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Special Report

PUBLIC INTERNATIONAL LAW BEFORE THE SINGAPORE AND MALAYSIAN COURTS

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There has been little if any systematic writing on Singapore and Malaysian international law cases in the intervening years following Professor S. Jayakumar's *Public International Law Cases from Malaysia and Singapore*, published in 1974.[1] The leading Singapore legal periodicals have not documented these cases on a regular basis. This is quite understandable as such cases would have tended to be relatively few and far between, there is often a lack of direct engagement with the public international law issues arising therein, and many of them never got beyond the lower courts. The commencement of a regular section that is devoted to the matter, such as is to be found in other national Year Books,[2] could have been considered ill-advised in these circumstances.

The publication of the present *Singapore Year Book of International Law* presents an appropriate occasion for a small attempt to be made to fill that gap, and to collect together some present-day cases where the Singapore (and to a lesser extent, the Malaysian)[3] courts have had to face public international law issues. However, since growth in the range and types of cases remains extremely slow, having a regular section might still seem overly-optimistic. In light of that, the present report is something of a compromise between having a regular section devoted to the very latest cases, and filling the need to review some of the more important previous decisions that have taken place since Professor Jayakumar's compilation. Fortunately, the period between January 2003 and July 2004 has also witnessed a fair (even perhaps uncharacteristic) amount of activity in the courts, and these cases have involved a relatively broad range of issues. Consequently, we propose to employ the discussion of these latest cases as a kind of window, and to discuss them against the background of other contemporary decisions in previous years that have touched upon similar issues.[4] In addition, reference to Malaysian cases has also been made where comparison is thought to be useful.[5]

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1 S. Jayakumar, *Public International Law Cases from Malaysia and Singapore* (Singapore: Singapore University Press, 1974).

2 The fine example of the British and Dutch Year Books comes immediately to mind.

3 Lesser to the extent only that I have chosen to emphasise the Singapore cases for the purposes of this *Year Book*, while being unable at the same time to avoid drawing appropriate comparisons with developments in Malaysia when called for.

4 While references may be made to older cases where appropriate, readers should turn to Professor Jayakumar's work for these, and especially for the many pre-Independence cases.

5 There appears to be a similar need for a systematic compilation of the Malaysian cases. This is not to say that there has not been scholarly writing on the application of international law in the Malaysian courts. Aside from the scholarly articles appearing in the *Malaysian Journal of International & Comparative Law/Jurnal*

In respect of the general approach adopted throughout this report, the aim is not to advance familiar English doctrine at the expense of how the Singapore and Malaysian courts actually treat such questions. On the contrary, the aim is to reproduce, and sometimes with some fullness, key passages from the several judgments so as to allow these to speak plainly for themselves.[6] Inevitably, there is a need in some places to tease out more fully what these various judgments might mean by what they say, and to fill in a few logical gaps.

I. Customary International Law before the Singapore Courts[7]

In *Public Prosecutor v. Nguyen Tuong Van*, the accused was a 23 year-old Australian national who was charged for an offence under section 7 of Singapore's *Misuse of Drugs Act*.[8] The judgment of the Singapore High Court in *Nguyen* provides the most explicit judicial treatment thus far of whether rules of customary international law could be considered a part of Singapore law, and if so how a customary rule could be established before the Singapore courts.[9]

A. *Article 36(1) of the Vienna Convention on Consular Relations*

The defence argued in *Nguyen* that the statements taken from the accused violated Article 36(1) of the *Vienna Convention on Consular Relations* 1963 (hereafter, the Vienna Convention).[10] The defence argued that the accused had not been advised of his rights and was not afforded an opportunity to consult with a consular officer prior to offering a statement under caution.[11] Singapore is not a signatory to the Convention, but it was contended that Article 36(1) applies to Singapore nonetheless because it amounts to customary international law.[12]

Undang-Undang that are cited in the present article, readers would also wish to refer to Tunku Sofia Jewa, *Public International Law—A Malaysian Perspective, Volume 1* (Kuala Lumpur: Pacifica Publications, 1996) especially at 23-33, 37-38, and 159.

6 A further reason is that some of the (Singapore) judgments discussed here, indeed quite a few, remain unreported, and in practical terms are accessible primarily only to scholars and practitioners in Singapore.

7 For Malaysia, see H.L. Dickstein, "The Internal Application of International Law in Malaysia: A Model of the Relationship Between International and Municipal Law" (1974) 1 *Jurnal Undang-Undang/Journal of Malaysian & Comparative Law* 204; *Public Prosecutor v. Narongne Sookpavit and Ors* [1987] 2 Mal.L.J. 100 (Mahadev Shankar J.), which is also discussed and reproduced in part in Tunku Sofia Jewa, *supra* note 5 at 29-33.

8 *Misuse of Drugs Act* (Cap. 185, 2001 Rev. Ed. Sing.)

9 *Public Prosecutor v. Nguyen Tuong Van* [2004] 2 Sing.L.R. 328 (H.C.) (Kan Ting Chiu J.), paras 30-42 and 99-108, respectively. The Singapore Court of Appeal's recent decision in *Nguyen Tuong Van v. Public Prosecutor* [2004] SGCA 47 (6 October 2004), C.A. No. 5 of 2004, was handed down as this article went to press. A commentary will appear in the 2005 *Year Book*.

10 *Vienna Convention on Consular Relations*, 24 April 1963, 596 U.N.T.S. 262.

11 *Public Prosecutor v. Nguyen Tuong Van* [2004] 2 Sing.L.R. 328 at para. 30.

12 *Ibid.* at para. 31. Article 36(1) of the Convention states:

> With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
>
> a. consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
>
> b. if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

B. *Proof of Customary International Law*

The prosecution responded by arguing,[13] first, there had been no breach of Article 36; secondly, even if there had been a breach, this could not support a challenge to the admissibility of the statements taken; and thirdly, Singapore is not a party to the Convention.

In connection with the last argument, Kan Ting Chiu J. observed that the Convention is itself silent on whether Article 36(1) is customary international law, and whether it applies to Singapore as such.[14] However, Kan J. noted that Singapore, in keeping with the established practice of other states, would notify the consular officers of the national state of the accused in such circumstances, that the Australian High Commission in Singapore had been informed in the present case,[15] and that[16]:

> Singapore holds herself out as a responsible member of the international community and conforms with the prevailing norms of the conduct between states. Specifically, the directive suggests the acceptance of the obligations set out in Article 36(1).

Therefore, "this leads me to agree with the defence counsel that Article 36(1) applies in Singapore". The learned judge also observed that "the Prosecution, which is in a good position to have knowledge of Singapore's position on this issue, did not assert the contrary".[17]

A second point of significance is the description above of what sort of standard of proof of customary international law would suffice before a Singapore judge. The classic English authorities that are still cited today for the proposition that customary international law is a part of the common law originate from the eighteenth century.[18] However, the basic proposition is said to originate even earlier, and is taken from Blackstone, who had written that: "the law of nations … is here adopted in its full extent by the common law, and is held to be a part of the law of the land".[19] But a late nineteenth century case was to cast some subsequent doubt on that proposition.

In *R v. Keyn*, a maritime collision caused the death of a passenger three miles from the English coast. By a vote of 7:6, it was held that England did not possess the requisite penal jurisdiction with which its courts could treat the matter.[20] Admittedly, the *ratio* is hard to discern with thirteen judges and a total of eleven judgments.[21] But one passage in particular in the speech of Lord Cockburn C.J. has caused much confusion[22]: "(I)t is only

> c. consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

13 *Ibid.* at para. 32.

14 *Ibid.*

15 *Ibid.* at para. 34. The directive standard operation procedures of the Central Narcotics Bureau of Singapore, reads (*Ibid.* at para. 35) in paragraph 3(c): "The Head Sector is to inform the resident or non-resident foreign mission concerned, (See sample at Annex B) giving details of the accused (full name, date of birth, passport number), date, place and time of arrest, charges preferred and trial date or place of remand (where applicable)". Kan J. concluded that other investigative agencies in Singapore would have a similar provision as part of their standard procedure.

16 *Ibid.* at para. 36.

17 *Ibid.* at para. 37.

18 *Buvot v. Barbuit* (1737) Cases t. Talb. 281 (Lord Talbot); *Triquet v. Bath* (1764) 3 Burr. 1478 (Eng., K.B.) (Lord Mansfield).

19 William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon, 1765), Book IV, Chapter 5.

20 *R v. Keyn* (1876) 2 Ex. D. 63 (Crown Cases Reserved).

21 See D.W. Greig, *International Law*, 2nd ed. (London: Butterworths, 1976) at 57, but who nonetheless agrees with the viewpoint herein expressed.

22 *R v. Keyn* (1876) 2 Ex. D. 63 (Crown Cases Reserved).

in the instances in which foreigners on the seas have been made specifically liable to our law by statutory enactment that the law can be applied to them." This has prompted some to suggest that a customary rule is not to be considered a part of English law unless made expressly a part of English law; by statute for example.[23] But this would be based on a misapprehension. The relevant point in *Keyn* was that[24]:

> Even if entire unanimity [between the various treatise writers consulted] had existed … the question would still remain, how far the law as stated by the publicists had received the assent of the civilized nations of the world …. *To be binding, the law must have received the assent of the nations who are to be bound by it.* This assent may be express, as by treaty or the acknowledged concurrence of governments, or may be implied from established usage …. Nor, in my opinion, would the clearest proof of unanimous assent on the part of the other nations be sufficient to authorize the tribunals of this country to apply, without an Act of Parliament, what would practically amount to a new law.

Sound opinion would suggest that the reference to an "Act of Parliament" must be read in that context, and cannot be treated in isolation. Proof of requisite "assent" is what counts, and that proof need not have been in the form of a domestic statute. The true question was what *England herself* considered properly to be the breadth of her territorial waters. According to Sir Hersch Lauterpacht therefore, the question of statutory enactment was never more than a question of proof, which is a separate question from whether custom was to be considered a part of the common-law without statutory intervention.[25]

Lord Alverstone C.J. was subsequently to clear up much doubt here. Taking custom to be a part of the common-law, His Lordship went on to observe that[26]:

> [A]ny doctrine so invoked must be one really accepted as binding between nations, and the international law sought to be applied must, like anything else, be proved by satisfactory evidence, which must shew either that the particular proposition put forward has been recognized and acted upon by our own country, or that it is of such a nature, and has been so widely and generally accepted, that it can hardly be supposed that any civilized State would repudiate it …. The cases *Wolff v. Oxholm* and *R v. Keyn* are only illustrations of the same rule ….

Thus *Keyn* was only a case that stood for what it would have taken there to *prove* what the customary rule was that bound England (*i.e.* an evidentiary question). To ask for an Act of Parliament there was perhaps understandable considering the extent to which there was uncertainty at the time over the breadth which England could claim over her territorial waters.[27]

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23 Sir William S. Holdsworth, *Essays in Law and History* (Oxford: Clarendon, 1946) at 263-266 is usually cited in this regard.

24 *R v. Keyn* (1876) 2 Ex. D. 63 (my emphasis).

25 Hersch Lauterpacht, *Private Law Sources and Analogies of International Law* (London: Longmans, 1927) at 76: "Clearly, the unsettled position of international law with regard to this particular question guided the learned judge when he emphasized the necessity of an Act of Parliament."

26 *West Rand Central Gold Mining Co. v. R.* [1905] 2 K.B. 391 (*per* Lord Alverstone C.J.) (my emphasis).

27 Dickstein has taken the same view, see H.L. Dickstein, *supra* note 7 at 206, where he says: "This … it should be emphasised, is relevant only to the evidentiary problem inherent in the application of custom in internal courts". For a concise description of the uncertainty in Europe over the proper breadth of the territorial sea at that time, see Barry E. Carter and Philip E. Trimble, *International Law*, 2nd ed. (Boston: Little, Brown & Co., 1995), at 1006.

There have been various modern cases, and much theoretical discussion since amongst international lawyers, couched usually as a matter involving a choice between an "incorporationist" or "transformationist" view in considering whether custom becomes "automatically" a part of the common law.[28] Some (incorporationists) consider this so, whereas other (transformationists) do not.[29] We will return to this issue below. At this juncture, the cases discussed above are intended only to illustrate the distinction between treating custom as a part of the common-law, and the separate and further requirement that proof of such custom is what actually counts in practice.

There is a final question that should be addressed before we conclude this discussion. How can proof of custom be measured by the standards imposed by domestic courts when proof of customary international law is surely a question of international law, and not of domestic law? One answer to this, we would like to suggest, is that in the case of a genuine conflict between Singapore law and international law, Singapore law would prevail.[30] The judge in *Nguyen* in fact confirmed this last proposition of Singapore law where he said that[31]:

> The Defence has … failed to make out a case that there was a breach of Art 36(1) because of the 20-hour interval. But I will go one stage further. Assuming that there was a breach, it does not necessarily follow that the accused's statements are inadmissible in evidence. *There must be some resultant prejudice that renders it wrong for the statements to be used, for example, that if he had timely consular advice, he would not have made the statements at all, or in the form or at the times he did.*

This last was patently a question for Singapore law; namely, when is a customary rule breached in the eyes of a Singapore court?

C. *Breach of the Customary Rule*

According to Kan J., if there is to be any breach of a customary rule so established[32]:

> [R]eference to state practice can be helpful. By an Agreement on Consular Relations between Australia and the People's Republic of China which came into force on 15 September 2000, notification is to be made within three days. As Australia regards three days an appropriate period under the agreement, there is little basis to suppose that it would find the 20 hours in this case unacceptable. It was not the defence case that the Australian government considers the notification to have been delayed in this case.

The defence had also cited the *LaGrand* case,[33] but the learned judge noted that the United States had admitted its breach of Article 36(1) in that case. *LaGrand* was therefore distinguished, and held to be irrelevant to the present case.[34] There seems no reason, however,

28 Ian Brownlie, *Principles of Public International Law*, 6th ed. (Oxford: Clarendon, 2004) at 42.

29 See the discussion in Greig, *supra* note 21 at 58.

30 "I would, however, hasten to add that if indeed in a particular case there is a real conflict between international law and national law, national law must prevail …. Lest I give the wrong impression that I am saying a state can flout international law with impunity, I should add that responsibility on the international plane of a failure by a state to comply with international law is a distinct and separate matter."; *Tan Ah Yeo & Anor v. Seow Teck Ming & Anor* [1989] Sing.L.R. 257 at 263D-G (H.C.) (Chao Hick Tin J.C.); *cf. Seow Teck Ming & Anor v Tan Ah Yeo & Anor and another appeal* [1991] Sing.L.R. 169 at 177D-G (C.A.) (Chan Sek Keong J., Yong Pung How C.J., L.P. Thean J.).

31 [2004] 2 Sing.L.R. 328, para. 41 (my emphasis).

32 *Ibid.* at para. 39; *cf.* Luke T. Lee, *Consular Law and Practice*, 2nd ed. (Oxford: Clarendon, 1991) at 138-151 for state practice.

33 *LaGrand Case (Germany v United States of America)*, Judgment of 27 June 2001.

34 [2004] 2 Sing.L.R. 328 at para. 40.

to think that had the case been relevant, it would have been taken into consideration in determining both the customary rule reflecting Article 36(1) and the question of its breach. In any event, it would not be unusual should judicial decisions such as those of the International Court of Justice which pronounce upon the meaning of a treaty rule be relied upon to prove the content of a (parallel) customary rule.[35]

D. *The "Beijing Statement" and the Universal Declaration of Human Rights*[36]

Consideration was also given, further on in the judgment, to the relevance of the "Beijing Statement" and the *Universal Declaration of Human Rights* of 1948. Kan J. observed that the "Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region" was "signed by the participants at the 6th Conference of Chief Justices of Asia and the Pacific, including the Chief Justice of Singapore, on 19 August 1995."[37] However, (1) there was "nothing in the Statement that relates to death sentences or mandatory death sentences", and (2) the defence had failed to show "how the Statement, which does not have the force of a treaty or a convention, assists the accused's argument that mandatory death sentences are illegal."[38] The Beijing Statement, standing alone, would not have sufficed, without more, to establish a customary rule binding upon Singapore. This must be correct, even if the Beijing Declaration could be considered to be what international lawyers would call "soft law".[39] This is not to say that it would not also have been helpful had the judgment applied the reasoning discussed earlier above (concerning Article 36(1) of the Vienna Convention) specifically to this instance; to show *why* the Beijing Statement does not (1) amount to custom, and/or (2) does not bind Singapore.

In addition, the defence relied on Article 9(1) of the Constitution of the Republic of Singapore, which states that: "No person shall be deprived of his life or personal liberty save in accordance with law." According to the defence, the word "law" would include Article 5 of the *Universal Declaration of Human Rights*: "No person shall be subjected to torture or to cruel inhuman or degrading treatment or punishment."

Since Singapore provides in section 216 of the *Criminal Procedure Code* (Cap. 68, 1985 Rev. Ed. Sing.) that death sentences are to be carried out by hanging, section 216 would violate Article 9(1) of the Constitution.[40] The defence had argued that[41]:

[35] Proof of parallel custom was dealt with by the International Court of Justice in the *North Sea Continental Shelf Cases (F.R.G. v. Denmark; F.R.G. v. Netherlands)*, Merits (1969) I.C.J. Rep. 3 at paras 70-74; and the *Nicaragua Case (Nicaragua v. U.S.A.)*, Merits (1986) I.C.J. Rep. 14 at paras. 175-186. As for international decisions generally, Lauterpacht has said that: "They are not direct evidence of the practice of States, or of what States conceive to be the law. International tribunals, when giving a decision on a point of international law, do not necessarily choose between two conflicting views advanced by the parties. They state what the law is"; *The Development of International Law by the International Court* (London: Stevens, 1958) at 20-21. It is, however, an obvious truism to add that while "[t]heir work is entitled to respectful examination", "[i]t is not, however, sacrosanct" and that [t]he more daring any particular judgment happens to be the less it is likely to constitute reliable evidence of international law as it stands"; Georg Schwarzenberger and E.D. Brown, *A Manual of International Law* (Milton: Professional Books, 1976) at 30.

[36] *Cf.* the Court of Appeal's recent decision in *Nguyen Tuong Van v. Public Prosecutor* [2004] SGCA 47 (6 October 2004), C.A. No. 5 of 2004 (Sing., Court of Appeal) (Chao Hick Tin J.A., Lai Kew Chai J., Yong Pung How C.J.). The Court of Appeal's decision was handed down as this article went to press and could not be addressed here. A commentary will appear instead in the 2005 *Year Book*. The reader is asked to consult this latest decision, especially for some of the points raised in this section.

[37] [2004] 2 Sing.L.R. 328 at para. 99.

[38] *Ibid.* at para. 101.

[39] See O.A. Elias and C.L. Lim, "'General Principles of Law', 'Soft' Law and the Identification of International Law" (1997) XXVIII Neth.Y.B.Int'l L. 3.

[40] [2004] 2 Sing.L.R. 328, paras. 103-105.

[41] *Ibid.* at para. 105.

> [A]n important question arises and that is the role of treaties and customary international law in domestic or municipal law. We submit that Singapore's vital participation in the world of transnational trade and commerce necessarily connects it to the influence of international standards and that they in turn must affect Singapore's domestic or municipal law.

Kan J. gave short shrift to this (admittedly, somewhat opaque) approach towards proof of the applicability of Article 5 under Singapore law. According to the learned judge[42]:

> The Declaration is not an international treaty or convention and there is no consensus that it is a statement or codification of customary international law, and it does not refer to hanging.
> There are those who believe that hanging is a cruel, inhuman or degrading punishment, but that is by no means a settled view.

E. *International Custom and the Common-Law*

To appreciate the significance of *Nguyen*, it is worth considering two post-Independence cases in particular.

1. *Krofan Stanislaus*

The first case, *Krofan Stanislaus v. Public Prosecutor* is well known. The court was concerned with whether members of armed forces who were not however in uniform and were saboteurs could be considered to be in a position analogous to that of spies. According to, Wee Chong Jin C.J.[43]:

> In the *Saboteurs' Case (Ex parte Quirin)* (1940) 317 U.S. 1; Annual Digest 1941-1942—Case No. 168; 87 Law Ed. 3 the Supreme Court of the USA in 1942 treated disguised saboteurs as being in the same position as spies. This view is also held by the authors of the *Manual of Military Law* Pt. III an official publication in 1958 of the United Kingdom War Office at para. 96 p 34 where it is stated "Members of the armed forces caught in civilian clothing while acting as saboteurs in enemy territory are in a position analogous to that of spies." We are of the opinion that this view does not offend against the rules of the law of nations respecting warfare and indeed states the position under customary international law. It seems to us to be consistent with reason and the necessities of war to treat a regular combatant in disguise who acts as a saboteur as being in the same position as a regular combatant in disguise who acts as a spy.

The finding that "soldier-saboteurs" are analogous to "soldier-spies" under customary international law, and more importantly for the purposes of the rule in Article 4(1), meant that no notification was required to any Protecting Power and that the accused would have no rights of communication that would otherwise exist under Article 107 of the 1949 *Geneva Prisoners of War Convention*.

However, the court was really only concerned with the proper interpretation of the rule in Article 4(1) of the 1949 *Geneva Prisoners of War Convention*, which requires that persons belonging to the category of "members of the armed force" of a party to the conflict should be treated as prisoners of war, a rule which the court had simply assumed would apply to Singapore without entering into the question of how that might have come about.[44]

[42] *Ibid*. at paras. 106-107.
[43] *Krofan Stanislaus v. Public Prosecutor* [1965-1968] Sing.L.R. 135, [1967] 1 Mal.L.J. 133 (Sing., Fed. Court of Appeals) (Wee Chong Jin C.J., Tan Ah Tah F.J., Ambrose J.).
[44] According to the court, *ibid*.:

The case did not truly turn on a point involving the applicability under Singapore law of international customary law. The Malaysia federal authorities had simply not extended the incorporation of a treaty rule by way of a Federal statute to Singapore (a component state) before Singapore withdrew from Malaysia altogether. This created a situation which the court considered was so unique that the likely precedential value of an extended inquiry into the applicability of the Geneva Conventions to Singapore would have been misplaced.[45]

2. *Star Cruises*

A more recent case, involving a decision of the Singapore High Court had steered closer to the point (*i.e.* the applicability of international custom under Singapore law). But it is not without its own difficulties. *Star Cruises Ltd. v. Overseas Union Bank* concerned the enforceability of a gaming debt before the Singapore courts[46]: "Counsel for the plaintiffs submitted in effect that the gaming took place in international waters and that the rules of municipal law were subordinated to the rules of public international law."

The learned judge found this argument to be flawed on account that[47]:

> The expression "international waters" means "between national waters". Principles of public international law recognize that high seas are no one's domain and as such are not subject to the sovereign rights of any state. In simple terms international waters do not belong to any nation. What the plaintiffs probably had in mind was "high seas" meaning that portion of ocean which was beyond the territorial waters of this sea-girt state of Singapore. In the context of the facts of this case this expression has no application. On the other side of Singapore territorial waters we have either Indonesian or Malaysian territorial waters.

The plaintiffs had argued that no gaming had occurred in Singapore's territorial waters. However, following the reasoning above, Selvam J. went on to consider the situation within (Singapore's) territorial waters, and noted that while the littoral state has "sovereign rights" over territorial waters, its civil and criminal laws "apply … save as exempted by the *United Nations Convention on the Law of the Sea*", and that the right of innocent passage is therefore "relevant … when a foreign ship is transiting the territorial waters of a state"[48]:

> The position then, so the argument goes, is that unless the 1949 Geneva Conventions were part of the domestic law of Singapore immediately prior to 16 September 1963, they were at all material times not part of the domestic law of Singapore. They were not part of the domestic law of Singapore immediately prior to 16 September 1963 because, although Her Majesty the Queen of England could under s 8 of the Geneva Conventions Act 1957 by order in council direct that any of the provisions of that Act shall extend to any colony, no such order in council extending the provisions of that Act to Singapore was ever made.
>
> The facts and circumstances on which this new argument has been based are unusual and unique and in all probability will remain unique. To decide it would involve a consideration of many aspects of International Law on which there seems to be no clear consensus of views and a consideration of the nature of multipartite international treaties and the extent to which they are or should be applied by domestic courts. It seems to us, in all the circumstances and as it has been raised at a very late stage of the whole proceedings that the proper course for us to adopt would be to decline to decide it and to proceed to deal with this appeal on the assumption that the 1949 Geneva Conventions are applicable to Singapore at all material times.

[45] Considering also that the rule in Article 4(1) was distinguishable from the present case in the first place.

[46] *Star Cruise Services Ltd. v. Overseas Union Bank Ltd.* [1999] 2 Sing.L.R. 412 at para. 79 (H.C.) (G.P. Selvam J.).

[47] *Ibid.* Presumably "international waters" in this context could (simply) have meant "outside Singapore's territorial waters".

[48] *Ibid.* at para 83. Singapore's *Common Gaming Houses Act* (Cap. 49, 1985 Rev. Ed. Sing.) makes gaming unlawful, unlike sections 6(2) and 6(5) of the *Civil Law Act* (Cap. 43, 1994 Rev. Ed. Sing.) which would instead only deny a legal remedy in Singapore in respect of gaming debts and securities based on them.

"Consequently, the actual play carried on while the Star Cruise ships were in the territorial waters of one country or another was at best freed from the grasp of the *Common Gaming Houses Act*, and therefore not unlawful."

All that was, however, by way of an aside, as[49]:

> The laws applicable to the present case belong to the entirely different regime of private international law (*i.e.* conflict of laws). The right of innocent passage has nothing to do with the applicability of the coastal state's civil laws to events and parties to civil litigation.

There are several points of interest, but the most significant point for our purposes is the conclusion drawn (albeit *obiter*) that the actual play could have been freed from the application of the *Common Gaming Houses Act*, assuming that the ship was exercising its right of innocent passage through (Singapore) territorial waters. There does not appear to be any evidence of Singapore having implemented in its domestic law the "exemption" in respect of innocent passage which Selvam J. had referred to (above), in which case the argument could at least be made that there is no such statutory exemption. Instead, the learned judge had referred to[50]:

> . . . conventional legal wisdom, otherwise called customary international law, that foreign states may claim certain rights and exemptions for their vessels and subjects within the territorial waters of other states. The right of innocent passage is recognized as the predominant of such rights.

The passage quoted immediately above would appear to treat custom as a part of Singapore law, indeed Selvam J. had gone on to say that[51]:

> Innocent passage signifies exemption from the general jurisdiction of the coastal state while the foreign vessel is passaging the territorial waters. The substance of these words were accepted and part of the customary international law of Singapore from time out of mind.

There is one profound difficulty with that view.[52] The reference to the *Common Gaming Houses Act* could clearly have only been intended to refer to the Singapore Act. Had an exemption based on the customary international law governing the innocent passage of ships become a part of Singapore law by way of the reception of international custom at common-law, it would have nonetheless become subject to statute. No exemption from the demands of the Singapore Act would have been possible without Parliamentary intervention.[53] In

[49] *Ibid.*

[50] *Star Cruise Services Ltd. v. Overseas Union Bank Ltd.* [1999] 2 Sing.L.R. 412 at para. 79.

[51] *Ibid.*, para 80.

[52] And putting aside that proof of Singapore's acceptance of the "innocent passage exemption" was attributed (only) to its existence "from time out of mind". *Cf. Public Prosecutor v. Narongne Sookpavit and Ors* [1987] 2 Mal.L.J. 100, below.

[53] An example here would be the express incorporation by statute of Article 28 of the 1982 of the *United Nations Convention on the Law of the Sea*, 10 December 1982, 21 I.L.M. 1261, which Singapore had ratified on 17 November 1994 (entering into force for Singapore on 17 December 1994). The matter is, at one level, relatively straightforward. Even if a customary rule were to apply at common-law, statute would prevail over the common-law. This was, in fact, the argument in the celebrated Malaysian case of *Public Prosecutor v. Oie Hee Koi and Associated Appeals* [1968] 1 Mal.L.J. 148, for which see Ahmad Ibrahim, "The Application of the Geneva Conventions, 1949, in Malaysia" (1982) 9 *Jurnal Undang-Undang/Journal of Malaysian & Comparative Law* 41. The matter may not, at least as a matter of legal theory, be as straightforward at another level. No case has arisen, for example, since the matter was first raised by Mr. Dickstein. Should a statute which incorporates a treaty have a privileged status under Malaysian (and we could add, Singapore) law? For the purposes of the relationship between common-law and statute, it should not matter whether or not an Act intends to incorporate a treaty rule. But at this further level, would a distinction be required between two kinds of statute law? One should not have thought so, and the applicable doctrine suggested by

fairness, all this occurred only in an undeveloped judicial aside. But this fact, and the difficulty just referred to should discourage reliance on *Star Cruises* for the proposition at hand.

3. *Is custom part of the common-law in Singapore?*

(i) *A Matter of Proof? (A Malaysian Analogy): Nguyen* therefore provides a valuable discussion of how a customary rule could be established to the satisfaction of a Singapore court. The view taken in *Nguyen* is, in many ways, similar to that taken in an earlier Malaysian case. In *Public Prosecutor v. Narongne Sookpavit and Ors*, Mahadev Shankar J. had considered that[54]:

> The customary law to which Article 14 of the *Convention of the Territorial Sea* is said to correspond may be the customary law of England or it may be customary international law. In the Court below, and before me, Defence Counsel seemed to suggest that it was self-evident that such customary law was part and parcel of Malaysian law.

However[55]:

> I am far from satisfied that this is the case ... .
>
> The Malaysian cases to which Mr. Dickstein has referred have not assisted me in coming to any definite conclusion on whether it could confidently be said that there is a right of innocent passage through territorial waters which is recognized by Malaysian Law. Section 13 and s. 14 of the *Evidence Act* 1950 require evidence to be given of a custom before the Court can reach a positive conclusion as to its existence. Foreign law is likewise a matter for proof by expert evidence under s. 45 of the *Evidence Act* (See also *Sarkar on Evidence* 11th p 501). No such evidence was led in the Court below. Nor was there any material in the Court below or before me to impel one to the conclusion that Article 14 of the *Convention on the Territorial Sea* or the draft of the negotiating text of 1977 had been imported into Malaysian Law.
>
> As to this, Article 76(1) of the Malaysian Constitution provides the Federal Parliament with the competence to enact legislation for the purpose of implementing treaties, agreements or conventions between the Federation and any other country or any decision of any international organisation of which the Federation is a member. So before a Convention can come into force in Malaysia, Parliament must enact a law to that effect .... No Malaysian statute has been cited to me to show that Article 14 had become part of Malaysian Law. In fact the Ordinance just cited stops at Article 13 and the irresistible inference must be that Article 14 was not intended to be imported into this country.

In *Nguyen*, Kan J. was similarly unimpressed by counsel's attempt to show that the Beijing Statement and the Universal Declaration were customary law in the absence of further evidence. He had considered, however, that the threshold of proof had been met in the case of a customary rule existing alongside the rule contained in the *Vienna Convention on Consular Relations*. Proof of the customary rule and of its acceptance by the forum State, it seems, is what matters.

common-sense should be the *lex posteriori derogate priori* doctrine. However, as Dickstein has pointed out, the United Kingdom is saved from this difficulty by the doctrine of Parliamentary supremacy, but Malaysia is not (and neither is Singapore); Dickstein, *supra* note 7 at 208-209.

54 *Public Prosecutor v. Narongne Sookpavit and Ors* [1987] 2 Mal.L.J. 100 (Mahadev Shankar J.).

55 *Ibid.* The reference to Mr. Dickstein's article was incorrect. The correct reference is that stated in this article.

(ii) *The Position Today*: A third Singapore case, *Public Prosecutor v. Taw Cheng Kong*,[56] had also earlier failed to provide for the "automatic" application of a rule of customary international law in Singapore (*i.e.* for the "incorporationist" viewpoint). It stands instead as authority for the proposition that the Singapore courts will apply those rules and principles of international law that have (previously) already been received into the common-law (*i.e.* a "transformationist viewpoint"). The Court of Appeal recognized an international customary law rule received into the common-law (the presumption against extra-territoriality), and ascribed to Parliament the intent to uphold that rule for the purposes of construing a statutory provision.

Whether *Nguyen* represents a clear departure from the previous ambivalence of the Singapore courts on the issue remains to be seen. The English Court of Appeal in *Trendtex Trading Corp. v. Central Bank of Nigeria*, had earlier stated what is the likely English position today.[57] In *Trendtex*, the customary rule had changed (from one which accords absolute immunity to a rule that would only accord limited or restricted immunity to foreign states and state entities). The English Court of Appeal was faced with a choice between the application of the old rule (which previous Court of Appeal decisions had done) or the application of the new rule. An earlier decision of the Court of Appeal, by a majority comprising Lawton and Scarman LJJ., had considered itself bound by precedent to the old customary rule by virtue of its prior binding application by the English courts.[58] However, the majority in *Trendtex*, comprising Lord Denning M.R. and Shaw L.J., chose the application of the new rule.

While it is sometimes said that the majority in *Trendtex* had therefore ignored precedent (the old rule had previously been applied instead by the English courts), it could be said that the case really involved a question of what precedent actually required in that case. If binding precedent could *only* be understood simply as an injunction to apply the rule of absolute immunity, then the majority view may be criticized for departing from the doctrine of binding precedent. But if it could *also* be understood to mean "apply whatever the applicable rule of customary international law is" instead, then it may be thought that the real difference between the majority and minority viewpoints in that case lay in differences in the characterization of the rule of precedent to be applied, but not that precedent should not be applied.[59]

Some international lawyers tend to discuss the whole issue in a sort of roundabout way, and ask whether the majority view is right. If so, they say, English law favours the "incorporationist" view (that custom "automatically" becomes a part of the common-law). If, however, the minority opinion of Stephenson L.J. is right, in which case the majority would be wrong, English law would therefore favour a "transformationist" view instead (meaning that, following the principle of *stare decisis*, whatever the customary rule of the day is, only the *substantive* rule which had previously been applied by the English courts could now be applied by the English courts).[60] There is also the further suggestion that the majority

[56] [1998] 2 Sing.L.R. 410 (C.A.) (Yong Pung How C.J., L.P. Thean J.A., Goh Joon Seng J.)

[57] [1977] Q.B. 529.

[58] *Thai-Europe Tapioca Service Ltd. v. Government of* Pakistan [1975] 1 W.L.R. 1485 (Eng., C.A.).

[59] See also Dickstein, *supra* note 7 at 206, which supports the view proposed here. Julius Stone probably put it best, in theoretical terms: "Somehow, lawyers' reasoning and especially appellate judicial reasoning, keeps open a way for entry into the corpus of legal propositions of elements of justice; as well as for the known or experienced facts of social, economic and political life of the time and place ... "; Julius Stone, *Legal System and Lawyers' Reasonings* (London: Stevens, 1964) at 325, following upon an earlier discussion of judicial reasoning and creativeness. The majority reasoning in *Trendtex* was clearly of the latter category, for even Stephenson L.J. had accepted that it would have been preferable to apply the new doctrine of restrictive immunity but for the view that he had there taken of what the doctrine of precedent required.

[60] The best examples of the genre being the discussions in Greig, *supra* note 21 at 58, Brownlie, *supra* note 28 at 42; D.J. Harris, *Cases and Materials on International Law*, 5th ed. (London: Sweet & Maxwell, 1998) at 79-80.

speeches stand for the proposition that customary international law provides an "exception" to the doctrine of precedent in English law, or the proposition that customary international law is "not subject to the principle of *stare decisis*".[61]

We would suggest that the better view is that expressed by the majority opinion of Shaw L.J. in that case[62]:

> It is with diffidence that I venture to suggest that there may be a flaw in the … conclusion as to the application of the principle of *stare decisis* …. May it not be that the true principle as to the application of international law is that the English courts must at any given time discover what the prevailing international rule is and apply that rule?

In other words, there were at least two *rationes decidendi* that could have been applied by the Court of Appeal.[63]

Interestingly, statute provides perhaps the strongest support for the proposition that international custom applies in Singapore. Section 3 of Singapore's *Application of English Law Act* states that[64]:

> (1) The common law of England (including the principles and rules of equity), so far as it was part of the law of Singapore immediately before 12th November 1993, shall continue to be part of the law of Singapore.
> (2) The common law shall continue to be in force in Singapore, as provided in subsection (1), so far as it is applicable to the circumstances of Singapore and its inhabitants and subject to such modifications as those circumstances may require.

Subject to the caveat in sub-section (2), that would therefore include the *Trendtex* decision.[65] This point has already been argued and won in Malaysia, for example. In respect of section 3 of Malaysia's *Civil Law Act* 1956 (which is substantially similar to the provision of Singapore's *Application of English Law Act*, discussed above),[66] Gunn Chit Tuan S.C.J. observed that[67]:

> Counsel [had] submitted that if [the Act] was intended to restrict sovereign immunity, then an Act of Parliament would have to be passed. He then referred to s. 3 of the *Civil Law Act* 1956, concerning the application of United Kingdom common law as

61 Harris, *ibid.* at 79; Martin Dixon and Robert McCorquodale, *Cases and Materials on International Law*, 4th ed. (Oxford: Oxford University Press, 2003) at 115, respectively.

62 [1977] Q.B. 529 (Eng., C.A.).

63 A phenomenon described in the following way by Sir Rupert Cross: "Various exceptions to the rule of *stare decisis* are considered" by the various writers, but "[a]s yet there has not been numbered amongst them a case in which there are two or more *rationes decidendi*." Cross cautioned that: "If, in such a case, an inferior court or, assuming the decision is that of an appellate court, a court of co-ordinate jurisdiction, were to conclude that it was not bound by *each ratio*, the lot of a lawyer advising his client with regard to the effect of a decision based on two or more *rationes* would be deplorable in the extreme"; Rupert Cross, *Precedent in English Law* (Oxford: Clarendon, 1961) at 88 (emphasis added). The majority in *Trendtex* did not reject "both *rationes*", but simply chose to rely on one and not the other, on which see (now) Rupert Cross and J.W. Harris, *Precedent in English Law*, 4th ed. (Oxford: Clarendon, 1991) at 81-84.

64 (Cap. 7A, 1994 Rev. Ed. Sing.).

65 All things remaining equal, see further the Practice Statement (Judicial Precedent) of the Court of Appeal [1994] 2 Sing.L.R. 689 (hereafter, "1994 Practice Statement"), following the abolition in Singapore of all appeals to the Judicial Committee of the Privy Council, thereby making the Singapore Court of Appeal the highest court in the land, unbound even by its own previous decisions and those of the Judicial Committee "where adherence to such prior decisions would cause injustice in a particular case or constrain the development of the law in conformity with the circumstances of Singapore"; 1994 Practice Statement, para. 3.

66 (Act 67); *cf.* section 3 of Singapore's *Application of English Law Act* (Cap. 7A, 1994 Rev. Ed. Sing.).

67 *Commonwealth of Australia v. Midford (Malaysia) Sdn. Bhd. & Anor* [1990] 1 Mal.L.J. 475 (Mal., S.C.) (*per* Gunn Chit Tuan S.C.J.).

> administered in England on 7 April 1956 to West Malaysia and stated that at that time, the law in England on sovereign immunity was as declared in cases such as *The 'Perlement Belge'* (1880) 5 PD 197 (refd).

However, Gunn S.C.J. took a different view[68]:

> Section 3 of the *Civil Law Act* 1956 only requires any court in West Malaysia to apply the common law and the rules of equity as administered in England on 7 April 1956. That does not mean that the common law and rules of equity as applied in this country must remain static and do not develop … .When the *Trendtex* cases [1977] 2 W.L.R. 356; [1977] 1 All. E.R. 881 (folld) was decided by the UK Court of Appeal in 1977, it was of course for us only a persuasive authority, but we see no reason why our courts ought not to agree with that decision and rule that under the common law in this country, the doctrine of restrictive immunity should also apply.

Without requiring the intervention of Parliament, the law in Malaysia was brought in line with the major trading nations.[69]

There is a related point. An international customary rule which has been accepted by Singapore as such may be taken to be a part of the common-law in Singapore even if it has not previously been received into domestic law (expressly) by way of a domestic statute or judicial pronouncement. Comparative Commonwealth and other case-law may be taken to be persuasive in these sorts of cases. The cut-off date in the equivalent Singapore Act occurs (unlike the Malaysian Act) *after* the decision in *Trendtex* in England. Certainly, there seems to be greater reason therefore, by virtue of the difference in the cut-off date between the Malaysian and Singapore Acts, to do so in the case of decisions like *Trendtex*, and there at least appears to be no clear reason in common-law principle for the Singapore courts not to take their lead from Gunn S.C.J. in yet other sorts of cases (where the statutory cut-off date lies prior to the comparative common-law authority).

F. *Custom and the Construction of Statute*

In *Taw Cheng Kong v. Public Prosecutor*, which we referred to above, a constitutional challenge was brought in respect of the extra-territorial extension of Singapore's *Prevention of Corruption Act* to citizens of Singapore.[70] Conduct which would have constituted an offence under the Act if it had taken place within Singapore would therefore constitute an offence even where such conduct had taken place outside Singapore. The defence argued that such an extension of Singapore law to the conduct of Singapore citizens abroad violated the equal protection clause under Article 12 of the *Constitution of the Republic of Singapore* (hereafter, the "Singapore Constitution") as the extension would be both over and under-inclusive.[71]

The learned district judge had rejected this argument at first instance, holding that[72]: "[S]ince s. 37 embodies the recognised legal right of a state to exercise jurisdiction over its citizens on the basis of nationality, the exclusion of Singapore permanent residents or non-citizens is neither arbitrary or unreasonable."

But on appeal to the High Court of Singapore, Karthigesu J.A. reversed that decision[73]:

[68] *Ibid.*

[69] R.H. Hickling and Wu Min Aun, *Conflict of Laws in Malaysia* (Malaysia: Butterworths, 1995) at 97.

[70] [1998] 1 Sing.L.R. 943 at para. 73 (H.C.) (Karthigesu J.A.).

[71] *Constitution of the Republic of Singapore* (1999, Rev. Ed.).

[72] [1998] 1 Sing.L.R. 943 at para. 73 (H.C.) (Karthigesu J.A.).

[73] *Ibid.* at para 75. The analogy drawn in the paragraph immediately preceding this (paragraph 74 of the High Court judgment) is not apposite; see *Re Letter of Request from the Court of New South Wales for the Prosecution of Peter Bazos (Deposition Proceedings)* [1989] Sing.L.R. 591 (H.C.) ("It is not disputed that

> [I]f a domestic law [enshrining a principle of international law] conflicts with the Constitution, the constitutional provision prevails: this is provided for by art 4 of the Constitution. Reference to a principle of international law does not address the difficulty. It only renders the argument circular: "international law prevails over the Constitution because it is international law". This is unacceptable and I am prepared to reverse the trial judge's holding on this particular question of law.

There the matter could have ended, but this was also the first time a Singapore court had struck down a legislative provision for being unconstitutional.

On further appeal, the Court of Appeal in *Public Prosecutor v. Taw Cheng Kong* applied the "rational nexus" test of equal protection; namely, whether the classification or distinction drawn in the Act, or the trait relied upon as basis for such classification or distinction, bears a reasonable relation to the mischief sought to be addressed in the Act.[74] In this case that classification distinguished between foreigners and Singapore citizens.

According to Yong Pung How C.J., in delivering the judgment of the court, an Act of Parliament would ordinarily apply within the territorial limits of the state, and thus would not normally be construed to apply to foreigners in respect of acts done by them outside the territorial limits of the state. Quoting Lord Russell C.J., Yong C.J. considered that to be "a rule based on international law by which one sovereign power was bound to respect the subjects and the rights of all other sovereign powers outside its own territory".[75] This statement therefore provides some support for the application of a (lesser) "transformationist" viewpoint in Singapore; namely, that an international customary law rule previously received into the common-law could be treated as a common-law rule. Yong C.J. concluded that[76]: "As a result, when it came to determining the rationality of the classification, the objective of the Act must be balanced against Parliament's intention to observe international comity."

The phrase "international comity" in this judgment probably owes something to the usage of that term in the common-law courts, and it is often used by the United Kingdom courts to mean a rule or principle of (customary) international law, as opposed to a rule pertaining only to the common courtesy of nations.[77] If this is correct the present case suggests that what the Singapore courts recognize as a customary rule of international law that has been received into the common-law could determine or condition the proper interpretation to be given to a statutory provision, or could at least be relied upon to determine the true intent of Parliament.

This proposition is to be distinguished from another proposition (discussed below)—that if a statute could be interpreted in accordance with a treaty obligation, then it should be,[78] so long as there was no conflict with domestic law.[79]

the word 'agreement' used as an alternative to the word 'treaty' … refers to an agreement between states that creates obligations in international law and not under the domestic laws of the countries concerned", *per* Chan Sek Keong J., as the Honourable Attorney-General then was).

74 *Public Prosecutor v. Taw Cheng Kong* [1998] 2 Sing.L.R. 410 at paras. 61-62 (Court of Appeal, Singapore) (Yong Pung How C.J., L.P. Thean J.A., Goh Joon Seng J.); see further *Kok Hoong Tan Dennis v Public Prosecutor* [1997] 1 Sing.L.R. 123 (H.C.) (Yong Pung How C.J.).

75 *Public Prosecutor v. Taw Cheng Kong* [1998] 2 Sing.L.R. 410 at paras. 65-69 (*per* Yong Pung How C.J.), recently applied in *Mak Chik Lun and Others v. Loh Kim Her and Others and Another Action* [2003] 4 Sing.L.R. 338 at para. 5 (H.C.) (*per* Belinda Ang Saw Ean J.).

76 *Public Prosecutor v. Taw Cheng Kong* [1998] 2 Sing.L.R. 410 at para. 70.

77 Brownlie, *supra* note 28, footnote 188, at 28 where he refers to the usage of the British and American courts.

78 *Tan Ah Yeo & Anor v. Seow Teck Ming & Anor* [1989] Sing.L.R. 257 at 263E-F (H.C.) (Chao Hick Tin J.C.).

79 "I would … hasten to add that if indeed in a particular case there is a real conflict between international law and national law, national law must prevail …. Lest I give the wrong impression that I am saying a state can flout international law with impunity, I should add that responsibility on the international plane of a failure

G. *Custom and the Supremacy of the Constitution*

There is a final aspect of the question of customary international law in domestic law that has been the subject of some misunderstanding in the scholarly literature. In *The Government of Kelantan v. The Government of Malaysia and Tunku Abdul Rahman Putra Al-Haj*, a case which will also be discussed further below, a constitutional challenge to the Malaysia Agreement had been brought before the Malaysian courts.[80] Thomson C.J. had considered that the Malaysia Act, which implements the Malaysia Agreement, was "not to be subjected to the minute interpretation which in private law may result in defeating through technical construction the real purpose of the negotiators" of the international agreement.[81] At the time, the rules concerning the proper interpretation of international treaties had not yet been codified, and were rules of customary international law.

While no reference has been made to this case, some suggestion has been made that aspects of the Singapore Constitution ought (properly) to be interpreted in light of existing international law rules. Commenting on the case of *J.B. Jeyaretnam v. Lee Kuan Yew*,[82] which concerned the rejection by the Singapore Court of Appeal of a "public figure" exception in the law of defamation despite the constitutional guarantee of free speech, Professor Tay has written that[83]:

> [T]he right to free speech—which exists both in international treaties and in the Singapore constitution—was said to be limited by the exception of defamation law, pursuant to the Constitution. The law of defamation, moreover, did not recognize different treatment for public and elected officials, as it does in the European and American examples, under the influence of international or regional norms.

Leading him to conclude that[84]:

> Increasingly the dicta of the courts in considering constitutional matters has been to move away from international law comparisons .... Instead, the emphasis has been on interpreting the national laws within the national context .... It remains to be seen whether that same approach will be applied by Singaporean courts to cases other than those involving human or constitutional rights. Where the laws concerned relate to business or commercial rights, such as intellectual property, or to systems of administration required by international trade or environmental laws, international norms may be characterized more as a helpful influence, rather than "interference".

The suggestion is that such reserve on the part of the Singapore courts in applying international (treaty and other) standards could either be reflective of the approach of the Singapore courts more generally, or if not, could result in the Singapore courts (arbitrarily) treating international human rights rules differently from other sorts of international rules.

However, since Singapore is not party to any treaty that imposes rules of State conduct in respect of the freedom of speech, such treaty rules (and the rules contained, for example, in

by a state to comply with international law is a distinct and separate matter"; *Tan Ah Yeo & Anor v. Seow Teck Ming & Anor* [1989] Sing.L.R. 257 at 263D-G (*per* Chao Hick Tin J.C.); *cf. Seow Teck Ming & Anor v. Tan Ah Yeo & Anor and another appeal* [1991] Sing.L.R. 169 at 177D-G (*per* Chan Sek Keong J.). See also the Malaysian case of *Public Prosecutor v. Narongne Sookpavit and Ors* [1987] 2 Mal.L.J. 100 (Mahadev Shankar J.). These cases are discussed further below.

80 *The Government of Kelantan v. The Government of Malaysia and Tunku Abdul Rahman Putra Al-Haj* [1963] Mal.L.J. 355.

81 *Ibid.* (*per* Thomson C.J.).

82 [1992] 2 Sing.L.R. 310 (C.A.). See further Michael Hor, "The Freedom of Speech and Defamation" [1992] Sing.J.L.S. 543.

83 Simon S.C. Tay, "The Singapore Legal System & International Law" in Kevin Y.L. Tan ed., *The Singapore Legal System* (Singapore: Singapore University Press, 1998) 467 at 483.

84 *Ibid.*

the *Universal Declaration of Human Rights* of 1948) could only be applied as international custom which, in turn, applies to Singapore. But since Article 4 of the Singapore Constitution states that the Constitution is the supreme law of the land, it would be difficult to see how a customary rule, even if adopted by a Singapore court, could condition or determine the application of a constitutional right. Such adoption by a Singapore judge could only be by way of the reception of an international customary rule into the common-law after all. Subjecting a constitutional right to an international customary or common-law rule would therefore tend to subvert the hierarchy of domestic legal sources.

Clearly a more expansive reading of the constitutional right of free speech, however desirable that may be, cannot be based on the reception of a customary international law right into the common-law.[85] All this is true, even assuming that the rule of customary international law is in the ultimate analysis at odds with the conclusion which the Court of Appeal reached in the *Jeyaretnam* case. This remains to be shown. In another case, *Haw Tua Taw v Public Prosecutor*, the Privy Council had simply found that there was no conflict between allowing a judicial inference to be drawn from the silence of the accused, and the *Universal Declaration of Human Rights*.[86]

In sum, even if it were established before a domestic court that a particular interpretation of a fundamental guarantee in the Singapore Constitution would violate international customary law, there is no apparent legal principle on which international customary right could be applied by a Singapore court instead if that should be taken to conflict with what the Constitution says, interpreted in the ordinary fashion of the Singapore courts. Put differently, some other argument would need to be made that the ordinary fashion in which constitutional rights are given meaning to by the courts in Singapore should always conform with international customary law.

II. Treaty Obligations before the Singapore Courts

A. *Incorporated and Unincorporated Treaties*

In both Singapore and Malaysia, there seems no reason to suppose that the principle should be any different from that in the United Kingdom. The Executive cannot legislate. That is the function of the legislature. Barring any contrary constitutional provision in Malaysia or Singapore, to allow treaties to apply "automatically" in Singapore, Malaysia or the United Kingdom would therefore be to violate the Constitutions of Singapore and Malaysia and the doctrine of Parliamentary supremacy in the United Kingdom. As such, it is said that treaties entered into by the Governments of these countries do not automatically create rights and obligations that are enforceable in the domestic courts of these countries. If such enforceable rights and obligations are sought, Parliament would first have to be called upon to "incorporate" (or "implement") such treaties by way of statute.[87]

[85] It may, however, be based on an entirely different sort of argument, for which see *Ong Ah Chuan v. Public Prosecutor* [1980] A.C. 319; T.K.K. Iyer, "Article 9(1) and 'Fundamental Principles of Natural Justice' in the Constitution of Singapore" (1981) 23 Mal.L.Rev. 213; A.J. Harding, "Natural Justice and the Constitution" (1981) 23 Mal.L.Rev. 226. But see Thio Li-ann, "An 'i' for an 'I': Singapore's Communitarian Model for Constitutional Adjudication" (1997) 27 Hong Kong L.J. 153.

[86] [1981] 2 Mal.L.J. 49 (P.C.).

[87] This general proposition has been affirmed by commentators both in Malaysia and Singapore, and stands in stark contrast to the position in the United States, for example. See Dickstein, *supra* note 7 at 207-209; Wan Arfah Hamzah, "*Amalan Triti Malaysia*" (1985) 12 *Jurnal Undang-Undang/Journal of Malaysian & Comparative Law* 17, at 22 *et seq*. (in Malay); Simon S.C. Tay, "The Singapore Legal System & International Law", *supra* note 83 at 473. They also contain useful discussions of the treaty-making process in Malaysia and Singapore. In contrast, the position in the United States may be summarized swiftly. Article VI, cl. 2 of the United States Constitution states that: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution

In 2003, in an unreported case before the Subordinate Courts, *Public Prosecutor v. Salwant Singh s/o Amer Singh*,[88] the learned district judge considered the possible legal effects, if true, of a suggestion that the Indian and Singapore Governments had concluded (what appears to have been suggested as) a binding international agreement. That purported "agreement" concerned the extradition of an Indian national to Singapore[89]: "Mr. Chandra Mohan submitted that India had extradited the Accused to Singapore on the basis that his possible sentence was only up to 7 years. The Defence appeared to suggest that my sentencing discretion was bound by this consideration."

To this, the learned district judge replied, *obiter*,[90] that "the contention that my sentencing discretion was fettered by the views of an organ of a foreign state offends a fundamental tenet of international law, that of state sovereignty",[91] and that "where the terms of Singapore's international agreement with a foreign state conflicts with our domestic law, the latter must prevail".[92] This last[93]:

> … is particularly so where the domestic law concerned is the Constitution, as it is the supreme law of the land: Art. 4 of the Constitution. Thus, even if the Singapore and Indian Governments had agreed that the maximum sentence that would be sought or imposed on the Accused is 7 years, such a treaty is not enforceable in our Courts as matters relating to sentencing is [*sic*.] constitutionally vested in the Judiciary, not the Executive: Art. 93 of the Constitution. Except to the extent that a treaty becomes incorporated into the laws of Singapore by statute, our Courts would have no power to enforce treaty rights and obligations at the behest of India or the Accused: *J.H. Rayner Ltd. v. Dept. of Trade* [1990] 2 A.C. 418.

But this is not to say that an unincorporated treaty obligation would not have any legal effect whatsoever under Singapore law.

or Laws of any State to the contrary notwithstanding." It is therefore said that, in the United States, treaties have automatically the force of the law of the land. However, Chief Justice John Marshall in *Foster v Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) was subsequently to distinguish between treaties which by their terms were self-executing, and those which cannot be read in such a way and resembled only a "contract" at the international level. The former would be "equivalent" (the word Marshall used) "to an act of the legislature". Nonetheless, it would be for the courts alone to decide which category a particular treaty should fall into. To this, it should be added that where the United States has specifically undertaken by treaty to enact a new law, however, it would be for Congress to enact that law and not the courts (Chief Justice Marshall's so-called "exception"). All this, however, has not prevented an element of "Executive law-making" from creeping in, either in the United States, or indeed under Westminster-style systems. Under Article II, cl. 2 of the United States Constitution, the President: "...shall have the power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur". By 1794, with the Jay Treaty, the President had dispensed with Senate's "advice"; see Thomas M. Franck and Edward Weisband, *Foreign Policy by Congress* (New York/Oxford: Oxford University Press, 1979), at 136 *et seq*. As for the requirement of "consent", this has also been obviated to an extent by not calling certain agreements negotiated by the President and entered into "treaties", but so-called "Presidential Executive Agreements" instead. While it may be objected that if these truly are not treaties, they cannot also be "self-executing" under Article VI, cl.2, the courts have offered some assistance to the President in the United States and would treat some Executive Agreements at least as "self-executing" agreements. See 301 U.S. at 331 (the "Belmont" doctrine), subsequently affirmed in *US v. Pink* 315 U.S. 203 (1942) and *Dames and Moore v. Regan*, 453 U.S. 654 (1981). Singapore, Malaysia and indeed other "Westminster-style" constitutions may achieve something similar by, first, obtaining Parliament's authority by way of parent legislation to engage in Executive law-making by subsidiary legislation; C.L. Lim, "Executive Law-Making in Compliance of International Treaty" (2002) Sing.J.L.S. 73.

88 *Public Prosecutor v Salwant Singh s/o Amer Singh*, M.A. No. 115 of 2003/01 (Sing., Sub. Ct.) (Kow Keng Siong, District Judge, unreported).

89 *Ibid*. at para. 33.

90 Counsel had failed to establish the existence of such an agreement: "I am not persuaded by Counsel's contention, which I found to be unsupported by any of the materials, including those from the Accused (exh F), placed before me"; *Ibid*. at para. 34.

91 *Ibid*. at para. 35.

92 *Ibid*. at para. 36.

93 *Ibid*.

B. *The Effect of Unincorporated Treaties on the Interpretation of Statute*

1. *A statute, if the language permits, should be interpreted in a manner consistent with international law*

Singapore case-law would appear to suggest something essentially similar to the position in England. According to Chao Hick Tin J.C. (as the Honourable Judge of Appeal then was) in *Tan Ah Yeo & Anor v. Seow Teck Ming & Anor*[94]:

> I can do no better than to cite the following passage from *Maxwell on The Interpretation of Statutes*, 12th Ed., at p. 183:
>
> Under the general presumption that the legislature does not intend to exceed its jurisdiction, every statute is interpreted, so far as its language permits, so as not to be inconsistent with the comity of nations or the established rules of international law, and the court will avoid a construction which would give rise to such inconsistency unless compelled to adopt it by plain and unambiguous language. But if the language of the statute is clear, it must be followed notwithstanding the conflict between municipal and international law which results.

While the passage refers to "international law", the case concerns the effect of an unincorporated treaty obligation, and not a customary law under Singapore law.

2. *Distinguishing cases where conflict with the plain terms of a statute, and where no conflict exists*

There had been occasion where statute and treaty conflicted. In these cases, the Singapore courts had simply adhered to what was considered to be the plain and unambiguous language of the statute.[95]

In *Re Letter of Request from the Court of New South Wales for the Prosecution of Peter Bazos (Deposition Proceedings)*, a request had been received by Singapore's Ministry of Foreign Affairs from its Australian counterpart to take the evidence of certain persons in Singapore for the purposes of criminal proceedings in Australia. The Minister for Law, in purportedly exercising his power under section 43(1) of Singapore's *Extradition Act*,[96] issued a notice authorizing the Senior District Judge or such other District Judge or Magistrate that the Senior District Judge may nominate to take the requested evidence in Singapore. That provision reads:

> The Minister may, by notice in writing, authorise a Magistrate to take evidence for the purposes of a criminal matter pending in a court or tribunal of a foreign State other than a matter relating to an offence that is, by its nature or by reason of the circumstances in which it is alleged to have been committed, an offence of a political character.

However, application was entered for an order of *certiorari* to quash the Minister's decision. The resultant dispute turned on whether the term "foreign State" as used in section 43(1) above should include Australia. The Attorney-General's Chambers, on behalf of the Government, argued that the term "foreign State" in section 43(1) refers to any foreign state (*i.e.*

[94] *Tan Ah Yeo & Anor v. Seow Teck Ming & Anor* [1989] Sing.L.R. 257 at 263E-F. See P. St. J. Langan, *Maxwell on the Interpretation of Statutes* (Bombay: N.M. Tripathi, 1969) at 183. For a more contemporary authority, see *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 A.C. 696 (House of Lords) (*per* Lord Bridge, Lord Ackner). I shall return to a discussion of the matter below.

[95] *Re Letter of Request from the Court of New South Wales for the Prosecution of Peter Bazos (Deposition Proceedings)* [1989] Sing.L.R. 591 (H.C.) (Chan Sek Keong J.); *Attorney General v. Elite Wood Products (Australia) Pty. Ltd. & Anor* [1992] 2 Sing.L.R. 280 (C.A.) (Warren L.H. Khoo J., Yong Pung How C.J., Lai Kew Chai J.).

[96] *Extradition Act* (Cap. 103, 2000 Rev. Ed. Sing.).

including Australia), and not the term "foreign State" as statutorily defined (which would exclude Australia). Counsel for the applicant contended, on the other hand, that the term "foreign State" as statutorily defined precluded declared Commonwealth countries under Part IV of the Act, and to which category Australia belonged. Chan Sek Keong J. (as the Honourable Attorney-General then was) rejected the Government's argument as a matter of construction[97]:

> [T]he legislative history of s. 43 supports the applicants' case rather than the reasoning of senior state counsel. There is one more bit of evidence which, in my view, concludes the point against senior state counsel. Both the first letters of the words "foreign state" in s. 5 of the 1873 Act were enacted in the lower case. If, as senior state counsel appears to have suggested, the expression might have been referable to any country, whether a British Possession or otherwise, other than the United Kingdom itself, and that the Singapore Parliament had intended to adhere to that meaning, s. 43 should have been enacted with those words in the same format. Instead, Parliament has intentionally used the first letter in the word "State" in the said expression in the capital case, consistently with the expression as statutorily defined. Since it has not been suggested that this is a printing error, it is, to my mind, the clearest evidence of the intention of Parliament.

Chan J. also rejected a second argument on behalf of the Government, in a key passage which justifies its quotation in full[98]:

> [T]hat there is an extradition treaty as defined (*i.e.* including an agreement) between Singapore and Australia and therefore Australia is a foreign State. The argument here is that since Australia and Singapore have in turn given effect to the scheme by enacting uniform legislation and each has declared the other a Commonwealth country within the terms of its own legislation, an extradition agreement has been constituted between Singapore and Australia. This argument also has no merit. Firstly, senior state counsel has conceded that Singapore's agreement to the scheme is not a binding agreement in a contractual sense. That being the case, there is no other basis for a binding agreement. Reciprocity need not be necessarily based on any prior binding agreement between the two countries. Secondly, even if there were an agreement between Australia and Singapore, it would not be an agreement for the purpose of the definition of "extradition treaty". It is not disputed that the word "agreement" used as an alternative to the word "treaty" in the definition of extradition treaty refers to an agreement between states that creates obligations in international law and not under the domestic laws of the countries concerned. In other words, such an agreement has to be governed by international law as distinct from municipal law: see D.P. O'Connell, *International Law* at p. 211. Therefore, the alternative argument must also fail.

In other words, the "agreement" in that case does not tell us what the Singapore statute means.

Nonetheless, it may be observed also that while it is one thing for State Counsel to concede before the Singapore courts that the agreement was "not binding in the contractual sense", it remains another matter altogether from the viewpoint of the foreign state with which Singapore purportedly has entered into an international treaty with.[99] There ought

[97] *Re Letter of Request from the Court of New South Wales for the Prosecution of Peter Bazos (Deposition Proceedings)* [1989] Sing.L.R. 591 at 605C-E (H.C.) (*per* Chan Sek Keong J.).

[98] *Ibid.* at 605F-606A.

[99] There is also common-law authority for the proposition that a statute implementing an international agreement should not only be construed in light of the applicable rules of treaty construction, but that such treaties "are not to be subjected to the minute interpretation which in private law may result in defeating through technical construction the real purpose of the negotiators"; *The Government of Kelantan v. The Government of Malaysia*

not to be any great difference between the treatment given to an "agreement" between two Commonwealth countries and a normally binding treaty. According to McNair[100]:

> When my *Law of Treaties*, 1938, was published, the relations between the different Commonwealth countries … were governed for the most part by what was called 'the *inter se* doctrine'. Its effect was that, although these countries were independent, their relations were regulated by some kind of domestic constitutional or intra-imperial law rather than by international law.

However he went on to observe that very little of that doctrine had remained by 1961[101]:

> In each case the answer must depend upon the intention of the parties. There is no reason why they should not enter into agreements which they regard as not being within the field of international law, and there is no doubt that they are free to contract, and capable of contracting, obligations with one another based on, and governed by, international law.

We would therefore suggest that the conclusion reached by Chan J. above was based on the fact that such purported agreements should fulfil the requirements of an international treaty for them to be treated as such, and that here the Attorney-General's Chambers had confirmed that the "agreement" in that case was not "a binding agreement in a contractual sense".[102] This view is supported by *Halsbury's*[103]: "the views of the executive on treaty relations may be volunteered to the court and where the Attorney-General appears and states those views, such a statement is equally conclusive evidence."

We may even go so far perhaps as to say that the responsibility for upholding Singapore's binding treaty obligations falls, ultimately, on the Attorney-General's Chambers in these sorts of cases.

The Government appealed. In *Attorney General v. Elite Wood Products (Australia) Pty. Ltd. & Anor*, the "concession" by State Counsel made earlier was to receive fuller argument and consideration.[104] Together with a change of Government lawyers for the appeal, there seems also to have been a change in tack. Deputy Senior State Counsel, Mr. Lee Seiu Kin (which the Second Solicitor-General, then was)[105] clarified that it was not the Government's position that the "agreement" with Australia was not legally binding under international law, but simply that the "agreement" did not take the *form* of a formal extradition treaty or agreement (form being irrelevant under international law to whether the "agreement" was in fact legally binding)[106]:

> State counsel concedes that there is no formal extradition treaty or agreement between Singapore and Australia. But he submits that a treaty need not be in any particular

and Tunku Abdul Rahman Putra Al-Haj [1963] Mal.L.J. 355 (*per* Thomson C.J., citing Wheaton); Tunku Sofia Jewa, *supra* note 5 at 159. In the present case, it appears that no question arose of the statute in question having been enacted to implement the "agreement" between Singapore and Australia.

100 Lord McNair, *The Law of Treaties* (Oxford: Oxford University Press, 1961) at 115.

101 *Ibid.*

102 See also *Public Prosecutor v. Nguyen Tuong Van* [2004] 2 Sing.L.R. 328 at para 37 (High Court, Singapore, unreported) (*per* Kan Ting Chiu J.). Recall that Kan J. referred to "the Prosecution" in that case. But we take it to be uncontroversial that the learned judge meant to refer to the Attorney-General's Chambers in this regard.

103 *Halsbury's Laws of Singapore*, (Singapore: Butterworths, 1999), Vol. 1, at 12-13.

104 *Attorney General v. Elite Wood Products (Australia) Pty. Ltd. & Anor* [1992] 2 Sing.L.R. 280 (C.A.) (Warren L.H. Khoo J., Yong Pung How C.J., Lai Kew Chai J.).

105 Assisted by Mr. Lionel Yee.

106 *Attorney General v. Elite Wood Products (Australia) Pty. Ltd. & Anor* [1992] 2 Sing.L.R. 280 at 284G-I (*per* Warren L.H. Khoo J.).

> written form. The mutual consent of the parties to be bound can even arise from conduct. In the case of Australia and Singapore, in relation to the matter of extradition between the two countries, something tantamount to a treaty was brought into being by the two parties subscribing to the Commonwealth scheme, and by their enacting parallel legislation and each declaring the other to be a country to which their respective legislation was made applicable.
>
> Since there is thus an extradition treaty or agreement between Australia and Singapore, Australia, by definition, it is argued, is a foreign state for the purpose of s. 43.

The Court of Appeal nonetheless upheld the conclusion reached by Chan J. on the basis that the terms of the Singapore statute were plain and unambiguous. Interestingly, the Court of Appeal added that[107]:

> Courts should not be concerned with the question whether a treaty subsists between Singapore and any state. The sort of detailed and involved examination which the learned state counsel undertook before us ought not to be necessary at all.

In sum, the reasons for dismissing what could have amounted to a binding treaty between Australia and Singapore were (a) that the agreement conflicted with the plain terms of the Singapore statute in that case, and/or (b) that such a treaty did not affect the plain terms of the statute. As for the more basic proposition that statute should be interpreted consistently with the nation's treaty obligations, the position stated earlier by Chao Hick Tin J.C. in *Tan Ah Yeo & Anor v. Seow Teck Ming & Anor* seems to be accepted.[108]

It is noteworthy that on appeal from *Tan Ah Yeo*, a differently constituted Court of Appeal from that in *Attorney General v. Elite Wood Products (Australia) Pty. Ltd. & Anor*) had affirmed the view taken by Chao J.C. earlier. The Court of Appeal in *Seow Teck Ming & Anor v. Tan Ah Yeo and another appeal* (decided a year before *Elite Wood Products*) went to some length to show that there was "no conflict whatever" between statute in that case and the treaty obligation in question "with respect to their respective scopes of application". Why should it have done so if it was not at least important to reconcile apparently conflicting demands emanating from treaty and statute?[109]

The Court of Appeal had simply added here that[110]: "the duty of the court is to give effect to a national law and not international law if there were a real conflict between them." From the viewpoint of a Singapore judge, this must be taken to be a correct statement of principle, and does not detract from the view expressed by Chao J.C. in the court below.

3. *Singapore's Interpretation Act*

Singapore's *Interpretation Act* deserves mention for completeness. At a quick glance, it appears to require *express* mention of the treaty by the statute in question for the view

[107] *Ibid.* at 287D (*per* Warren L.H. Khoo J.). A close reading of the judgment suggests, however, that this is no more than an aside; *Ibid*., 284G-I, 286G-287C.

[108] *Tan Ah Yeo & Anor v. Seow Teck Ming & Anor* [1989] Sing.L.R. 257 at 263E-F.

[109] A good example would be the meaning of the phrase "piracy by the law of nations" under section 15(d) of the *Supreme Court of Judicature Act* (Cap. 322, 1999 Rev. Ed. Sing.). In addition to a customary international law definition, should the Singapore courts not also, if required, account for the definition of piracy under Article 101 of the United Nations Convention on the Law of the Sea, 10 December 1982, which Singapore ratified on 17 November 1994 (and which entered into force for Singapore on 17 December 1994)? In this regard, see also the "first recommendation" in Robert C. Beckman, "Combating Piracy and Armed Robbery against Ships in South East Asia: The Way Forward", (2002) Ocean Devel. & Int'l L. 317 at 334.

[110] *Seow Teck Ming & Anor v. Tan Ah Yeo and another appeal* [1991] Sing.L.R. 169 (C.A.) (Chan Sek Keong J., Yong Pung How C.J., L.P. Thean J.).

expressed by Chao J.C. to apply.[111] Section 9A(3)(e) of Singapore's *Interpretation Act* states that:[112]:

> Without limiting the generality of subsection (2), the material that may be considered in accordance with that subsection in the interpretation of a provision of a written law shall include …
>
> (e) any treaty or other international agreement that is referred to in the written law …

Are the words "that is referred to in the written law" words of limitation therefore? Should the word "may" in the *chapeau* be read in contradistinction to "may not"? If the answer is "yes" to both questions, little room, if any, would remain for the view taken by Chao J.A., which we take here to be a correct statement of legal principle.[113] What happens where the Act does not refer at all to the treaty in question?

First, the Act says that section 9A(3)(e) should be read "without limiting the generality of" section 9A(2), which states that: "in the interpretation of a provision of a written law, if any material not forming a part of the written law is capable in assisting the ascertainment of the meaning of the provision, consideration may be given to that material."

Secondly, *Maxwe*ll teaches that what is involved is really a "presumption against a violation of international law" (*i.e.* more generally). Could this then not be the more basic presumption which the draftsman had in fact intended in the case of the Singapore Act?

Thirdly, the common-law in England, for example, favours a broader approach. There are two versions of the presumption in England at common-law. The first version is akin to the terms of section 9A(3)(e) of Singapore's *Interpretation Act*. That version, which was expressed by Diplock L.J., requires *cogent evidence*, for example, that the statute seeks to give effect to the treaty in question.[114] But a second version exists, and which was expressed by Lord Denning M.R. in *R v. Secretary of State for Home Affairs, ex parte Bhajan Singh*.[115] This second version was subsequently also confirmed by Lord Bridge in *R v. Secretary of State for the Home Department, ex parte Brind*,[116] and it supports the view taken by Chao J.A. instead.

We would therefore say that an Act should be interpreted consistently with international law insofar as that does not violate the plain terms of the Act. That includes a treaty obligation not referred to expressly in the Act. Put differently, statute should prevail over an international treaty obligation only where it is plainly intended to do so.

4. *Can a singapore court consult the preparatory work of a treaty?*

Can a Singapore court consult the preparatory work pertaining to a treaty which falls for judicial consideration? Common-law authority would suggest that the answer is "yes".[117]

111 It appears that this matter has not, previously, provoked attention.

112 *Interpretation Act* (Cap. 1, 2002 Rev. Ed.).

113 *Tan Ah Yeo & Anor v. Seow Teck Ming & Anor* [1989] Sing.L.R. 257 at 263E-F.

114 *Salomon v. Commissioner of Customs and Excise* [1966] 3 All E.R. 871 at 875-6 (Eng., C.A.) (*per* Diplock L.J.). Also discussed in *R v. Secretary of State for the Home Department, ex parte Brind* [1991] 1 A.C. 696 (Eng., H.L.) (*per* Lord Ackner).

115 [1975] 2 All E.R. 1083, at 1083 (Eng., C.A.). For an earlier discussion of "the two versions", see C.L. Lim, "Executive Lawmaking in Compliance of International Treaty", [2002] Sing.J.L.S. 73, at 88 (note 31).

116 *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 A.C. 696 (Eng., H.L.) (*per* Lord Bridge).

117 *The Government of Kelantan v. The Government of Malaysia and Tunku Abdul Rahman Putra Al-Haj* [1963] Mal.L.J. 355 (*per* Thomson C.J., citing Wheaton); *Fothergill v Monarch Airlines* [1980] 2 All E.R. 696 at 714 (*per* Lord Scarman); *Sidhu v British Airways* [1997] 1 All E.R. 193, at 202 (*per* Lord Hope); *R v. Secretary of State for the Environment, Transport and the Regions, ex parte International Air Transport Association*, *The Times*, 3 June, 1999 (Eng,. Q.B. Div.); Michael Byers, "Decisions of the British Courts During 1999 Involving Questions of Public or Private International Law" ("Public International Law") (1999) 70 Brit.Y.B.Int'l L. 277 at 314.

According to Thomson C.J. in *The Government of Kelantan v. The Government of Malaysia and Tunku Abdul Rahman Putra Al-Haj*[118]:

> The Malaysia Agreement ... is also part of an Agreement between the previously sovereign States that went to make up the Federation of Malaya and accordingly should be construed in the light of the principles generally applied to the interpretation of treaties. These are summarized in the following passage from Wheaton's *International Law* (6th ed.) page 522:
>
> > The general principle is that treaties, being compacts between nations, are not to be subjected to the minute interpretation which in private law may result in defeating through technical construction the real purpose of the negotiators.

In *Fothergill v. Monarch Airlines*, Lord Scarman stated the well-known position which is applied by the English courts today[119]:

> The broad approach of our courts to the interpretation of an international convention incorporated into our law is well settled. The international currency of the convention must be respected, as also its international purpose. The convention should be construed on broad principles of general acceptation.

Commenting on the *Kelantan* case, Tunku Sofia Jewa puts it this way (in the Malaysian context)[120]: "whenever municipal and international rules of interpretation differ in matters involving international law, the latter rules would prevail."

However, it may be suggested here that this view, while both preferable and coincides with the need for a nation to observe its international legal duties, may nonetheless be rejected by a domestic court if, inevitably, a straightforward conflict would result between domestic and international law. That suggestion cannot lead to or involve a violation of statutorily prescribed rules regarding the proper interpretation of Parliamentary Acts, for example.

In Singapore, the difficulty discussed in the preceding section (concerning the application of Singapore's Interpretation Act) would also apply to this question. Article 32 of the *Vienna Convention on the Law of Treaties* states that[121]:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
> (b) leads to a result which is manifestly absurd or unreasonable.

Whether this rule (and the rule in Article 31 of the Vienna Convention)[122] should be applied by a domestic (Singapore) judge when construing a treaty rule in a domestic setting might be

[118] *The Government of Kelantan v The Government of Malaysia and Tunku Abdul Rahman Putra Al-Haj* [1963] Mal.L.J. 355 (*per* Thomson C.J., citing Wheaton).
[119] [1980] 2 All E.R. 696, at 714 (*per* Lord Scarman).
[120] Tunku Sofia Jewa, *supra* note 5 at 159.
[121] 22 May, 1969.
[122] Article 31 states that:

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

thought, at first, to depend upon whether Singapore is a party to the Convention, which it is not. However, Articles 31 and 32 are likely to be considered to be customary rules that are accepted by Singapore.[123] If so, there is no reason why the rules of interpretation contained in Articles 31 and 32 of the Vienna Convention should not be applied by a Singapore judge. Insofar as situations may also arise where the interpretation of a Singapore Act is involved, section 9A(2) of the Interpretation Act would, likewise, appear to permit this. To complete the analysis, it may be noticed that the passages quoted above relate to treaty rules incorporated by statute, but there seems no reason in legal principle to think that the position should be different simply because the treaty rule in question has not been incorporated into statute, so long as a treaty rule falls for (domestic) judicial consideration.

C. *Unincorporated Treaty Obligations and the Application of the Common-Law*

We have noticed that a broad reading of the doctrine in *Tan Ah Yeo & Anor v. Seow Teck Ming & Anor* suggests that legal principle aims to avoid a conflict between international and domestic law (*i.e.* regardless of the source of the international or domestic law called into question). This leaves some room perhaps for the (more far-reaching) suggestion that common-law rules should also be applied with an eye towards treaties which the forum State has entered into, but which remain unincorporated by statute.

The matter has arisen before the Court of Appeal in England. Neill L.J. in *Rantzen v. Mirror Group Newspapers (1986) Ltd.*, a case concerning the amount of damages awarded in a defamation action, had considered that the court must construe its power under statute to substitute for the jury award such sum as it considers proper so as to "give proper weight to the guidance given … by the European Court of Human Rights".[124] This was based on the view that the common-law rule was in fact the same as the treaty rule, relying on the earlier (English) Court of Appeal case of *Derbyshire County Council v. Times Newspapers Ltd*.[125]

However, the earlier view taken in *Derbyshire County Council* seems to have been based on the conclusion that it was, in fact, not wholly clear what the common-law rule was in that earlier case since previous authorities had been uncertain on the matter. It has therefore been suggested that the Court of Appeal in *Derbyshire County Council* had considered that it was "under a duty to decide uncertain questions of common law in a manner consistent

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be *taken* into account, together with the context:
   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
   (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
   (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

[123] The texts of what became Articles 31 and 32 were adopted unanimously by the several delegations; by a vote of 97:0:0 and 101:0:0, respectively; Ralf GüntherWetzel and Dietrich Rauschning, *The Vienna Convention on the Law of Treaties: Travaux Preparatoires* (Frankfurt: Alfred Metzner Verlag, 1978), at 237-256. Sir Ian Sinclair concludes that: "There is no doubt that Articles 31 to 33 of the Convention constitutes a general expression of the principles of customary international law relating to treaty interpretation"; Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed. (Manchester: Manchester University Press, 1984) at 153.

[124] [1993] 3 W.L.R. 953, at 966F-967C (*per* Neill L.J.). This was prior to the statutory implementation, in the United Kingdom, of the Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950.

[125] [1993] A.C. 534.

with the Convention", and that the House of Lords had at least not disapproved of this view on appeal in that case.[126]

Whatever may be thought of this suggestion, it is at least difficult to see why a statutory rule should, so far as possible, be construed in accordance with such treaty obligations which the forum State has incurred and which have not yet been incorporated by statute, but that the same cannot be said of a common-law rule. If the reply to this is that the application to statute is due to another presumption, that Parliament has no wish to violate the treaty obligations which the nation has entered into, but that the same cannot be said of the common-law, then it may be countered that the "will" of Parliament relied upon here is only a convenient legal fiction after all, and no more (or less) real than the application of judicial policy.[127]

III. Extra-Territorial Penal Jurisdiction[128]

The jurisdictional scope of a country's criminal laws is called into question when at least part of the act constituting the crime has been committed abroad. However, there is today a widespread use of a multiplicity of heads of jurisdiction by domestic laws, and which allow a country to prescribe for the conduct of nationals and non-nationals abroad.[129] This is consistent with public international law which generally recognises these various heads of jurisdiction commonly asserted today by States when claiming so-called "extra-territorial" jurisdiction.[130]

The view upheld in Singapore both in notable examples of Parliamentary speech and judicial *dicta* appears to be that Singapore law holds tightly to the traditional common-law doctrine that a country's laws are simply not presumed to apply extra-territorially.[131] According to this view, it is therefore only when statute (in the Singapore *Penal Code* or elsewhere)[132] expressly provides for the extra-territorial application of Singapore criminal law in the case of particular offences that the Singapore courts would recognise such extra-territoriality. Otherwise, there is a general presumption against extra-territoriality. Notable examples of such express statutory provision include section 37(1) of the Prevention of Corruption Ac;[133] sections 8(b), 8A(1) and 8A(2) of the *Misuse of Drugs Act*;[134] sections 11(1), (2) and (3) of the *Computer Misuse Act*;[135] and sections 196, 205 and 339(2) of

126 See Christopher Staker, "Decisions of the British Courts During 1993 Involving Questions of Public or Private International Law" ("Public International Law"), (1993) 64 Brit.Y.B.Int'l L. 447 at 456-457, 462.

127 A more difficult sort of case to justify in comparison is the case where the forum State is not party to a treaty, but a rule or principle within that treaty is adopted as the common law position, or employed for the purposes of statutory construction. These cases may, on close analysis, be upheld as cases involving the application of international custom, or where the Parliamentary intent underlying the local statute in question is otherwise plain, but they would aside from such cases be difficult to justify in terms of the application of international law by the forum court. See, for example, *AB v. AC and another application* [2004] SGDC 6 (District Court, Singapore, unreported); *cf.* Chan Wing Cheong, "The Law in Singapore on Child Abduction" Sing.J.L.S. [forthcoming in December 2004].

128 Jurisdiction in relation to private law disputes is, properly, the subject of the conflict of laws. Here, we are concerned only with penal jurisdiction; C.L. Lim, "Singapore Crimes Abroad", [2001] Sing.J.L.S. 494.

129 For an (unsuccessful) challenge brought against the power of Parliament in Singapore to legislate extra-territorially, see *Public Prosecutor v. Taw Cheng Kong* [1998] 2 Sing.L.R. 410 at paras. 21-43 (C.A.) (Yong Pung How C.J., L.P. Thean J.A., Goh Joon Seng J.) (*per* Yong Pung How C.J.); Lim, *ibid.* at 499-501.

130 Still useful is the Harvard Research Draft Convention on Jurisdiction with respect to Crime (1935) 29 A.J.I.L.(Suppl.) 443, including the commentary thereto.

131 *Public Prosecutor v. Taw Cheng Kong* [1998] 2 Sing.L.R. 410 at paras. 66-70 (*per* Yong Pung How C.J.), and the Minister's speech during the debates attending the Second Reading of the extra-territoriality amendment to the *Misuse of Drugs Act* (Cap. 185, 2001 Rev. Ed. Sing.).

132 *Penal Code* (Cap. 224, 1985 Rev. Ed. Sing.).

133 (Cap. 241, 1993 Rev. Ed. Sing.).

134 (Cap. 185, 2001 Rev. Ed. Sing.).

135 (Cap. 50A, 1998 Rev. Ed. Sing.).

the *Securities and Futures Act*.[136] While section 15(d) of the Supreme Court of Judicature Act in Singapore also provides for extra-territorial jurisdiction in respect of "piracy by the law of nations",[137] and other Acts in Singapore also provide for categories of crime created by international multilateral conventions,[138] there is no general extra-territoriality clause in the Penal Code itself unlike the case under the Indian Penal Code or the Malaysian Penal Code.[139]

In the recent case of *Mak Chik Lun and Others v. Loh Kim Her and Others*, Belinda Ang Saw Ean J. recalled that[140]:

> Mr. Shanmugam referred me to … his argument that evidence of transactions entered outside the jurisdiction should be disregarded. The rationale for this is founded on the presumption that statutes have no extraterritorial effect unless expressly provided by Parliament to have such a reach. See *PP v. Taw Cheng Kong* [1998] 2 Sing.L.R. 410; *PP v. Pong Tek Yin* [1990] Sing.L.R. 575 and *Parno v. SC Marine Pte Ltd* [1999] 4 Sing.L.R. 579. The Court of Appeal in *Taw Cheng Kong* at 432 approved the general rule of construction referred to in the speech of Lord Russell CJ in *R v. Jameson* [1896] 2 Q.B. 425 at 430 where his Lordship stated:
>
> > One other general canon of construction is this— … an Act will not be construed as applying to foreigners in respect to acts done by them outside the dominions of the sovereign power enacting. That is a rule based on international law by which one sovereign power is bound to respect the subjects and the rights of all other sovereign powers outside its own territory.

The point had arisen in *Mak Chik Lun* in the following way[141]:

> Counsel for the Defendants, Mr. Hri Kumar, contends that s. 2 of the Act which defines "moneylender" is not restricted to a person whose business is moneylending in Singapore. If it were to be so restricted, the Act would say so. The focus is on the status of the person as a moneylender and not the nature of the transaction. In considering his status as a moneylender, his activities outside the jurisdiction are relevant. His patterns of lending and modus operandi are relevant to determining his status as a moneylender.

As such, counsel argued that it would be necessary to look at "all the business activities of the lender", including "his business outside the country".[142] The learned judge ruled,

136 (Cap. 289, 2002 Rev. Ed. Sing.). For some other long-standing examples, see Lim, *supra* note 128 at 534 (fn. 118).

137 (Cap. 322, 1999 Rev. Ed. Sing.).

138 See, for example, sections 3, 6 and 7 of the *Hijacking of Aircraft and Protection of Aircraft and International Airports Act* (Cap. 124, 1997 Rev. Ed. Sing.), in relation to which section 15 of the *Supreme Court of Judicature Act* (Cap. 322, 1999 Rev. Ed. Sing.) expressly provides for the High Court jurisdiction over "any person within or outside Singapore". Section 15 also provides for such jurisdiction over offences "on board any ship or aircraft registered in Singapore" and where an offence is committed "by any person who is a citizen of Singapore on the high seas or on any aircraft". More recent notable legislation of this nature include section 3 of the *Tokyo Convention Act* (Cap. 327, 1985 Rev. Ed. Sing.); sections 3 to 7 of the *Maritime Offences Act* 2003 (No. 26 of 2003, Sing.) which implements the ("Rome") *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, 10th March 1988, and a consequential amendment (in section 13) to section 15 of the *Supreme Court of Judicature Act* (Cap. 322, 1999 Rev. Ed. Sing.) so as to include this Act under section 15(1) of the *Supreme Court of Judicature Act*; section 34 of the *Terrorism (Suppression of Financing) Act* (Cap. 325, 2003 Rev. Ed. Sing.); and section 6 of the *United Nations Act* (Cap. 330, 2002 Rev. Ed. Sing.).

139 Discussed, for example, in Lim, *supra* note 128 at 505 *et seq*., 534.

140 *Mak Chik Lun and Others v. Loh Kim Her and Others and Another Action* [2003] 4 Sing.L.R. 338 at para. 5 (H.C.) (*per* Belinda Ang Saw Ean J.).

141 *Ibid*. at para. 7.

142 *Ibid*. at para. 8.

however, that the loans purportedly made abroad (in China) were not relevant as they did not go towards proof of moneylending in Singapore, which is what the Act is concerned with (requiring evidence that the accused had carried on the business of a moneylender *in* Singapore). Ang J. considered therefore that[143]: "To ascertain whether he has *extended* his moneylending business to Singapore, of relevance is evidence of moneylending activity in Singapore and his activities outside are irrelevant and disregarded."

A straightforward reading of this case would suggest that while the defence had argued that extra-territoriality was implied in the Act, the judge simply rejected such a reading on the basis of the proper construction of the Act. Viewed in this way, the matter was one strictly of statutory interpretation, and another case will have to be awaited to test the limits of the presumption of territoriality at common-law in Singapore.

Nonetheless, some consideration may be given to the desirability of a general extraterritoriality clause in Singapore, not unlike that found in the Malaysian and Indian Codes, for example.[144] It is also noteworthy that in Singapore, the Court of Appeal has expressed the view that[145]:

> As Singapore becomes increasingly cosmopolitan in the modern age of technology, electronics and communications, it may well be more compelling and effective for Parliament to adopt the effects doctrine as the foundation of our extraterritorial laws in addressing potential mischief. But we must not lose sight that Parliament, in enacting such laws, may be confronted with other practical constraints or considerations which the courts are in no position to deal with. The matter, ultimately, must remain in the hands of Parliament to legislate according to what it perceives as practicable to meet the needs of our society.

IV. Recognition Issues in the Domestic Courts: the Role of Executive Certification

A. *Anthony Woo v. Singapore Airlines Ltd.*

Questions of recognition, of States and Governments for example, commonly arise in connection with a certificate issued by the Executive branch. The matter arose recently before the Singapore courts in *Anthony Woo v. Singapore Airlines Ltd*.[146] That case concerned the recognition of a putative foreign State (Taiwan/the Republic of China) and, indirectly, of a putative foreign Government (the Government in Taipei).

A certificate had been requested of the Singapore Ministry of Foreign Affairs under Singapore's *State Immunity Act* 1979 in respect of Singapore's position on Taiwan.[147] In a letter to the applicants, the Ministry stated that it was "unable" to issue that certificate. Choo Han Teck J. concluded that the Ministry's "answer" to whether Singapore recognizes Taiwan for the purposes of the Act had therefore been given in the negative.[148] This was

[143] *Ibid.* at para. 13.

[144] Although I have argued previously that the absence of such a general extraterritoriality clause does not always preclude the Singapore courts from considering that Singapore law could, *under the common-law*, extend to crimes that, physically at least, were committed abroad; Lim, *supra* note 128 at 508.

[145] *Public Prosecutor v. Taw Cheng Kong* [1998] 2 Sing.L.R. 410 at 437F-G (*per* Yong Pung How C.J.). Generally speaking, however, it is usually in the interests of smaller powers to resist the growth of long-arm jurisdiction, and not to encourage it, in which case the courts in such countries may find it unavoidable occasionally to employ a broad conception of territoriality at common-law instead.

[146] *Anthony Woo v. Singapore International Airlines* [2003] 3 Sing.L.R. 688 (H.C.)(Choo Han Teck J.).

[147] *State Immunity Act* (Cap. 313, 1985 Rev. Ed. Sing.).

[148] Whereas the United Kingdom Foreign and Commonwealth Office has since 1980 refrained from issuing certificates on the recognition of any Government, that is not the current position of the Singapore Ministry of Foreign Affairs (M.F.A.). This provides perhaps the strongest support for the view taken by the learned judge.

upheld by the Court of Appeal in *Civil Aeronautics Administration v. Singapore Airlines Ltd*.[149]

According to section 3(1) of the 1979 Act:

> A state is immune from the jurisdiction of the Court of Singapore except as provided in the following provisions of this part.

It was not disputed in this case that the third party was a department of the Government of the Republic of China,[150] where section 16(1) of the Act also provides that:

> The immunities and privileges conferred by Part II apply to any foreign or Commonwealth State other than Singapore; and references to a state include references to …
>
> (b) the government of that state; and
> (c) any department of that government,
>
> but not to any entity (referred to in this section as a separate entity) which is distinct from the executive organs of the government of the state and capable of suing or being sued.

If that were all, the matter would have been a straightforward one. It would be for the courts to interpret the meaning of the word "state" (or, as may be, the terms "foreign or Commonwealth State") in sections 3(1) and 16(1). However, section 18(a) of the Act provides further that:

> A certificate by or on behalf of the Minister for Foreign Affairs shall be conclusive evidence on any question—
>
> (a) whether any country is a state for the purposes of Part II, whether any territory is a constituent territory of a Federal State for those purposes or as to the person or persons to be regarded for those purposes as the head or government of a state …

The defendant therefore wrote to the Ministry of Foreign Affairs in the following terms[151]:

> We are representing Singapore Airlines in Third Party actions against the Taiwan Civil Aeronautics Administration (C.A.A.) arising from the SQ006 air crash in Taipei, Taiwan, on 30 October 2000. The C.A.A. made an interlocutory application to set aside the action on the basis that, as a department of the Ministry of transport and Communication of the Republic of China, it is immune from the jurisdiction of Singapore courts pursuant to section 3 of the *State Immunity Act* (Chapter 313) ("the Act").
>
> Under section 18 of the Act, a certificate by or on behalf of the Minister for Foreign Affairs is necessary to conclusively indicate whether any country is a "state" for the purposes of Part II of the Act. Enclosed herewith are extracts of Part II and section 18 of the said Act for your easy reference.

The Ministry replied, both to the defendant and to a similar letter by the third party (The Taiwanese C.A.A.): "I wish to inform you that we are unable to issue the certificate pursuant to s. 18 of the *State Immunity Act*."

One question was whether the court should, at that point, have embarked on an independent inquiry as to whether Singapore in fact recognizes Taiwan (*i.e.* recognizes Taiwan *de facto*), even if there had been no formal recognition of Taiwan. There seems to be no

[149] *Civil Aeronautics Administration v. Singapore Airlines Ltd* [2004] 1 Sing.L.R. 570 (C.A.) (Chao Hick Tin J.A.; Woo Bih Li J.).
[150] *Anthony Woo v. Singapore International Airlines* [2003] 3 Sing.L.R. 688 at para. 2.
[151] *Ibid.* at para. 3.

reason in legal principle to preclude such an independent inquiry, indeed the contrary would be true, since the Act says that whatever the Executive says is conclusive but does not say what happens if we do not know what the Executive is saying.

If so, there would be two possible outcomes. First, that Taiwan is a state for the purposes of the Act. If the court concludes, however, that there is not even *de facto* (as opposed to formal) recognition, then it may usually be supposed that there can therefore be no immunity either.

Choo J. had concluded that no independent inquiry was required by the court. The Court of Appeal, however, while agreeing with this, conducted an independent inquiry nonetheless. It did this purely as an aside, but concluded in the end that Taiwan was not recognized by Singapore either *de jure* or *de facto*.

One difficulty which will not be dwelt upon here is whether, as things stood in that case, the Ministry's answer was in fact clear and unambiguous. The Civil Aeronautics Administration argued that it was not. Choo J. concluded however that it was, and it was for that reason that he did not therefore think that an independent judicial inquiry was required in that case.[152]

B. *The Question of an Independent Judicial Inquiry: Civil Aeronautics Administration v. Singapore Airlines Ltd.*

The underlying presupposition in the conclusion drawn by Choo J. was that so long as the Ministry's answer is clear, or considered to be clear, then it would be conclusive (following section 18(a) of the Act). In effect, what this means is that whether a state is a "state" for the purposes of the Act is not usually to be determined "objectively" by judicial inquiry, but by reference to what the Executive branch says when asked of the matter. It would usually be preferable therefore for the Executive to be asked to clarify its statement if there should arise any doubt.

However, the opposite holds true where an independent inquiry is to be conducted by the courts instead. In the one case the Executive's voice is clear, and that voice should be conclusive, but in the other it is (by definition) not clear (for why else would there be an independent inquiry?), and some other means must therefore be found to discover the facts. Viewed in this way, the approach taken by the Court of Appeal was unusual.

The Court of Appeal (while agreeing with the learned High Court judge) inquired independently into Taiwan's position, in which it found (*obiter*) that Taiwan in any event does not enjoy *de facto* recognition.[153] However, this conclusion was reached with heavy reliance placed on the view that the Singapore courts should defer to the view expressed by the Ministry in such matters.[154] Chao J.A. considered that[155]:

> A question such as that which arises in the present case, whether an entity is a State so as to enjoy sovereign immunity in Singapore, is eminently a matter within the exclusive province of the Executive to determine, as what are involved in the question are not only matters of fact but also matters of policy. The courts are not in the best position to decide such a question.

And, again[156]:

[152] *Ibid.* at para. 7.
[153] *Civil Aeronautics Administration v. Singapore Airlines Ltd* [2004] 1 Sing.L.R. 570 at paras. 15-16.
[154] See also Olufemi A. Elias, "The International Status of Taiwan in the Courts of Canada and Singapore", in this *Year Book*.
[155] *Civil Aeronautics Administration v. Singapore Airlines Ltd* [2004] 1 Sing.L.R. 570 at para. 22.
[156] *Ibid.* at para. 27.

> It is really not for the courts to get themselves involved in international relations. The courts are ill-equipped to deal with them. If the answer of the Executive to a query is not clear enough, the proper recourse would be for the court to seek further clarification and not to second-guess the Executive or to determine the answer independently based on evidence placed before it.

There is a long-line of established authority for this "one voice" doctrine, as Lord Atkin had described it in the case of *The Arantzazu Mendi*.[157] The Vice-Chancellor, Sir Lancelot Shadwell had in1828 taken the view that "sound policy requires that the courts of the King should act in unison with the Government of the King".[158] English common-law has not looked back since. In *Mighell v. Sultan of Johore*, Lord Esher took the view that "once there is the authoritative certificate of the Queen through her minister of state as to the status of another sovereign, that in the courts of this country is decisive".[159] Again, in *Duff Development v. Kelantan* what the executive said there was allowed to prevail even over clear evidence of Kelantan's patently subservient status at the time.[160] Likewise, in *R v. Secretary of State for Foreign Affairs, ex parte Trawnik*, Forbes J. considered that: "The fact that the certificate is conclusive marks its content out as the exclusive sphere of the Foreign Secretary and prohibits the courts from intruding into that sphere".[161]

The difficulty with the Court of Appeal's reliance on the "one voice" doctrine is not confined to the issue of clear certification, but also concerns the proper interpretation of Parliament's intent in enacting the *State Immunity Act* of 1979 in the first place. Did Parliament intend that the Executive should not only have the last word on whether a foreign state is recognized by Singapore, but also that it should have the last word whether or not a putative foreign state should therefore be entitled to immunity? This last is, after all, a substantive legal question now governed by statute. The Singapore courts have answered "yes" to this question, either because the "one voice" doctrine should be applied where the certificate is clear, or because the "one voice" doctrine points the way even where the certificate is not.

We may compare this approach of the Singapore Court of Appeal with a Malaysian case to illustrate our next point. There, the Executive was faced with a provision similar to section 18 of the Singapore Act, at least in its essential design.

C. *A Malaysian Analogy*

In *MBF Capital Bhd & Anor. v. Dato' Param Cumaraswamy*[162] action was brought for defamation against the defendant, a Special Rapporteur of the United Nations. The defendant was thereby entitled to functional immunity, provided the acts called into question were done in his official capacity. But who should decide whether that was so?

Malaysia had been a party since 28 October 1957 to the *Convention on the Privileges and Immunities of the United Nations* of 1946.[163] That Convention had been implemented under the *International Organizations (Privileges and Immunities) Act* 1992.[164] Article 22

[157] *Republic of Spain v. SS "Arantzazu Mendi" (The Arantzazu Mendi)* [1939] A.C. 256 (*per* Lord Atkin).
[158] *Taylor v Barclay* [1828] 2 Sim. 213. On the older cases, see F.A. Mann, *Foreign Affairs in English Courts* (Oxford: Clarendon, 1986) 38 *et seq*.
[159] [1894] 1 Q.B. 149, at 158.
[160] [1924] A.C. 797 (H.L.).
[161] The case involved an action for nuisance on account of the noise arising from a shooting-range employed by the British armed forces in Berlin. There, the Secretary of State had certified that "Germany is a State for the purposes of Part I of the State Immunity Act of 1978" and that the British Military commandant was a part of the Government therein; *The Times*, 18 April 1985 (Eng.Q.B.Div.).
[162] [1997] 3 Mal.L.J. 300 (Zainun Ali J.C.).
[163] *Convention on the Privileges and Immunities of the United Nations*, 13 February 1946, 1 U.N.T.S. 15.
[164] No. 485 of 1992.

of Part VI of the Convention states, in the *chapeau* therein, that "experts … performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions …" Article 22(b) of the Convention further provides that "they shall be accorded, in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind". On the other hand, section 7 of the Malaysian Act of 1992 states that:

(1) The Minister may give a certificate in writing certifying any fact relating to the question whether a person is, or was at any time or in respect of any period, entitled, by virtue of this Act or the regulations, to any privileges or immunities.
(2) In any proceedings, a certificate given under this section is evidence of the facts certified.

The Secretary-General of the United Nations issued a letter (referred to in the judgment as a "certificate") "determining" that, on the basis of Article 22 of the Convention above[165]:

> … the words which constitute the basis of [the] plaintiffs' complaint in this case were spoken by the Special Rapporteur in the course of his mission. The Secretary-General therefore maintains that Dato' Param Cumaraswamy is immune from legal process with respect thereto.

The Secretary-General went on to add that[166]:

> Under [Article 34 of] the Convention, the Government of Malaysia has a legal obligation to "be in a position under its own law to give effect to the terms of this Convention". The Secretary-General of the United Nations therefore requests the competent Malaysian authorities to extend to Dato' Param Cumaraswamy the privileges and immunities, courtesies and facilities to which he is entitled under the *Convention on the Privileges and Immunities of the United Nations*.

The Malaysian Minister of Foreign Affairs, acting under the powers granted to him under section 7 of the Malaysian Act of 1992, certified that[167]:

> Under the *Convention on the Privileges and Immunities of the United Nation*s 1946 and under the *Diplomatic Privileges (United Nations and International Court of Justice) Order* 1949 Dato' Param Cumaraswamy shall enjoy the privileges and immunities as are necessary for the independent exercise of his functions. He shall be accorded immunity from legal process of every kind only in respect of words spoken or written and acts done by him in the course of the performance of his mission.

This appears (deliberately) to have left the legal question to be determined (*viz*. the extent of the immunity on the facts of the present case) to the Malaysian courts.

In effect, it would also have been the approach usually taken in these sorts of cases in the United Kingdom. The Executive would refrain from pronouncing on a question of law in these kinds of cases since certificates are normally issued where the United Kingdom Foreign and Commonwealth Office regards the question as one of fact. This is especially so where such facts are known peculiarly to the Executive itself, and the courts will usually recognise the conclusiveness of a certificate where it pertains only to such matters. Certification of "mixed" questions of fact and law could, therefore, invite a judicial finding that a certificate is not conclusive. We are also told that in cases involving questions of law, the United Kingdom Foreign and Commonwealth Office (for example) will usually refuse to issue a

[165] That letter, from Mr. Kofi Annan, is reproduced in the report; *MBF Capital Bhd. & Anor v. Dato' Param Cumaraswamy* [1997] 3 Mal.L.J. 300.
[166] *Ibid*.
[167] *Ibid*.

certificate at all, such as where the question is whether a certain person is by reason of diplomatic immunity immune from suit.[168] There is much to commend such a practice.

Predictably, however, both parties in the *Cumaraswamy* case read the Minister's certificate in support of their respective arguments[169]:

> Dr. Cyrus Das concluded, not unnaturally, that it could only be construed that the Minister had acceded to the Secretary-General's request to accord immunity to the defendant, coming as it did, close on the heels of the Secretary-General's certificate of 7 March 1997.

Whereas[170]:

> Dato' V.K. Lingam resisted that notion and went further to submit that the certificate made no specific reference to the present civil suit at all.

Dr. Das argued also that since the certificate was clear in its terms, it should bind the court. Dato' V.K. Lingam, on the other hand, argued against the Executive interfering with the judiciary in the performance of the functions of the latter. The judge considered that[171]: "the Minister's certificate, in as much as the Secretary-General's certificate is concerned, was carefully issued and was certainly not born out of caprice". The matter was essentially one of judicial policy[172]:

> It might be asked whether allowing the certificate to hold sway, would in effect, be tantamount to subordinating the competence of this court to deal with any dispute that may arise, although the general notion is that national courts should not assume the function of arbiters of conflicts such as is evident in this case.

The learned judge went on to conclude therefore that while he was "unable to hold that the defendant was absolutely protected by the immunity he claimed", this "did not mean however, that the defendant was estopped from adducing further evidence at trial to support his claim."[173]

What is striking about the *Cumaraswamy* case, when compared with the Singapore Court of Appeal's approach in *Civil Aeronautics Administration* was that the Malaysian court considered that the certificate should be construed independently so as not to "subordinate the competence of this court", whereas the Singapore Court of Appeal, while engaging in an independent inquiry as an aside, had considered it important nonetheless to heed the "one voice" doctrine even where what was arguably also involved was the proper construction of a Singapore statute.

V. State Immunity

In Singapore, State immunities are codified in the State Immunity Act of 1979, which resembles closely the United Kingdom State Immunity Act of 1978.[174] The case of *Anthony Woo v.*

168 Elizabeth Wilmshurst, "Executive Certificates in Foreign Affairs: The United Kingdom" (1986) 35 I.C.L.Q. 157 at 165 and 168.

169 *MBF Capital Bhd. & Anor. v. Dato' Param Cumaraswamy* [1997] 3 Mal.L.J. 300.

170 *Ibid.*

171 *Ibid.*

172 *Ibid.*

173 *Ibid.*

174 Malaysia, as we noted above, does not have such an Act, and the matter falls to be addressed at common-law; *Commonwealth of Australia v. Midford (Malaysia) Sdn. Bhd. & Anor.* [1990] 1 MLJ 475 (Mal., S.C.) (*per* Gunn Chit Tuan S.C.J.); *cf. Village Holdings Sdn. Bhd. v. Her Majesty The Queen in Right of Canada* [1988] 2 MLJ 656 (Mal., H.C.) (*per* Shankar J.).

Singapore Airlines Ltd. and the appeal in *Civil Aeronautics Administration v. Singapore Airlines Ltd.* present the most comprehensive treatment of the Singapore Act thus far by the Singapore courts.[175] Perhaps the single most important issue of law that arose in respect of the application of the Act concerned the proper interpretation of section 7.

Where what is involved is death or personal injury, or damage to or loss of tangible property, the Singapore and United Kingdom Acts both *preclude* the enjoyment of state immunity where it is caused by an act or omission "in Singapore" or "in the United Kingdom" under sections 7 and 5, respectively. Conversely, the intent (it could be argued) appears to have been *not* to preclude immunity where the events occur outside the forum state (*presumably* because this was the common-law position before the United Kingdom Act was passed and also the position under customary international law).[176] Since the personal injuries "exception" in section 7 of the Singapore Act appears to stand alone,[177] and does not involve the need to distinguish *acta jure gestionis* from *acta jure imperii*, one would not have thought that Parliament meant to modify the international customary law position or the position at common-law.

More importantly, the "personal injuries exception" in section 7, being limited to making an exception to immunity only in respect of death or personal injury occasioned by acts or omissions "in Singapore" is clearly derived from the United Kingdom statute,[178] which in turn is derived from Article 11 of the *European Convention on State Immunity* which the United Kingdom Act had been intended to implement. Such an exception was, from the outset, intended to be closely circumscribed. As Lady Fox explains[179]: "Its justification seems to be based on an assertion of local control or jurisdiction over acts occurring within the territory of the forum State …"

The ruling in *Anthony Woo* and in *Civil Aeronautics Administration*, on the basis that the Executive had precluded the immunity of the Civil Aeronautics Administration of Taiwan, presents therefore a much expanded reading of the sort of subject-matter the "exception" would encompass (*i.e.* death or personal injury caused by acts or omissions abroad). Recall

[175] Earlier judicial pronouncements in Singapore have not been that significant as the immunity issue arose only tangentially in both cases; *Korea Jomnyong Trading Co. v. Sea-Shore Transportation Pte. Ltd. & Anor*, Suit No. 230 of 2002 (Sing., H.C.) (unreported) (*per* Tan Lee Meng J.); *Praptono Honggopati Tjitrohupojo & Ors v. His Royal Highness Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj* [2002] 4 Sing.L.R. 667 (H.C.) (*per* M.P.H. Rubin J.).

[176] For proof of the customary position, see Article 11 of the *European Convention on State Immunity*, 16 May 1972, Cmnd 5081; ETS No. 74; Article 12 of the "ILC Final Draft Articles and Commentary on Jurisdictional Immunities of States and their Property" in *Yearbook of the International Law Commission* 1991, Vol. 2, Pt. 2 at 13; Article 12 of the Draft Articles on Jurisdictional Immunities of States and their Property, Annex I, Report of the Ad Hoc Committee on Jurisdictional Immunities of States and their Property, 24-28 February 2003, GAOR, Fifty-eighth Session Supplement No. 22 (A/58/22); Article III.F of the International Law Association's Revised Draft Articles for a Convention on State Immunity, 14-20 August 1994, Report of the Sixty Sixth Conference (1994) at 21-27 and 452-499; Article 2(2)(e) of the Resolution of *L'Institut de Droit International* on Contemporary Problems Concerning the Immunity of States in Relation to Questions of Jurisdiction and Enforcement, 2 September 1991. For these documents and accompanying commentary to the U.K. provisions, see Andrew Dickinson, Rae Lindsay and James P. Loonam, *State Immunity: Selected Materials and Commentary* (Oxford: Oxford University Press, 2004) paras 1.036, 1.102, 2.025-2.026, 2.064, 2.081, and 2.116, respectively. (This footnote appears in substantially similar form in a forthcoming article; C.L. Lim, "Non-Recognition of Putative Foreign States (Taiwan) under Singapore's State Immunity Act" (2004) [unpublished]).

[177] *Cf. Schreiber v Canada (Attorney-General)*, 2002 SCC 62; [2002] 3 SCR 269 (Canada) at para. 31; Sienho Yee, "Foreign Sovereign Immunities, *Acta Jure Imperii* and *Acta Jure Gestionis*: A Recent Exposition from the Canadian Supreme Court, (2003) 2 Chin. J.I.L. 649. It is another matter, however, if the Act des not apply at all, and where the position is governed at common-law. Here, the English courts have (somewhat controversially) considered that the personal injuries exception would be subject to the application of the distinction between *acta jure imperii* and *acta jure gestionis*; *Holland v. Lampen-Wolfe* [2000] 1 W.L.R. 1573 (Eng., H.L.) (*per* Lord Millet).

[178] Singapore Parliamentary Debates, Official Record, 7 September 1979, col. 409 (Mr. E.W. Barker).

[179] See Hazel Fox, *The Law of State Immunity* (Oxford: Oxford University Press, 2004) at 309 *et seq*.

that the Court of Appeal in *Civil Aeronautics Administration* had based its conclusion (that the Taiwanese C.A.A. is not immune) on a construction of the Executive certificate; specifically, that the Government of Singapore does not recognize Taiwan. In consequence, the Singapore Act is now read so as to tie the rule in section 7 above to the enjoyment of formal recognition. One wonders whether the position at common-law and under public international law was not simply that the Singapore courts would not have had *subject-matter* jurisdiction (as opposed to jurisdiction *ratione personae*) in such cases, *regardless* of the question pertaining to Taiwan's status.[180]

The recognition aspect is arguably also not as concerned with when there would *not* be immunity, as with when immunity *would* be available. English-speaking courts would (because of the "one voice" doctrine) find that immunity *could* apply, provided that the act or omission in question does not fall within one of the statutory exceptions to immunity, if the government of the forum state were to expressly recognize the foreign state as a sovereign. It is an entirely different proposition to suggest that it is for the Executive to decide that immunity *cannot* apply in a particular case. Arguably, what the Act of 1979 does is to encourage judicial rule-application, or at least it was not intended to alter the rule under customary law or common-law. Whether the practice of deferring to the Executive in matters of foreign relations (under the "one voice" doctrine) should at least make an exception for state immunity is, at the very least, an interesting issue which we are now confronted with in Singapore.

In the case of Taiwan, the neatest way to admit such an exception, at least for state immunity cases, is to do what the United States and the United Kingdom (in respect of foreign corporations, at least) have done; namely, to enact a statutory exception.[181]

[180] As Professor Brownlie puts it: "A connected question of considerable significance is the distinction … between immunity as a plea based upon the status of the defendant as a sovereign state (*ratione personae*), and immunity *ratione materiae*, which affects the essential competence of the local courts in relation to the particular subject-matter. The immunity *ratione personae* (procedural immunity) is a bar to the jurisdiction of the state of the forum which would exist (or be presumed to exist) but for the existence of a title of immunity. In fact the proponents of the principle of restrictive immunity, by reducing the role of status as a basis for conferring a title to immunity, have inevitably given greater prominence to the nature of the subject-matter and the issue of the essential competence of the judicial organs of the forum state." There is another approach: "Even if there is no basis for immunity *ratione personae*, and a basis for subject-matter jurisdiction exists, the question still remains whether the courts of the forum have an essential competence (in terms of general international law) in respect of the issue"; Brownlie, *supra* note 28 at 326-327. For this second approach, see *Buttes Gas and Oil Co. and Another v. Hammer and Another* [1982] A.C. 888 (*per* Lord Wilberforce). But for the argument against something which is at least (even if only) analogous to this sort of thinking in a private international law context, see the sentiment expressed in Adrian Briggs, "Public Policy in the Conflict of Laws: a Sword or a Shield?" (2002) Sing.J.I.C.L. 953, especially at 963 *et seq*. Yet the point at issue here, for our purposes, is arguably different. The argument for treating a matter as non-justiciable within the meaning of the *Buttes* doctrine is one that proceeds from another sort of judicial caution, one which if not applied (as Lord Wilberforce would have it in *Buttes*) could "imperil the amicable relations between governments and vex the peace of nations", not to mention violate an international customary rule. It is ultimately a matter of judicial policy, and needless to say also of a satisfactory characterization of the issue at hand, whether Lord Wilberforce's sentiment should prevail in the present case, or whether (in the analogous private international law context) judges should simply avoid the application of customary international law rules in these sorts of cases (when the matter is characterized instead as one of common law private international law).

[181] For the case of the United Kingdom, see Ilone Cheyne, "The Foreign Corporations Act" (1991) 40 I.C.L.Q. 981. *Cf.* Singapore's *Companies Act* (Cap. 50, 1994 Rev. Ed. Sing.), where the word "corporation" is defined as:

> … any body corporate formed or incorporated or existing in Singapore or outside Singapore and includes any foreign company but does not include—
>
> (a) any body corporate that is incorporated in Singapore and is by notification of the Minister in the *Gazette* declared to be a public authority or an instrumentality or agency of the Government or to be a body corporate which is not incorporated for commercial purposes;
>
> (b) any corporation sole;
>
> (c) any co-operative society; or
>
> (d) any registered trade union …

VI. Diplomatic Immunity

There are no reported (or unreported) Singapore cases in respect of diplomatic immunities in the post-Independence period. Singapore is not a party to the 1961 *Vienna Convention on Diplomatic Relations*,[182] and consequently there is no enabling legislation in this respect. However, since much of that Convention would also reflect general or customary international law, it would be interesting to see how such customary rules could (indeed, would) be applied in the Singapore courts should a dispute pertaining to diplomatic immunity which is not otherwise covered by Singapore statute ever make its way to the Singapore courts.[183] The Singapore courts may yet be persuaded not only to treat the rules of the Vienna Convention as customary rules, but also to apply these rules in Singapore as such.[184]

Malaysia, on the other hand, is a party to the Vienna Convention and has passed enabling legislation implementing parts of that Convention; namely, the Malaysian *Diplomatic Privileges (Vienna Convention) Act* of 1966.[185] A notable Malaysian case which arose in 1998 concerned Article 31(2) of the Vienna Convention, which states that: "A diplomatic agent is not obliged to give evidence as a witness."

The *travaux preparatoires* suggest that this formulation, proposed by Sir Gerald Fitzmaurice, is now to be considered to be a correct reflection of customary international law. Several members of the International Law Commission during the debates leading to the adoption of this provision considered that no legal obligation whatsoever is imposed on the diplomatic agent to give evidence as a witness, and not simply that such a person would be immune from legal process. Thus, under the Convention (and it appears, under customary international law too) a diplomatic agent who refuses to give evidence as a witness does

What would the words "formed or incorporated or existing … outside Singapore" mean in this context? For the case of the United States, see the United States *Taiwan Relations Act* (22 U.S.C.A. § 3303).

182 *Vienna Convention on Diplomatic Relations*, 18 April 1961.

183 This is not to say that there is no statutory provision granting diplomatic immunity from legal process under Singapore law. See *Diplomatic Privileges (Commonwealth Countries and Republic of Ireland) Act* (Cap. 83, 1985 Rev. Ed. Sing.) which currently applies (only) to Canada, Australia, New Zealand, India, Sri Lanka and Malaysia under section 6 of the Act; *International Organisations (Immunities and Privileges Act)* (Cap. 145, 1985 Rev. Ed. Sing.); *International Development Association Act* (Cap. 144A, 2003 Rev. Ed. Sing.), and section 11 of the *Mutual Assistance in Criminal Matters Act* (Cap. 190A, 2001 Rev. Ed. Sing.). For consular privileges, see the *Consular Conventions Act* (Cap. 52) which currently applies (for the purposes of sections 3 and 5 of the Act) to Norway, Sweden, the United States, Greece, France, Mexico, Germany and Italy under *the Consular Conventions (Consolidation) Order* (Cap. 52, Order 1, 1985 Rev. Ed. Sing.).

184 In 1980, the following question was put to the then Senior Minister of State for Foreign Affairs: "It is known that under the guise of the normal functions of diplomacy, Soviet officials in the embassies, the press agencies, information offices, trade offices, joint venture companies, etc. have indulged in subversive activities. The recent example of the subversive activity of the Soviet Ambassador in Wellington is a case in point. In Singapore, we had the trouble with the Moscow Narodny Bank. I would like, therefore, to caution the Hon. Minister to be vigilant against any subversive activity by Soviet officials in Singapore. Specifically, I would like to know the number of Soviet diplomats and other officials in the Soviet press agency, trade and information offices, and whether we should not reduce the number of Soviet officials present here. Singapore has very little trade with the Soviet Union and we have limited official exchanges. We maintain a very small but dedicated mission in Moscow, but the Soviet embassy here is very large both in terms of personnel and space. Sir, I hope the Hon. Minister will look into this question that I have raised"; Sing. *Parliamentary Debates*, col. 1108 (18 March 1980) (Dr. Lau Teik Soon). The Senior Minister of State for Foreign Affairs replied: "When diplomatic relations were established in 1968, the strength of the Soviet Embassy was increased and the staff now comprises a total of 28, *i.e.* 10 diplomatic staff who enjoy diplomatic immunity and privileges and 18 non-diplomatic staff. At present the Singapore Embassy in Moscow, although having reciprocal rights, has only three diplomatic and seven non-diplomatic staff, which we consider adequate for the present. If we need to, we can increase this strength to the same number as the number of Soviet staff in Singapore"; Sing. *Parliamentary Debates*, col. 1109 (18 March 1980) (Mr. S. Dhanabalan). The precise legal basis of that immunity is not apparent, however, from the statement of the then Senior Minister of State.

185 (Act 24/1966).

not commit any violation of a legal obligation.[186] This would also appear to have been the view taken by the Turkish Ministry of Foreign Affairs in the case below.

In *Public Prosecutor v. Orhan Olmez*[187]:

> [E]xtradition proceeding [were] commenced in the Magistrate's Court, Kuala Lumpur on 12 December 1986. On 20 December 1986, the First Secretary to the Turkish Embassy in Kuala Lumpur, Mr. Tarik Yelvac, gave evidence at the request of the defence. The Deputy Public Prosecutor called him to testify at the proceeding and he attended court that day on the basis of a diplomatic note (P20) dated 19 December 1986. He completed the examination in chief and Mr. Karpal Singh had commenced his cross-examination. During his cross-examination on the documents sent by the Turkish Government, there was some confusion about the translation. The matter was adjourned to enable the witness to identify the translation with the right documents. On 21 January 1987, when the hearing resumed for Mr. Karpal Singh to continue with his cross-examination, Mr. Yelvac did not turn up in court. A document dated 19 January 1987 (P21) was produced by the Deputy Public Prosecutor. This document is another diplomatic note sent by the Turkish Embassy stating that Mr. Yelvac would not be appearing in court any more. As a result of this note and Mr. Yelvac's absence, Mr. Karpal Singh applied to the court to issue a warrant of arrest against Mr. Yelvac to compel him to appear in court.

The learned High Court judge granted Mr. Karpal Singh's application. The "first" diplomatic note (dated 19 December 1986) had read[188]:

> The Embassy of the Republic of Turkey presents its compliments to the Ministry of Foreign Affairs and with reference to its Note No 728-300 dated 18 December 1986, has the honour to inform the latter of the following:
>
> Upon the instructions of the Turkish Ministry of Foreign Affairs with a view to fulfilling the legal requirements of the Malaysian authorities, Mr. Tarik Yelvac will be present during the case hearing of Mr. Orhan Olmez in his capacity as consul of this Embassy solely for authentication of the legal documents prepared and sent by the Turkish authorities as well as letters, notes and documents sent by this Embassy.
>
> In this connection, during the hearing, Mr. Yelvac will reply only to the questions pertaining to the authentication of the aforementioned legal documents. Mr. Yelvac will refrain from replying any other questions posed by either the Honourable Magistrate or other persons.
>
> The Embassy of the Republic of Turkey would be grateful if the foregoing is transmitted to the relevant Malaysian authorities before the hearing. The Embassy of the Republic of Turkey avails itself of this opportunity to renew to the Ministry of Foreign Affairs the assurance of its highest consideration.

The "second" diplomatic note (19 January 1987) informed the Malaysian authorities, however, that[189]:

> [U]pon the instructions of the Turkish Ministry of Foreign Affairs, Mr. Tarik Yelvac will not be appearing before the Court again, in connection with the case hearing of Mr. Orhan Olmez which will be held between 21-24 January 1987.
>
> Since Mr. Yelvac has already appeared in the court and given evidence as to the authentication of the legal documents prepared and sent by this Embassy, *the relevant*

[186] Eileen Denza, *Diplomatic Law: A Commentary on the Vienna Convention on Diplomatic Relations*, 2nd ed. (Oxford: Clarendon, 1998) at 259-260.

[187] [1988] 1 Mal.L.J. 13 (Mal., H.C.) (*per* Zakaria Yatim J.).

[188] *Ibid.* (emphasis added).

[189] *Ibid.*

> *Turkish authorities believe that the legal requirements of the Malaysian authorities have already been met.*
>
> The Embassy also believes that the evidence submitted would be sufficient for Mr. Orhan Olmez's extradition to Turkey.

Before the Malaysian Supreme Court, Hashim Yeop Sani J. described the crux of the matter put to the Court[190]:

> Whether or not the learned Judge was right in law to hold that the act of the sending State allowing the diplomatic agent concerned to give evidence solely for authentication of the legal documents in an extradition enquiry constitutes a waiver of immunity from jurisdiction under Article 32 of the Schedule to the *Diplomatic Privileges (Vienna Convention) Act* 1966.

Hashim Yeop Sani J. considered that[191]:

> The restrictive language in the first diplomatic communication is clear and it cannot be construed as anything like a waiver of immunity. It was merely to express the diplomatic agent's willingness to give evidence voluntarily although he is not by virtue of Article 31(2) of the Convention legally *obliged* to give evidence as a witness.
>
> A waiver under the Convention must always be express—Article 32(2).

Consequently, the learned High Court judge had fallen into error in considering that the first note had amounted to an express waiver of immunity.

There are two points of special interest, for our purposes. First, in what is apparently a mere aside, the Malaysian Supreme Court considered that while "diplomatic envoys are sacrosanct and the principle of their inviolability is generally recognized"[192]:

> There is, however, one exception. If a diplomatic envoy commits an act of violence which disturbs the internal order of the receiving State in such a manner as makes it necessary to put him under restraint for the purpose of preventing recurrence of similar acts, or if the diplomatic envoy conspires against the receiving State and the conspiracy can be made harmless only by putting him under restraint, he may be arrested for the time being, although he must in due time be safely sent home.

Secondly, the learned High Court judge had earlier ruled in respect of the "first" diplomatic note that[193]:

> The conditions stipulated in the diplomatic note (P20), that Mr. Yelvac should refrain from replying [to] any questions put by the Magistrate and counsel for the fugitive criminal, are contrary to our law especially the Extradition Ordinance and the Evidence Act. I accordingly rule that the conditions stipulated in the diplomatic note (P20) do not affect the law and procedure in the extradition proceeding and the Magistrate should ignore these conditions. These conditions are also contrary to the spirit of the Vienna Convention on Diplomatic Relations, 1961 to which the Republic of Turkey is a contracting party and also contrary to the rules of international law.

190 *Ibid.* (Supreme Court, Malaysia) (*per* Hashim Yeop Sani J.).

191 *Ibid. Cf.* Article 29 of the Vienna Convention, which states that: "The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity."

192 *Ibid. Cf.* United Kingdom Interdepartmental Committee on State Immunities, *Report on Diplomatic Immunity*, Cmnd 8460, at 3-4; Harris, *supra* note 60 at 349-350, from which it appears that the United Kingdom practice here would be to request a waiver of immunity in such circumstances, and failing such, to treat the diplomat in question as no longer acceptable to the United Kingdom, barring any "exceptional features" in the particular case.

193 *Ibid.* (Mal., H.C.) (*per* Zakaria Yatim J.).

According to the Supreme Court, however, the High Court judge had erred[194]: "Because of his view that the first diplomatic note contains an express waiver the learned Judge fell into the second error when he ruled that the Turkish Embassy was not entitled to claim immunity for Mr. Yelvac in the second diplomatic note."

It would be disingenuous to speculate on what a Singapore judge standing in the shoes of the learned Malaysian High Court judge would do. But there seems no reason to think, however, that (generally speaking) the rules of the Vienna Convention could not be treated as customary international rules applying at common-law. There is, after all, some authority in Singapore for the proposition that[195]: "The privilege affording Ambassadors and other accredited representatives of foreign countries immunity from all writs and processes is an ancient doctrine of the common law declared in terms by the *Diplomatic Privileges Act*, 1708."

Practical difficulties could result if there were, however, to arise a conflict between such rules and the requirements of statute or the Singapore Constitution as such conflict would be resolved by reference to the usually applicable legal principles discussed earlier. Some cases of apparent conflict with statute could conceivably be resolved by reference to an intention on the part of Parliament to accommodate diplomatic privileges if this does not cause violence to the language of the Act in question. In yet other cases, relief may be provided to the foreign State where the issue could be characterised not as an issue involving diplomatic immunity alone, but also an issue of state immunity.[196]

VII. Conclusion

Unsurprisingly, English doctrine has continued to play a dominant role in many of the cases discussed above. This could still be expected in the future, at least until such time when

[194] *Ibid.* (Mal., S.C.) (*per* Hashim Yeop Sani J.). For earlier commentary on this case, based on a report appearing in the *International Law Reports* (87 ILR 212), see Denza, *supra* note 186 at 258-262. Should Turkey have waived its entitlement to immunity in this case? See UN Doc A/CONF 20/14, Add 1, v. 90; Harris, *supra* note 60 at 349. For Parliamentary debate in Singapore in respect of waiver of immunity in a particular case, see Sing. *Parliamentary Debates*, cols. 570-57 (16 October 1989).

[195] *Re Contraband Mails ex M.V. "Conte Rosso"* [1946] 1 Mal.L.J. 5 (Sing., H.C.) (McElwaine C.J.). The statement is supported in Westlake, for example, which would have been likely (and appears) to have been widely consulted still in that period; John Westlake, *International Law, Part 1: Peace*, 2nd ed. (Cambridge: Cambridge University Press, 1910) at 277:

> It is generally admitted that a diplomatic person is exempt from the territorial jurisdiction on engagements contracted by him either in his official capacity, or in a purely private as distinguished from a mercantile or professional capacity, and that so much of his property, movable or immovable, as is necessary to his dignity and comfort cannot be seized for any debt. But opinions and the practice of courts differ as to points beyond these, and since in such circumstances no international agreement can be asserted the question is one for national law … It is enough to say that in England the widest views as to diplomatic immunity are adopted.

Referring to st. 7 Anne, c.12, Westlake adds (footnote 2 at 277) that the Act "has always been considered in England as declaratory and not innovating". This is also supported in a Foreign Office despatch of 1898, in which the Attorney General and the Solicitor-General had approved the view taken there that the Statute of Anne: "was really declaratory of the common law of this country, and declared the embodiment in our municipal law of the principles of international law"; Lord McNair, *International Law Opinions, Volume 1: Peace* (Cambridge: Cambridge University Press, 1956), at 198.

[196] This would involve the need to persuade a Singapore court of the veracity of Sir Stephen Brown's observation in *P v. P* [1998] Times L.R. 119, [1998] 1 F.L.R. 1026 (Family Division), and that the observation applies in favour of the foreign State in the particular case: "… it has been accepted by the Court of Appeal in the case of *Propend Finance Pty. Ltd. v. Sing* (unreported) 17 April 1997 that the agent of a foreign state will enjoy immunity in respect of his acts of a sovereign or governmental nature. Accordingly, there may be cases where the diplomatic agent may enjoy both diplomatic and State immunity. These immunities will not be co-extensive". *Cf.* Michael Byers, "Decisions of British Courts During 1998 Involving Questions of Public or Private International Law" ("Public International Law") (1998) 69 Brit.Y.B. Int'l L. 305 at 316-318.

there would have emerged a sufficiently dense body of local jurisprudence with its own peculiar doctrinal concerns. Insofar as such a fully-developed local body of cases has not yet emerged, there appears also to be some opportunity for the Singapore and Malaysian courts to treat decisions and dicta in both countries as persuasive, barring any special circumstances or considerations of judicial policy peculiar to each jurisdiction. Examples include the weight given to unincorporated treaties by the Singapore courts when construing a statutory provision touching upon an international treaty obligation,[197] and the reception given to the *Trendtex* doctrine (that custom becomes "automatically" a part of the common-law) in Malaysia (in respect of the application of the doctrine of restrictive state immunity).[198] Indeed, the Malaysian and Singapore courts may still take similar or analogous approaches to common issues despite divergent national treaty practices (thereby leading to differences in statutory coverage of international law issues in the domestic laws of the two countries). There seems no reason in principle to think that just because Malaysia is a party to the *Vienna Convention on Diplomatic Relations* of 1961 and Singapore is not, or that Singapore has a State Immunity Act and Malaysia does not, that the courts in the two countries could not sometimes profit from an occasional glance at each other's practices. Foreign cases of treaty rule-application which arise as a result of the incorporation of a treaty by way of statute do not, for example, preclude parallel customary rule-application where custom is treated by the forum court as a part of the common-law instead (subject of course to any contrary demand which statute or a constitutional requirement may impose in the forum state).

Time will tell, but for now it is hoped that the present survey may be of some small use to legal scholars and members of the legal and diplomatic professions. It is intended that such a survey could from time-to-time be offered as the body of cases continues to grow, in the confidence that so far as this branch of the law is concerned its time will come eventually.

197 *Contra P.P. v Wah Ah Jee* (1919) 2 F.M.S.L.R. 193 (FMS, S.C.) (Earnshaw C.J.C.).

198 Put differently, does Singapore ascribe to an absolute doctrine of immunity *at common-law*? Surely not. See, however, *United States of America v. Yang Soon Ee & Anor* [1950] Mal.L.J. 102 (Sing., H.C.), applying *The Christina* [1938] A.C. 485. Nonetheless, for actions *in rem*, the common-law is today, without doubt, that stated in *The Philippines Admiral* [1976] 2 W.L.R. 214, whereas the law in respect of actions *in personam* is to be taken to have been correctly stated by the majority in *Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] 1 Q.B. 529, affirmed in *I Congreso del Partido* [1983] 1 A.C. 244 (Eng., H.L.) (*per* Lord Wilberforce), for the reasons given in the speech of Gunn Chit Tuan S.C.J. in*Commonwealth of Australia v. Midford (Malaysia) Sdn Bhd* [1990] 1 Mal.L.J. 475 (Supreme Court, Malaysia). See also section 3 of Singapore's *Application of English Law Act* (Cap. 7A), and our discussion in Part I.E.3(ii), above.