brought unregistered weapons into the Kingdom of Thailand, which is an offence under Sections 7, 55, 72 para 1, and 78 para 1 of the Firearms Ammunitions Explosives Firecrackers and Artificial Firearms Act BE 2490 (1947).

by the Prosecutor were not enough to persuade the Criminal Court to decide otherwise. The Prosecutor lodged an appeal with the Court of Appeal within the requisite 15 days in accordance with Section 14 of the Extradition Act BE 2472.

The Court of Appeal considered factual submissions from both sides and started its opinion by mentioning that when the incident took place in the year 2000, the Extradition Treaty between the Kingdom of Thailand and the LPDR had not yet come into force. Therefore, the Court of Appeal had to examine the provisions of the Extradition Act BE 2472, which was the relevant law governing this matter.

Pursuant to Section 4 of the Act, in the absence of an extradition treaty, the Royal Thai Government may, at its discretion, surrender to foreign States persons accused or convicted of crimes committed within the jurisdiction of such States, provided that by Thai law such crimes are punishable with imprisonment of at least one year and other requirements are met.

The Court of Appeal found that the *prima facie* facts satisfied the conditions for extraditing these offenders to the LPRD. Firstly, there was at least one diplomatic note requesting the extradition of all seventeen Defendants. Secondly, these Laotian Defendants were clearly those wanted by the Government of the LPDR. Thirdly, they had already been charged with gang robbery by the Jumpasak Office of Prosecutor of the LPDR. Lastly, the offence was punishable by Thai law with imprisonment of more than a year.¹²²

However, on the Defendants' argument that the crimes were of a political nature, the Court of Appeal had to bear in mind the provision in Section 13(2) and (3) of the same Act, which reads as follows:

The court need not hear evidence for the accused in his defence except upon the following points:

- (1) That he is not the person wanted;
- (2) That the offence is not extraditable or is of a political character;
- (3) That his extradition is in fact being asked for with a view to punishing him for an offence of a political character;
- (4) His nationality.

On this point, from the accounts of the incident by witnesses, especially by three Thai military personnel working at the time of the incident at the Thai Border Checkpoint located not far from the scene of the incident, the Court of Appeal was convinced that the seventeen Defendants were members of a national liberation movement attempting to liberate the LPDR from Communism. Moreover, at the time of the incident, while some Defendants were wearing military uniforms and others were wearing normal civilian attire, each of them wore a red scarf around his neck as a sign of being on the same side. After taking control of the Wang Tao Border Checkpoint, some of them in the group replaced the LPDR's national flag with a red flag with a three-headed elephant in the middle. They also kept more than ten

¹²² See note 3 above.

people hostage somewhere near the Thai-Lao border until the following morning, before the gunfight between them and the LRDP Army broke out.

The Court of Appeal concluded that all of these factors made the Defendants' acts political in character, taking also into account national and political unrest in the LDPR after the incident. In addition, the Court of Appeal suggested that by taking hostages and keeping them for some time after the armed robbery showed that such an incident was not intended to be a normal gang robbery but, in fact, indicated an intention to cause unrest in the local area in order to draw international attention, and to disturb the Communist regime in the LPDR. The Court of Appeal, therefore, decided that, by virtue of Section 13(2) and (3) of the Extradition Act BE 2472, the Defendants' offences were not extraditable ones. Thus, the judgment of the Criminal Court was affirmed and the appeal by the Prosecution was dismissed.

Extradition of foreign nationals – political offence

THE PUBLIC PROSECUTOR v. SOK YOUEN A.K.A. SOK YUEN

Court of Appeal, 30 September 2003 (BE 2546)

(Black Case No. 1668/2546, Red Case No. 8630/2546)

Suriya Dethdan, Thanith Keasawapitag and Tawat Sethtamonkhon JJ

The Defendant, who fled to and hid in Thailand around the year 1999, was accused by the Cambodian authorities of committing two offences, namely, (a) the attempted murder of Prime Minister Hun Sen of Cambodia on 24 September 1998, resulting in losses of life and property damage; and (b) the illegal possession of firearms. The first offence is punishable with imprisonment of ten to twenty years, whereas the second one is punishable with imprisonment of six months to three years. An arrest warrant was issued by the Cambodian military court.

The Criminal Court, after examining the facts of the case as well as contentions and arguments from both sides, reached the following conclusions. Firstly, the Defendant was the person named in the extradition request. Secondly, his offences were extraditable offences under the Extradition Act BE 2472 (there being no extradition treaty between Thailand and Cambodia in force at the time of the extradition request). Finally, the offences were not of a political character. The Criminal Court, therefore, ordered that the Defendant be detained with a view to his extradition.

The Defendant lodged an appeal against the decision of the Criminal Court¹²³ to extradite the Defendant to Cambodia, pursuant to Section 15 of the Extradition Act BE 2472 and authorizing his detention pending extradition.

The Defendant's appeal to the Court of Appeal contended, *inter alia*, that his offences were of a political nature and/or that his extradition was in fact being sought in order to punish him for his membership of an opposition political party in Cam-

¹²³ Facts and the decisions of the Criminal Court of this case (Black Case No. Phor. 6/2543; Red Case No. Phor. 7/2545 on 28 November 2002) were published in the *Asian YIL*, Vol. 10, 2001-2002, State Practice Section, pp 249-252.

bodia. Moreover, the Defendant argued that he was granted refugee status by the UNHCR under Article 33 of the 1951 UN Convention relating to the Status of Refugees. Therefore, Thailand would have an obligation not to extradite him to the Cambodian authority.

The Court of Appeal made the following factual findings. There had been regular armed conflicts in Cambodia up to the Paris Conference of 1991, resulting in general elections being held under UN supervision in 1993 and 1998. After the elections, despite the fact that there were some clashes among political parties, including the political party to which the Defendant belonged, the political situation, in general, was peaceful. Even if the attempted murder of Mr. Hun Sen had been successful, this would have led to a change of the person in charge of the government, but not of the political regime as a whole. Thus, the Defendant's offences were not political in nature. Rather, they were criminal offences with the ultimate aim to cause unrest in the nation, or acts of terrorism. In addition, it was doubtful that, once being extradited, the Defendant would be put on trial for any political offence, other than possibly being forced to confess that Mr. Sam Rainsy, the leader of the political party to which the Defendant belonged, was the mastermind behind the Defendant's acts, and this possibility was not within the jurisdiction of Thai Courts.

The Court of Appeal rejected the Defendant's contention on his refugee status granted by the UNHCR pursuant to Article 33 (1) of the 1951 UN Convention relating to the Status of Refugees, as the Defendant himself acknowledged in his appeal that Thailand was not party to the 1951 UN Convention.

The other arguments put forwarded by the Defendant were also rejected by the Court of Appeal as unfounded and the appeal was dismissed.

OTHER RELEVANT STATE PRACTICE

Registration of partnership between same-sex partners at a foreign embassy

Private International Law: Registration of partnership between same-sex partners at a foreign embassy in Thailand

In March 2003, the Embassy of Sweden in Bangkok sent a diplomatic note to the Ministry of Foreign Affairs, Thailand, requesting a legal opinion on the following issues, namely, 1) whether it was permissible for the Embassy to perform the registration of partnership between same-sex partners at the Embassy premises in Bangkok, and 2) whether such registration was permissible under Thai laws and regulations and, if it was, whether there were any conditions thereof.

According to Swedish family law, which has been in force since 1 January 1995,¹²⁴ such registration of partnership is allowed for two persons of the same

¹²⁴ The Swedish Registered Partnership Act 1995; Section 1 (under Chapter 1: Registration of partnership) provides that two persons of the same sex may request the registration of their partnership.

sex. Furthermore, in practice, the Embassy of Sweden now registers regular marriages between two persons of opposite sexes insofar as one partner is a Swedish citizen and the other partner is a Swedish citizen or a foreign citizen (but not a Thai citizen); and as one of the persons in question has been living in this country for at least one year. The marriage ceremonies at the Embassy of Sweden in Bangkok are performed by the Ambassador or his Deputy Chief of Mission. As such, the Embassy, thus, suggested that similar rules be applied to same-sex registrations of partnership at the Embassy in Bangkok.

The Department of Treaties and Legal Affairs, Ministry of Foreign Affairs of Thailand, issued a legal opinion on this matter¹²⁵ in its Memorandum No. 0802/190/2547 dated 5 February 2004 in reply to the request for a legal opinion from the Department of European Affairs of the same Ministry as follows:

a. Relevant International Law

Article 5 (f) of the Vienna Convention on Consular Relations 1963 clearly stipulates that a consular representative has a function in 'acting as notary and civil registrar and in capacities of a similar kind, and performing certain functions of an administrative nature, provided that there is nothing contrary thereto in the laws and regulations of the receiving State'.

b. Relevant Thai Laws and Regulations

1. Part 5 of the Conflict of Laws Act BE 2481 (1938 AD) deals with situations where a couple of more than one nationality desires to have registration of partnership in Thailand. Section 19 provides that the conditions of marriage shall be governed by the law of nationality of each party to the marriage. By virtue of Section 20, a marriage in accordance with the form prescribed by the law of the country where such marriage takes place shall be valid. Pursuant to Section 15 of the same Act, whenever the law of a foreign country is to govern, it shall be applied insofar as it is not contrary to the public order or good morals of the Kingdom of Thailand.

2. Sections 1448-1460 of the Thai Civil and Commercial Code on Family Law clearly state that a marriage can take place only between a man and a woman.¹²⁶

Having examined the applicable law relating on this matter, the Department of Treaties and Legal Affairs was of the opinion that although the Swedish Government has approved the registration of partnership between same-sex partners, such registration will be lawful and applicable only within Sweden or in other States whose legal systems recognize such registration of partnership for same-sex partners, but not in accordance with the Thai laws and regulations.

¹²⁵ Based on an opinion given by a Foreign Affairs Division of the Ministry of Interior of Thailand in its Note to the Ministry of Foreign Affairs No. MI 0204.1/10599 dated 15 September 2003.

¹²⁶ Chapter II: Conditions of Marriage, The Thai Civil and Commercial Code, Book V.

Furthermore, despite the fact that there are no clear laws or regulations governing such registration in Thailand, such partnership registration is not compatible with the fundamental norms of established laws and regulations; namely, the Civil and Commercial Code, particularly the public order or good morals of Thailand. Therefore, such registration of partnership between same-sex partners, even inside the Swedish Embassy's premises in Thailand, does not conform to Thai laws and thus, is not permissible under the Thai legal system.

Counter-terrorism laws

Domestic Laws to Counter International Terrorism: the Amendment to Section 135 of the Thai Penal code

With the increasing threat of international terrorism and as a Member State of the United Nations having an obligation to implement the UN Security Council's resolutions adopted under Chapter VII of the UN Charter, particularly UN Security Council Resolutions 1267 (1999), 1333 (2000) and 1390 (2002), Thailand has promulgated a Royal Decree to amend provisions relating to criminal offences and commission of terrorist acts in Section 135 of the Penal Code BE 2546 (2003) as follows.¹²⁷

- Section 135/1 includes definitions of terrorist offences, based largely on definitions of criminal acts under Article 2 of the Draft Comprehensive Convention on International Terrorism then pending before the Sixth Committee of the UN General Assembly. In this Section, whoever commits any of the following criminal offences:
 1. an act of violence or any act to cause death or serious injury to the life and freedom of an individual;
 2. an act causing serious damage to a public transportation system, a telecommunication system, or an infrastructure facility of public use;
 3. an act causing damage to property belonging to a State or an individual, or the environment, resulting or likely to result in major economic loss...
 and if the commission of the offence is intended to threaten or coerce the Royal Thai Government, or any foreign government, or an international organization, to do or abstain from doing any act, thus, causing serious damage, or is intended to create unrest so as to intimidate a population, that person is said to commit a terrorist act and shall be punished with death, imprisonment for life, or imprisonment of three to twenty years and fine of sixty thousand to one million Baht.

Nevertheless, any demonstration, gathering, protest, objection or movement that calls for the government's assistance or for fair treatment, as an exercise of the freedom under the Thai Constitution, shall not be regarded as a terrorist offence.

¹²⁷ Royal Decree on the Amendment of the Penal Code B.E. 2546 (2003)

- Section 135/2 lays down principles for acts of preparation leading to commission of terrorist offences, mainly that whoever:
 1. threatens to commit a terrorist act by demonstrating behavior which leads to a reasonable belief that the person will do as he/she has threatened;
 2. collects forces or firearms, provides or compiles any assets, gives or receives training relating to terrorism, makes preparations for or conspires to commit a terrorist act, or commits any offence which is part of the plot to commit a terrorist act, or instigate people to partake in committing a terrorist act, or does any act to conceal the knowledge of the commission of a terrorist act...

shall be punished with imprisonment of two to ten years and fine of forty thousand to two hundred thousand Baht.
- Section 135/3 further provides that whoever is an accomplice to any offence mentioned in Section 135/1 or 135/2 shall be liable to the same punishment as a principal in such offence.
- Section 135/4 was adopted in order to assert jurisdiction over persons and groups of persons listed by UN as having connection with al Qaida and Taliban Groups (around 400 or more persons have been so identified). It provides that 'a person who is a member of a group designated by a United Nations Security Council resolution or declaration as a group committing an act of terrorism, which resolution or declaration has been endorsed by the Royal Thai Government, shall be liable to imprisonment not exceeding seven years and to fine not exceeding one hundred forty thousand Baht'.