Foreword from President

Greetings to Fellow Readers,

As the ALSA Year is coming to an end, the ALSA International Board 2016/17 would like to present to you one of our annual deliverables – the Academic Publication which is a combined edition of both Asian Journal of Legal Studies and ALSA Law Review.

Together with our new initiative, the ALSA Legal Newsletter, the Academic Publication is a platform where we hope that members will become more internationally minded by bringing up-to-date legal news and contemporary legal issues within different jurisdictions to your attention.

As we continue to work together to the betterment of our organisation and to the benefits of our members, I would like to use this opportunity to express my appreciation to all parties who have contributed to this meaningful project for without whom, this publication would not be possible. Thank you.

The respective contributors and Academic Activities Department have put in a great deal of effort and commitment towards ensuring the success of this project. I hope that all of you will find this year’s issue of Academic Publication interesting and engaging.

Happy reading to one and all 😊

Thank you and ALSA Always Be One!

Chew Jing Hao (Jayden)
President
Asian Law Students’ Association
International Board 2016/17
Foreword from Vice President for Academic Activities

It is with my greatest pleasure that I present to you the masterpiece of Asian Law Students’ Association’s (“ALSA”) Academic Publication 2017.
You are currently in possession of the combined edition of ALSA Law Review and the Asian Journal of Legal Studies (“AJLS”). Herein is an accumulated works and sweats of ALSA’s members across Asia subjected to a peer-to-peer review under ALSA Academic Publication Editorial Board.
Before I proceed further, about ALSA—we are a premier law students’ organisation based in Asia, networking over 15,000 members across 16 countries. Our main goal is to provide a venue for young leaders and future world players of Asia a forum to exchange ideas, meet/network with their peers and develop legal and other skills needed to be successful leaders. Academic Publication is one of the major keys to achieve such goal.
Under ALSA’s Academic Publication are mainly 2 initiatives founded in 2007: ALSA Law Review and AJLS.

ALSA Law Review is a student-run journal published annually by ALSA International which focuses on a diversity of a shifting legal landscape of Asian countries. This year, the theme of ALSA Law Review is ‘War on Drugs’ which shines spotlights on relevant situations and legal circumstances of each countries relating to stances on narcotics prevention mechanism and rehabilitation programs available. Law students-young scholars drawn upon sources available only for locals and aspired to reckon recommendations to their respective authorities.

AJLS is a compendium of articles relating to studies of the legal system of Asian countries and feature comparative legal analyses
that is application in international framework as a whole written by students, academia and professionals. Particularly about this edition of Academic Publication, it concerns a wide range of contemporary legal issues within different jurisdictions from Asia to Europe thanks to our partner, European Law Students’ Association’s support. Lastly, I would like to thank all parties who contributed greatly to this project primarily the Director of Academic Publication, Academic Publication Editorial Board and contributors of the articles. Without any further ado, flip the page and have your perspective broadened and have your thirst for knowledge quenched by analyses between distinct legal systems. ALSA always be one!

Prin Laomanutsak
Vice President of Academic Activities
Asian Law Students’ Association
International Board 2016/17
Foreword from
Director of Academic Publication

After hundreds of man hours dedicated by over dozens of people, I am proud to finally publish something I have dedicated an entire year towards. I am fortunate to have been entrusted with this responsibility. It has been a learning and a rewarding experience for everyone involved.

The ALSA Academic Publication is definitely what I would consider as the embodiment of the spirit of ALSA in one neat little package. It is the cooperation between law students, scholars, and professionals across Asia to present and discuss legal issues from the perspective of each respective individuals.

In the Law Review, the theme set forth is the “Law on Drugs”. It has been inspired by the controversy regarding drug law enforcement in the Philippines. Each article, contributed by each country, explored different issues with regards to drugs. This reflects the different brand of drug issues embedded in different countries. For example, the issue of extrajudicial killings perpetrated by the Philippine government as part of its “War on Drugs” is an issue unique to the country. A highly technological country such as South Korea may experience illicit drug trade activity on the Social Network Services (SNS), something that has little to no activity in other countries. Hopefully, ideas set forth by each article can help the understanding of different drug issue in different countries.

The Asian Journal of Legal Studies is a collection of high-caliber articles of assorted titles. They were graciously submitted to us by professionals and other legal scholars.
I hope that you will find the articles as interesting as I do, whether that will be about a comparative study of drug issues between Macau and China, or the harmonization between environmental protection and economic development from a legal perspective.

Thank you, and ALSA always be one!

Itsariya Tivakul
Director of Academic Publication
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Members of the Editorial Board
2016-2017

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# Table of Content

Foreword from President I

Foreword from Vice President II for Academic Affairs

Foreword from IV Director of Academic Publication

Members of the Editorial Board IV

**AJLS**

Empowering Survivors in the Asian Climate Battleground: PROPOSING A CRIMINAL JUSTICE MODEL FOR CRISES AFTER CALAMITIES 11

Chevron vs. Ecuador: Harmony of Environmental Protection and Economic Development from the Legal Perspective 37

Introduction to the Evidentiary Principles of the International Court of Justice 51

The Implementation of Indonesia’s Rights As Archipelagic State Under UNCLOS Regime In The Case Of China’s Claim Over Traditional Fishing Rights At Waters Of Natuna Island 65
The Constitutional and legal framework in Thailand since the 22 May 2014 coup d'état and Thailand’s international human rights obligations

Asset Acquisition: A Forgotten Field Within Indonesian Legal System

Problem Schemes in Implementing Thin Capitalization Rules in Thailand

Law Review

Foreword from Academic Advisor

- ALSA Law Review

Macau: Comparison of and Cooperation on Drug Issues between Macau and Mainland China

Malaysia: Laws on Drugs: Are They Effective Enough in Eradicating Drug Problems in Malaysia?

Korea: Drug Markets on the Internet and Social Networking Services in Republic of Korea

Indonesia: Indonesia’s War on Drugs: Due Process of Law in Capital Punishment for Drug Traffickers in Indonesia
Japan: 199
Japanese Drug Issues: Focusing on the Young

Brunei: 212
Brunei’s War on Drugs: Are We Seeing the Silver Lining of Finally Conquering It?

Philippines: 238
Defeating Inverted Pentagrams: Criminal Liabilities of the Chief of State and His Minions in Errant War on Drugs

Taiwan: 258
When Returning Back to The Society from Rehabilitation Centers — Suggestions for the Future

- ELSA Law Review 270
  The Right to Life in Armed Conflict: The Ratio of the Norms of International Humanitarian Law and the Norms of International Human Rights Law.
EMPOWERING SURVIVORS IN THE ASIAN CLIMATE BATTLEGROUNDS: PROPOSING A CRIMINAL JUSTICE MODEL FOR CRISES AFTER CALAMITIES

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ABSTRACT

Criminal justice mechanisms are often overlooked in the crafting of laws, rules and policies related to disaster risk reduction, response and management. This leads to the detriment of citizens in communities ravaged by calamities, for they are doubly victimized, first by the consequences of the natural phenomena, and second by the ineffectuality of the criminal justice system in their locale in the chaos following the storm. This paper examines the effects of such oversight in Asia. In particular, it analyzes legislation and jurisprudence related to the intersection of disaster law and criminal law, and how it has failed in the aftermath of the strongest storm to ever make landfall in history. Applicable not only to the Philippines but also to greater Asia, it recommends best practices and key policies for stronger criminal justice mechanisms to take effect in the aftermath of natural calamities, in order to prevent abuses on the accused, support community rehabilitation and ultimately uphold human rights.
A. INTRODUCTION

“It’s time to change the mindset that natural disasters are inevitable.”

_Gordon McBean_

When we think of natural disasters, we often refer to them as unstoppable or inevitable. After all, what are humans in the face of the forces of nature? That is why it proves to be an interesting idea when UN Secretary General Kofi Annan noted that we have to differentiate a calamity from a disaster, stating that it is only a disaster when states fail to recognize their vulnerabilities and are unable to effectively prepare for incoming onslaughts.\(^1\) While natural phenomena can give birth to a host of potential calamities, they need not turn into outright disasters. Planning, preparation and proper execution remain key factors in order to prevent injustice from being wrought unto citizens in the aftermath of a natural calamity. In other words, while calamities cannot be prevented, it is in human hands for disasters to be averted.\(^2\)

One such aspect of problems confronting communities after a natural calamity pertains to criminal justice. Any established community requires the imposition of order; it is important therefore to have a strong criminal justice system in place after a

\(^1\) Report of the Secretary General to the General Assembly, “On international cooperation on humanitarian assistance in the field of natural disasters, from relief to development,” A/60/227.

natural calamity. This is because criminal cases lie at the heels of natural and man-made calamities, accidents and disasters, violating even the most basic of all human rights. It is the State’s duty to prevent these violations, by ensuring sufficient government compliance and ability to intervene in citizen affairs when necessity demands.

But this is easier said than done. The question remains: how we deal with criminality in the aftermath of a natural calamity?

This paper analyzes key criminal justice policies and their implementation in the wake of catastrophes. In particular, it zooms in on a number of examples from all around Asia. One of them is Tacloban City, one of the urban areas directly hit by Typhoon Haiyan in 2013, which scientists claim as “the worst storm to ever make landfall in history”, and where reports of crime were widespread ipso facto. In contrast, it looks at similar post-calamity examples, including Myanmar after Cyclone Nargis in 2008 and East Japan after the 2011 earthquake.

Not only does the paper provide a critique of Philippine disaster laws in relation to natural disasters, it also recommends best practices from around the world which can applicable in the

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local setting, advocating for policy modifications at the level of both local and national government in relation to disaster risk reduction, response and management, particularly in the Asian region.

B. METHODOLOGY

The objective of the paper is to propose a criminal law model which is applicable in the aftermath of a natural calamity. It should be properly responsive and address both the immediate and long-term concerns as outlined in this article. To meet this main objective, it looks at the general international literature concerning natural calamities, including statistics, policies and recommendatory papers in order to provide an overview of how disasters shape development. In addition, it looks at criminal justice in the wake of public disorder from an multinational setting, and draws best practices which could be applied across cultures and jurisdictions.

It makes use of the case study approach by zooming in on various localities after a natural disaster, and identifies the requirements of the community when it comes to addressing concerns of criminal justice after a calamity.

From these data analysis, adopting the Critical Research in Information Systems (CRIS) framework, the article then provides general guidelines which could assist in the crafting of legislation and policy at the intersection of disaster law and criminal justice, which not only uphold the rights of the accused and the victim, but also assist in long-term inclusive development of the community.

C. AN ASIAN CLIMATE BATTLEGROUNDS

Around the world, the frequency of hydro meteorological natural disasters, those which refer to storms, floods and other
weather-related disturbances, has been increasing, with Asia suffering the worst of these effects. In fact, the Asian Development Bank notes that natural disasters are “four times more likely to affect people in Asia and the Pacific than those in Africa, and 25 times more likely than those in Europe or North America.”

The past two decades have seen humongous economic losses due to natural disasters to the tune of US$927 billion, and this in Asia alone. In contrast, damages amount to an approximate US$956 billion during the same period in the Americas, Europe, Africa and Australia all combined. Indeed, it is very important for Asian countries to revisit key policies regarding disaster risk reduction, response and management. In the same vein, it is equally necessary for them to do so with a focus on criminal justice, as this affects public order in the communities affected by calamities, and can translate to sociopolitical and economic damages even long after the storm has passed.

The Philippines provides for an excellent case study when it comes to the intersection of laws on natural disasters and criminal justice. Lying in the middle of the Ring of Fire, this archipelagic country suffers an average of 200 to 250 earthquakes on any given day, and is at risk from eruptions from its 22 active volcanoes all around the islands. In addition, it is squarely nestled in the Pacific

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8 *Id.*
9 *Id.*
Typhoon Belt, with an average 19 to 21 typhoons passing through the Philippine Area of Responsibility (PAR) on any given year.\textsuperscript{11} While this number is more or less uniform in the coming years, the 2013 Intergovernmental Panel on Climate Change Report estimates that cyclone intensity will dramatically increase, resulting to more super typhoons in certain areas, including the Philippines.\textsuperscript{12}

The UN International Strategy for Disaster Reduction (ISDR) ranks the Philippines 12\textsuperscript{th} out of 200 countries based on the Mortality Risk Index (MRI) pertaining to natural disasters. On the other hand, the United Nations Office for the Coordination of Humanitarian Affairs (OCHA) rank Filipinos second in the world when it comes to vulnerability to these natural calamities.\textsuperscript{13} This could be due to the fact that not only is the Philippines in a geographically dangerous location, it is also suffering from both overpopulation and extreme poverty,\textsuperscript{14} which drive crime rates up regardless of the presence of a natural calamity.\textsuperscript{15}


Truly, the Philippines is a climate battleground, with the indomitable human spirit on one side of the ring, and the majestic forces of nature on the other. With climate change an undisputable and inevitable fact, this battleground is set to expand to greater Asia, predicted to wreak even greater havoc. It is therefore wise to be prepared, analyzing existing policies in order to create newer, better ones, in order to facilitate the resilience of communities to be affected by these calamities. This we do by examining Philippine criminal justice laws, rules and policies, evaluating their efficacy, and providing recommendations for improvement which could prove useful not only to the Philippines but also to other Asian countries as well who share comparatively similar legal systems.

**D. TACLOBAN AFTER HAIYAN: A CASE STUDY OF CRIMINAL LAWS POST-DISASTER**

The United Nations Office for Disaster Risk Reduction identifies a disaster as “a serious disruption of the functioning of a community or a society involving widespread human, material, economic or environmental losses and impacts, which exceeds the ability of the affected community or society to cope using its own resources.”16 The ASEAN Agreement on Disaster Management and Emergency Response more or less adopted this definition, and characterized them these as damaging to “human life, health, property or the environment.” 17 The Inter-Agency Standing Committee, a inter-agency forum involving UN and non-UN

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humanitarian partners, defined natural disasters as the “consequences of events triggered by natural hazards that overwhelm local response capacity and seriously affect the social and economic development of the region.”\textsuperscript{18} Regardless of these varying definitions, it is clear from their phraseology that to bring order to the community after a natural disaster through sound criminal justice policies would be a huge leap towards mitigating its negative impacts.

Philippine jurisprudence in criminal law is replete with legislative enactments pertaining to periods prior to, during and after a disaster, whether it be considered an Act of God or manmade.\textsuperscript{19}

Premiere among them is the Revised Penal Code. Despite being promulgated in 1930, it remains good law up to present. For one, it imposes a heavier penalty on an act committed “on the occasion of a conflagration, shipwreck, earthquake, epidemic or other calamity or misfortune,\textsuperscript{20} considering it as an aggravating circumstance, which in turn imposes a heavier penalty on the person of the accused.

Several crimes are also qualified when their commission is attended by a natural calamity. These include crimes against


\textsuperscript{20} Act No. 3815 (1930), Art. 14 §7.
property\textsuperscript{21}, in particular that of theft\textsuperscript{22} \textit{vis-à-vis} robbery.\textsuperscript{23} Homicide may also be qualified as murder when the accused takes advantage of “an earthquake, eruption of a volcano, destructive cyclone, epidemic, or other public calamity” to commit the crime, punishable by \textit{reclusion perpetua}\textsuperscript{24} to death.\textsuperscript{25}

In all previous cases, when the circumstance of a public calamity is attended by other qualifying circumstances, it will then be considered as \textit{generic aggravating}\textsuperscript{26}, similarly imposing a heavier penalty upon the accused.\textsuperscript{27}

The Revised Penal Code also provides a dual system of punishment and reward for convicts who are unwittingly given the opportunity to escape on the occasion of a natural calamity. It

\begin{itemize}
\item Robbery and theft are both crimes against property; however, they differ in that an essential element of robbery is the employment of violence or intimidation of any person, or force upon anything. The latter type of crime is arguably more common after a natural disaster, particularly since the act of looting usually involves violence and entry “through a opening not intended for entrance or egress,” or “by breaking any wall, roof, or floor or breaking any door or window.” Lifted directly from Chad Osario, \textit{When Order has Fallen: Philippine Criminal Justice in the Aftermath of Natural Calamities}, unpublished manuscript.
\item According to Justice Reyes in his commentary of the Revised Penal Code, the elements of theft are as follows:
\begin{enumerate}
\item That there be taking of personal property
\item That said property belongs to another
\item That the taking be done with intent to gain
\item That the taking be done without the consent of the owner
\end{enumerate}
That the taking be accomplished without the use of violence against or intimidation of persons or force against things
\item \textit{Id.}, Art. 293, \textit{vis-à-vis} Chap. 3, § 1.
\item \textit{Id.}, Art. 76. \textit{Reclusion perpetua} lasts from 20 years and 1 day in prison to 40 years.
\item People v. Dueno, G.R. No. L-31102 (1979)
\item Act No. 3815 (1930), Art. 62.
\end{itemize}
penalizes those who escape and do not willingly return with an additional 1/5 fraction of their remaining penalty.\textsuperscript{28} In contrast, it grants a 2/5 diminution of the \textit{total} sentence to be served when the person chooses to remain in one's cell, despite their ability to leave.\textsuperscript{29} Those who left momentarily but came back within 48 hours after the cessation of the cause of the public calamity is entitled to a reduction of 1/5 of the total sentence to be served.\textsuperscript{30}

Interestingly, the Revised Penal Code, while being more than 80 years old, has seen very few case laws which apply its provisions pertaining to public calamities, despite both the high number of crimes and the high number of natural disasters in the country.

Despite exhaustive analysis, it is clear that Philippines laws focused on or related to natural disasters rarely discuss criminal justice in the aftermath of a calamity. From Presidential Decree No. 1566, which was passed in 1978 and which created the National Disaster Coordinating Council (NDCC)\textsuperscript{31} to the Climate Change Act, which created the Climate Change Commission,\textsuperscript{32} to the most recent Republic Act No. 10121, otherwise known as the "Philippine Disaster Risk Reduction and Management Act,"\textsuperscript{33} precious little headway has been made to address criminal justice concerns in the wake of disasters.

In the aftermath of natural calamities, peace and order should become the primary concern. And yet, existing disaster risk

\textsuperscript{28} \textit{Id.}, Art. 158.
\textsuperscript{30} Act No. 3815 (1930), Art. 98.
response, rehabilitation and management policies make little mention of these terms. ‘Crime’ and ‘criminal’ never appeared in the law itself. ‘Peace’ has been mentioned only to refer to the peace process in Mindanao. Further textual analysis show that even the word ‘order’, which is essential in any post-disaster community, has not been given enough attention. It has never been used as a noun to refer to the much-needed rehabilitation after a natural calamity; instead, its linguistic utilization has been limited to its form as either an adverb, a noun to describe command or instruction, or a compound preposition coupled with an infinitive as its object.

The law itself provides prohibited acts and penalties before, during and after a calamity, but it is limited only to that, as no discussion has been made regarding enforcement and the agency mandated to do so. The local police force, being victims themselves, can hardly be counted on to focus on this task.

A look at the Implementing Rules and Regulations reveal a similar gap. While Rule 9 allows private individuals to volunteer their help via accreditation and training, this does not include in its ambit the maintenance of peace and order. Interestingly, when it comes to Disaster Response under the National Disaster Risk Reduction and Management Plan, the Department of Social Welfare and Development takes the lead role.

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34 “Orderly transitions”. Id., §3(j).
35 “Executive orders”. Id., §28.
36 “In order to”. Id., §§ 2(i); 3(e)(d)(o); 6(a); 21 ¶2; 22(c).
37 Id., §§ 19; 20
38 Id., Rule 7.
40 Id., Rule 7.
Thematic Area 3: Disaster Response

Overall Responsible Agency: Department of Social Welfare and Development (DSWD)

<table>
<thead>
<tr>
<th>Outcome</th>
<th>Lead agencies</th>
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</thead>
<tbody>
<tr>
<td>Well-established disaster response operations</td>
<td>DSWD</td>
</tr>
<tr>
<td>Adequate and prompt assessment of needs and damages at all levels</td>
<td>Disaster Risk Reduction and Management Councils (DRRMCs), Office of Civil Defense &amp; DSWD</td>
</tr>
<tr>
<td>Integrated and coordinated Search, Rescue and Retrieval (SRR) capacity</td>
<td>Department of National Defense (DND), DILG &amp; Department of Health (DOH)</td>
</tr>
<tr>
<td>Safe and timely evacuation of affected communities</td>
<td>Local Government Units (LGUs)</td>
</tr>
<tr>
<td>Temporary shelter needs adequately addressed</td>
<td>DSWD</td>
</tr>
<tr>
<td>Basic social services provided to affected population (whether inside or outside evacuation centers)</td>
<td>DOH</td>
</tr>
<tr>
<td>Psychosocial needs of directly and indirectly affected population addressed</td>
<td>DOH</td>
</tr>
<tr>
<td>Coordinated, integrated system for early recovery implemented</td>
<td>DSWD</td>
</tr>
</tbody>
</table>

While it is not discounted the essential role that the DSWD plays in the aftermath of a calamity, it is equally noteworthy that
the Department of Interior and Local Government, which retains control and supervision over the Philippine National Police has no clear directive in how peace and order is to be maintained in the affected communities during the key crucial period immediately following a natural disaster. Instead, their mandate is limited only to search, rescue and retrieval.

The Secretary of the Department of Justice also plays no key role in the NDRRM Plan, albeit being a permanent member of the National Council. This despite the clear fact that communities which have been victimized by natural disasters “immediately need legal assistance in areas such as housing, insurance, disaster relief programs, lost documents, and the criminal justice system.”

E. AREAS FOR IMPROVEMENT OF CURRENT DRRRM LAWS

“If strong measures to control law and order are not in place before a disaster or emergency, civil unrest and looting and other crimes are likely to increase after a disaster or emergency,” notes foreign jurisprudence.

This statement has been spot-on in the case of the Philippines. Typhoon Haiyan, known locally as Typhoon Yolanda,

43 Chiaki Ota, Legal Humanitarian Assistance: Instituting Disaster Response Clinics and Law Firm Engagement, 19 Geo J. on Poverty L & Pol’y 515 (2012) New Orleans and the failure of its criminal justice system after Hurricane Katrina is a well-documented example in the international setting. Not only were convicted felons able to flee from jail, hundreds who awaited trial waited months, or even up to a year, in incarceration for such minor infractions as parking tickets and other offenses punishable by a maximum of six months. In Brandon L. Garrett & Tania Tetlow, Criminal Justice Collapse: The Constitution After Hurricane Katrina, 56 Duke L. J. 127 (2006).
cost a staggering US$5.8 billion.\textsuperscript{45} It affected more than 2 million families in 44 provinces, and weeks after it swathed through the Visayas region, thousands of families still remain displaced.\textsuperscript{46}

The dire situation, extreme need and the lack of resources resulted to a reports of lawlessness and crime, particularly in communities where food supplies ran low and there was no visible order. Homicide, murder and physical injuries were prevalent, victimizing even unsuspecting minors.\textsuperscript{47} Communities lived in fear of militants and escaped convicts, as reports of looting, raiding and

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raping abound. Even supply vans catering to the victims of the natural disasters did not escape the attention of armed men.

Interviews on the ground reveal that right after the storm, eleven detainees took the opportunity to escape. Warning shots were fired, which prevented more from fleeing, but when nighttime came, more of them took advantage of the broken facilities and broke out of jail. The morning after, a head count revealed that a total of 360 detainees got away. After that, there were reports of rape, robbery, and looting, all attributed to the detainees who fled their cells.

While there were victims outside the penal walls, the same held true for those who remained inside them, though for different reasons.

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reasons. Because of red tape and the bureaucratic processes, prisoners who chose to remain inside their cells for minor crimes were detained even longer than the actual sentences that were to be imposed upon them, taking months of additional incarceration.\(^5^1\) In some cases, even up to a year.\(^5^2\)

Outside the prison cells, it was chaos, at least for the first few days. Due to the lack of manpower, the local police force could do precious little. It was only after reinforcements arrived from the Special Armed Forces (SAF) that they were able to confiscate looted goods. However, they could not detain criminals for long, nor could they file cases, as there were no local prosecutors present.\(^5^3\)

Reports from international media noted the weak presence of the national government,\(^5^4\) which drew heavy criticism from all sides of the political spectrum.\(^5^5\) Years after, government programs are still criticized on its poor handling of rehabilitation efforts in Tacloban, some of which come from the locals themselves.\(^5^6\)

While police reports intend to show a more stable political


\(^{52}\) Phone interview with Philippine National Police-Tacloban Chief Domingo Cabillan (March 13, 2016) (unpublished transcript on file with the author).

\(^{53}\) *Id.*


environment in Tacloban now due to reduced crime rates, it is undeniable that so many violations of rights happened in the period immediately after Typhoon Haiyan, violations which could have been easily preventable had the national government taken steps to do so.

The same thing happened in other Asian countries after a particularly strong natural disaster. The aftermath of Cyclone Nargis, for example, reported incidents of violence and looting. The situation was dire enough that it was feared that mass riots would break out. The 2004 tsunami in Aceh, Indonesia, was similarly catastrophic. Brigadier-General ito Sumardi reports that the tsunami “destroyed the entire criminal justice system and anything that survived was in total chaos.” Half the police stations were wiped out by the wave, and more than 1,500 policemen were missing. The rest of the surviving policemen could not report for duty.

Because of this vulnerability, criminals have set their sights on targeting the tsunami victims.

It is clear that a number of criminal justice systems in Asia have failed to take into account a model which can be adapted in the wake of a natural disaster. But how can we improve this, and how can other countries which are in danger of experiencing similar dilemmas, prevent these problems from happening?

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60 Id.
F. PROPOSING A CRIMINAL JUSTICE MODEL IN THE AFTERMATH OF NATURAL CALAMITIES

In crafting any criminal justice policy, we must ensure that it complies with international obligations, particularly those related to human rights. After all, criminal justice mechanisms have been identified as “a principal source of grave human rights violations.”\(^{62}\) We must take note of this in order to prevent victims of natural disasters to be doubly-victimized by the criminal justice system of their respective countries, whether they be the accused or the complainant in a criminal case.

In truth, this is supported by international law. The Operational Guidelines on Human Rights and National Disasters strongly recommends that first and foremost, order must be established following a calamity.\(^{63}\) It is therefore imperative upon the State to strengthen its criminal justice system in the event of such disasters and plan for contingencies with respect to criminal justice implementation. This necessarily includes how the persons of the accused are being detained.

It is an established fact that the detainee does not lose his humanity, and ergo his human rights, once he has been incarcerated. That is why the State should still keep in mind that under Article 11 of the International Covenant of Economic, Social and Cultural Rights (ICESCR), State Parties have the obligation “recognize the right of everyone to [...] adequate food, clothing and housing, and to the continuous improvement of living conditions.”\(^{64}\)


\(^{63}\) Espenilla, *supra* note 19.

UN Guiding Principles further qualify that these must be readily available, accessible, acceptable and adaptable.\textsuperscript{65, 66} They make no special distinction regarding detainees, and so the governments must comply to take care of them the same way that they care of everyone in the community affected by natural disasters.

Furthermore, under the International Covenant on Civil and Political Rights (ICCPR), it requires that “all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”\textsuperscript{67} Failure to so amounts to gross negligence, and not only be considered as mass infringement of human rights, but also amount to a state crime. Such was the case in \textit{Budayeva v. Russia}\textsuperscript{68}, where the European Court of Human Rights (ECHR) ruled that mismanagement of a calamity has resulted in gross violations of human rights. The same can be argued for the mismanagement of a criminal justice system in the aftermath of a natural hazard. This is not even to mention that when arrest or detention has exceeded the mandate of the law, the ICCPR also allows an enforceable right to compensation.\textsuperscript{69}

At the regional level, countries like the Philippines, Myanmar and Indonesia, as part of the Association of Southeast Asian Nations (ASEAN), have agreed to abide by the ASEAN Human Rights Declaration (AHRD). It is a non-binding declaration, but nevertheless lays a social framework by which member-countries can uphold human rights. In any case, some of its key tenets are already considered legally-binding under customary law, including those under the ICESCR, the ICCPR, the Convention on

\textsuperscript{65} UN High Commissioner for Refugees, \textit{Guiding Principles on Internal Displacement}, 22 July 1998, E/CN.
\textsuperscript{67} ICCPR Art. 10.1
\textsuperscript{68} Budayeva and Others v. Russia [2008] ECHR 15339/02 & Ors [20 March 2008].
\textsuperscript{69} ICESCR Art. 9.5
the Elimination of Discrimination Against Women (CEDAW), and the Convention on the Rights of the Child (CRC).

Based on some of the best legal practices and disaster policies around the world, particularly with regards to criminal justice implementation, one of the ways by which criminal justice policies after a natural disaster can be properly upheld is by **proper contingency planning**. This necessarily includes extended training for law enforcement officers and community actors, as well as members of the Bar and the Bench, in order to better manage the criminal justice system in various eventualities in the wake of calamities.

The creation and invocation of **mutual assistance pacts** can also be instrumental in keeping order not only during the immediate post-disaster period, but generally in all instances of mass disorder.  

This applies both at the macrosocial and microsocial levels: pacts can be made between not only between states, but also between local law enforcement agencies. When it comes to international relations, these pacts take the form of bilateral and multilateral treaties, accompanied by reciprocal obligations to lend assistance whenever required. At the community level, local governments can enter into similar obligations. This is essential particularly during the initial post-

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70 This proposal was initiated by the National Advisory Commission on Civil Disorders, otherwise known as the Kerner Commission, to address a series of riots due to intense racial issues during the Johnson Administration. In NAT’L ADVISORY COMM’N ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 15–16 (1968). In Garrett, *supra* note 45.

71 The Philippines, in particular, enjoy these potential benefits with the ASEAN and the United States, to name just two, with the reciprocal obligation to send help when a co-party to the agreement is similarly imperiled. Lifted directly from Chad Osorio, *When Order has Fallen: Philippine Criminal Justice in the Aftermath of Natural Calamities*, unpublished manuscript.
calamity period, when the local government is disabled, assistance from the national government is far away, and external help is much needed.72

These mutual assistance pacts may encompass a variety of things, from basic resources like food, water and medicine, to assistance in setting up rehabilitation centers, to manpower and supplies for immediate medical assistance and relief. More than that, however, law enforcement officers may be temporarily assigned from one local government to another, providing interim support and lending peace and order on the ground.

This is particularly appreciated and effective especially when the majority of the members of the local law enforcement are victims of the calamities themselves. As such, the latter cannot then be expected to focus solely on duty. Law enforcement colleagues from other local governments can lighten the heavy and unexpected workload, help boost morale, and ultimate assist in facilitating a return to normalcy.

More law enforcement officers on the ground can also serve to deter crimes even before they occur. Visibility is important. However, arrest, particularly in the wake of natural calamities, should "be used sparingly during an emergency to maintain order rather than resort to mass arrests."73 This entails changing the ‘arrest mindset’.

In the Philippines alone, the situation for both the accused and the convicted is extremely dire, where congestion rates for penal institutions go as high as 310%.74 It is therefore imperative to

72 This statement has been made in reference to federal aid given to states affected by calamities, but may also be applicable in the Philippine settings to local government units vis-à-vis the national government. In Garrett, supra note 45.
73 Garrett, supra note 45.
74 Rie Takumi, Congested Prison Cells Pose Health Risks to Prisoners, GMA News, Mar 21, 2015
minimize incarceration in order to declog jails and prisons. More so after a natural calamity, when resources turn even more scarce. As for the detained, instead of being productive citizens, they are often reduced to unutilized humanpower, if not unfed or unattended in violation of their human rights. Southeast Asia has a particularly high number of overcrowded prisons, including Indonesia, Vietnam, Thailand and Sri Lanka. Other Asian examples include Bangladesh, with a 302.4% occupancy rate, and Pakistan, with 249.5% occupancy rate.

Alternatives to arrest include roving patrols to boost police visibility, clear and unequivocal warnings, and confiscation of looted items. Only in extreme cases should arrests be made.

However, it is a fact that despite these precautionary measures, crimes will still occur and arrests will still have to be made. In these instances, though, must the rights of the accused prevail more than ever, in order to prevent them from being abused by the layers of bureaucracy of the system.

It has been suggested that a revised set of criminal procedure will kick in only in the event that a situation has been classified as a public disaster. This is meant to uphold the constitutional rights of the accused, vis-à-vis the special circumstances surrounding the commission of the crime, and the


imposition and service of the sentence. It posits that during times of unrest, disorder or natural disaster, the accused should be entitled to their rights, with the national government to mandate the following:

1. Require the state corrections department and prosecutors to make promptly available names and locations of all inmates to defense counsel and families;

2. Conduct prompt triage hearings to release non-felony offenders, for whom due process should prevent indefinite detention, and waive or reduce statutory bail;

3. For more serious offenses, insist that prompt hearings be held in which prosecutors decide whether to charge or accept guilty pleas with probation (to be supervised for evacuees in their new homes);

4. Ensure full access to counsel at detention facilities;

5. Conduct prompt hearings to ascertain adequacy of indigent defense counsel, solicit volunteer counsel if there is a shortage of local counsel, and evaluate the institutional adequacy of the indigent defense office;

   Insist on compliance with charge deadlines and speedy-trial deadlines, and if there is no compliance, entertain writs of habeas corpus—with priority for misdemeanor detainees.77

   In order to properly accomplish these, it is also ideal to create emergency criminal courts in the wake of calamities, meant to hasten criminal justice administration.78

   “[E]mergency courts could provide a clearinghouse for such subjects as planning for transfer of prisoners; tracking and making public updated contact information for defense attorneys and prosecutors; making public lists

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77 Kerner Commission, supra note 72.
78 Id.
of prisoners and where they are located; monitoring hearings; ensuring adequate indigent defense; ensuring court deadlines are complied with; safeguarding records and evidence; and supervising efforts to locate witnesses and evidence.”

The importance of focusing on criminal courts cannot be more emphasized, as it is usually those detained in jails and prisons whose human rights stand to suffer the most during their period of detention. Much more so when chaos abounds, and they become doubly victimized: first from the natural calamity, and second from the treatment they receive during incarceration. Family members are also indirectly victimized, with the agony of fending for themselves and ignorant of the plight of the accused languishing behind cell walls.

In the emergency criminal courts lies the power of discretion to release detainees based on the evidence against them, as well as hold that an accused be held further by virtue of a strong legal basis to do so, issuing warrants or commitment orders as may be required. The creation of these emergency criminal courts will

79 Garrett, supra note 45.

80 In the United States, where there is a solid body of documentation, human rights abuses of prisoners are rampant after a natural calamity. There have been cases of prison transfers where the inmates’ medical records were not forwarded, and necessary medications were not administered. See ACLU NATIONAL PRISON PROJECT, Abandoned and Abused: Orleans Parish Prisoners In The Wake Of Hurricane Katrina, Aug. 13, 2006 <http://www.aclu.org/ pdfs/prison/oppreport20060809.pdf> accessed April 18, 2017. Failure to inform counsel and families where these prisoners have been transferred indefinitely also constitutes violations of constitutional rights. Bounds v. Smith, 430 U.S. 817, 828 (1977); Richmond Newspapers v. Virginia, 448 U.S. 555 (1980). In Garrett, supra note 45—A year after the storm, prison officials, public defenders and law school clinic students continued to locate hundreds of inmates who had yet to see a lawyer or a judge—In Garrett, supra note 40, citing Gwen Filosa, Pledge to release detainees unmet: Frustrated judge orders report on indigents’ cases, Times-Picayune, Aug. 31, 2006, at B1.
then have a two-fold effect: it can immediately set free those detained who are guilty of minor offenses or those with no strong legal basis for their incarceration, and; further protect the general public by keeping the effort and resources of the local law enforcement agencies into keeping the truly dangerous criminals in check and behind bars.  

Of course, though, criminal justice is not only about retribution nor punishment; ideally, it should nip crimes in the bud. Poverty and extreme need has been pointed to as key factors in the likelihood of crime, most particularly robbery and looting, after a natural disaster. It is essential then to provide the proper mechanisms by which immediate relief and long-term rehabilitation can flourish, and establish effective means for socioeconomic alleviation. This includes more efficient management of aid, proper resource allocation, and swift action on the part of the national and local government.

**G. CONCLUSION**

Disaster risk response, rehabilitation and management laws are intricately weaved with the criminal justice system. However, in the chaos of the wake of a calamity, this intersecting

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81 In post-Haiyan Tacloban, hundreds of looting suspects were released as no charges were filed, thus they cannot be detained for more than 18 hours. In the Philippines, this scenario of untimely release of convicts is likely to happen again in areas ravaged by calamities if no charges are filed or no court issues warrant of arrests. See Joey Gabieta, *Tacloban cops release 100 lootings suspects as no charges filed*, Inquirer.net, Dec. 6, 2013 <http://newsinfo.inquirer.net/541793/tacloban-cops-release-100-looting-suspects-as-no-charges-filed> accessed April 18, 2017. Recorded cases of this also happened after Typhoon Katrina in New Orleans. Police officers simply released people they have apprehended, taking only photographs of them with their loot, hoping to arrest them later with a warrant. See Dan Baum, *DELUGED: When Katrina hit, where were the police?*, New Yorker, Jan. 9, 2006 <http://www.newyorker.com/magazine/2006/01/09/deluged> accessed April 18, 2017.

aspect of the law tends to be easily forgotten, not realizing that sturdy criminal justice mechanisms could actually assist in relief and rehabilitation efforts both by the local and the national government.

With the advent of greater hydrometeorological disasters coming the way of Asia due to rapid climate change, it is clear that we have to prepared for all eventualities. We have to learn then from the example of the dearth of criminal justice policies in particular countries in Asia to respond better to crises after calamities. This means that DRRRM policies must incorporate into its way of thinking criminality in the wake of disaster, and must make space for key recommendations to protect the most basic of all constitutional and human rights embodied in criminal law. These include more training and contingency planning at the community level, including mutual assistance pacts. It also envisions the creation of emergency criminal courts, with a different set of criminal procedure, and efforts to change the ‘arrest mindset.’ Lastly, relief must be given equal effort and opportunity as peace and order: effective socioeconomic alleviation can curb crimes.

The convergence of disaster law and criminal law entails not only substantial preparation but also a change of mindset; this could be the key to preventing natural calamities from turning into full-pledged disasters.
**Chevron vs. Ecuador: Harmony of Environmental Protection and Economic Development from the Legal Perspective**

*Dr. Piti Eiamchamroonlarp*

**Introduction**

Despite being a mean to ensure energy security and sustain economic growth, the oil and gas development could significantly contribute to environmental degradation. As a result of oil and gas development in Ecuador's Amazon, a series of disputes between Chevron and the Ecuadorian government clearly illustrates potential clashes between economic development and environmental protection. In 2011, Ecuadorian court found Chevron to be guilty for pollution it caused thus issued an $8 billion fine along with an addition of $8 billion if Chevron did not promptly issue an apology (also referred to as the 'Lago Agrio Litigation'). As of the time of writing, the plaintiffs are still trying...

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their best to enforce this judgment in the United States and Canada. Apart from battles in courtrooms, Chevron initiated an arbitration proceeding under the UNCITRAL Arbitration Rules against Ecuador in September 2009 by relying on investment protection.4

This paper analyses that legal principles such as the polluter-pays-principle (or commonly referred to as the ‘PPP’), sustainable development and fair and equitable treatment are capable of reconciling economic development and environmental protection. Its first section addresses the possible synergy between environmental protection and economic development through the lens of sustainable development. Furthermore, given the existence of international foreign investment protection in Ecuadorian’s oil industry, the second section critically assesses the competence of investment protection standards in mutually ensuring investor’s interests and environment protection. In particular, this paper attempts to investigate the ambiguous relationship between fair and equitable treatment and principles of environmental regulation.

Environmental Protection and Economic Development

an American oil company which was bought and wholly-owned by Chevron in 2001, had carried out operational in 1964 and ceased its operation in 1992. It drilled and operated 356 oil wells and opened at least 1,000 pools in the rain forest. While facilitating Ecuadorian’s economic growth, TexPet’s operations 86 constituted widespread and long-lasting environmental and social impacts, including severe pollution from both accidental spill and routine.6 For harmonising the potentially conflict between economic development and environmental protection, sustainable development is applicable.87

Apart from sustaining the needs of present without jeopardising the ability of future generations to meet their own needs,88 the core elements of sustainable development comprise economic development, social development and environmental protection89. Interestingly, the principle of sustainable development postulates that economic growth and environmental protection need not be considered contradictory.90 For this reason, there is neither absolute protection of economic nor environment, but reconciliation.

86 The consortium led by Texaco extracted nearly 1.5 billion barrels of Amazon crude over a period of twenty – eight years (1964 – 1992). During its tenure as operator, Texaco drilled 339 wells and built 18 central production stations, in an area that now spans more than a million acres of Orellana and Sucumbios. See Kimerling (n3), 449 – 450. 6 Ibid, 657.
90 Holder (n 7), 218.
Reflecting the above scholarly comments, the need for reconciliation is affirmed by the ICJ in *Gabčíkovo-Nagymaros*, the case concerning the construction and operation of the Gabčíkovo-Nagymaros System of Locks between the Hungarian People's Republic and the Czechoslovak People's Republic. The ICJ recognised the need to reconcile economic development with protection of the environment by ruling that:

"Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind - for present and future generations of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development."

In relation to the oil industry, the African Commission on Human and People's Rights in the *Ogoniland* case acknowledged

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93 *The Social and Economic Rights Action Centre and the Center for Economic and Social Rights V. Nigeria*
Nigeria’s right to produce oil and, simultaneously, imposed state’s responsibility to take reasonable measure to prevent ecological degradation and to secure an ecologically sustainable development. Therefore, through the sustainable development’s lens, the Ecuadorian government with the cooperation of Chevron and TexPet is allowed to exploit its hydrocarbon resource and therefore sustain its economic growth. Concurrently, it assumes responsibilities to protect the environment.

Given the responsibility to protect the environment, the Ecuadorian government and its local court shall be capable of regulating the environment by penalising the polluter. Nevertheless, a further analysis on the relevant principles of environmental regulations should be performed to justify the considerable environmental compensation imposed in the Lago Agrio judgment.

Imposing environmental liability upon Chevron and TexPet is justifiable on the ground of the polluter-pays-principle (‘PPP’). The Lago Agrio Litigation judgment awarded the

94 ‘Justifiable’ in this context implies the ability of the host state to protect the environment by applying the PPP and imposing environmental liability. This conclusion does not rule out controversial issues such as ‘appropriate amount’ of the compensation and effectiveness of the trial. For instance, on March 11, 2011 Chevron has appealed the judgment on the ground of fraud by the plaintiffs’ lawyers, supporters and others that has corrupted the trial, as well as the numerous legal and factual defects in the judgment. See Carly Gillis, ‘Ecuador vs Chevron Texaco brief history’ (Counterspill, 27 April 2011) <http://counterspill.com/article/ecuador-vs-chevron-texaco-briefhistory> accessed 14 April 2012.

95 Alongside the environmental protection, preventing distortion of international trade is the economic function of the PPP. For instance, the Recommendations of the OECD and the EC referred to the PPP as an instrument of harmonisation intended to ensure the smooth functioning of the common market. See Sanford E. Gaines, ‘The Polluter Pays Principle: From Economic Equity to Environmental Ethos’ (1991) Vol. 26 Texas International Law Journal 463, 489.; Nicholas De Sadeleer, Environmental
plaintiffs a total of more than US$18 billion for the environmental damage and health problems resulting from the operation.  

According to the redistributive function of the PPP, it is imperative to return the profits accruing to Chevron and TexPet as the results of its activities to the public authorities responsible for inspecting, monitoring, and controlling the pollution these activities produce. 

On the other hand, the judgment allows the suffering people to be compensated. Additionally, penalising multinational corporations and building instruments for international environmental accountability under the current free trade regime are apparently significant. The use of rule of law to promote and impose oil developments without controlling or remedying the injuries caused is fundamentally unfair and reveals gross inequities in law and governance.

Importantly, it should be noted that the principle of sustainable development does not put limits on economic growth but requests the less-damaging development and as such reveals the cooperation between economic development and environmental protection. Interestingly, the PPP justifies ability of Ecuador to regulate the environment and simultaneously benefit the free trade regime. Hence, this mutually supportive relationship displays the synergy between principles of environmental regulation and principle economic law.

Notwithstanding, it is too superficial to acknowledge the foregoing compatibility without mentioning investment protection standards and the involvement of investment arbitration tribunal. This is because the Lago Argio judgment has been suspended by


96 Hinton (n3).
97 Sadeleer (n17), 3.
98 Kimerling (n3), 660
99 Ibid, 663.
the investment arbitration tribunal. For this reason, it is necessary to investigate whether or not the existing investment dispute would undermine the importance of environment protection and therefore vitiate the abovementioned mutually supportive relationship.

**Environmental Protection and Investment Protection**

Like other Latin American nations, Ecuadorian government chose to sustain economic growth through their own natural resource by attracting foreign investments. Foreign oil companies (‘FOC’), however, always seek for reasonable level of legal protection. Apart from the relationship between the host state and the oil investor, the host state and the home state of the oil investor may enter into a bilateral investment treaty (‘BIT’), such as the Ecuador-United States BIT. This BIT is deemed as one of various available investment protection tools. Theoretically speaking, BITs generally seek to protect foreign investors against

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102 Oksan Bayulgen, *Foreign Investment and Political Regimes: The Oil Sector in Azerbaijan, Russia and Norway* (Cambridge University Press 2010), 33.


104 Loncle (n1), 269.
expropriation and discriminatory treatment and guarantee them fair and equitable treatment.\textsuperscript{105}

Soon after the \textit{Lago Agrio} judgment, Chevron submitted the claimant’s notice of arbitration alleging that Ecuador has breached its investment agreements and its Treaty obligation.\textsuperscript{106} The aforesaid breach includes undermining and nullifying the Remediation Contract.\textsuperscript{107} Among other allegations, Chevron has alleged that Ecuador has breached its obligation to provide Chevron’s and TexPet’s investment fair and equitable treatment, full protection and security, and treatment no less than that required by international law.\textsuperscript{108} Later, the \textit{Lago Agrio} judgment was suspended by the arbitration tribunal in February 2012.\textsuperscript{109} Pending the final award, the concern is that the tribunal may exclusively protect Chevron and TexPet and as such deteriorate ability of Ecuador to regulate its environment. As one of the core arguments invoked by Chevron and TexPet, essence and function of fair and equitable treatment will be discussed in turn.

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\textsuperscript{105} Anatole Boute, ‘The Potential Contribution of International Investment Protection Law to Combat Climate Change’:
\textsuperscript{106} Claimants’ Notice of Arbitration (n4), 15.
\textsuperscript{107} Chevron has alleged that Ecuador has refused to notify the \textit{Lago Agrio} court that TexPet and its affiliated companies have been fully released from liability for environmental impact resulting from the former Consortium’s operations. In addition, Ecuador has refused to indemnify and protect and defend the rights of Claimant in connection with the \textit{Lago Agrio} Litigation. Besides, Ecuador has supported the \textit{Lago Agrio} plaintiffs in various ways, including openly campaigning for a decision against Chevron and by initiating baseless criminal proceedings against two Chevron attorneys. See Claimants’ Notice of Arbitration (n4), 15.
\textsuperscript{108} \textit{Ibid} , 16.
\textsuperscript{109} The Second Interim Award on Interim Measures (n22), para 3.
\end{flushleft}
Fair and equitable treatment is considered the most promising standard of protection from the investor's perspective.\textsuperscript{110} Despite having a vague definition, the sub-principles of fair and equitable treatment includes: the respect for the legitimate expectations of investors, stability and predictability of the legal framework, protection against arbitrariness and discrimination, and procedural proprietary and due process.\textsuperscript{111} One challenging task of fair and equitable treatment is its capability to balance the competing interests and integrate environment protection in the investment protection regime. With respect to \textit{Lago Agrio} Litigation, it is reasonable to determine whether or not the arbitration tribunal is going to consider the investors' environmentally-malpractice, such as improperly disposing of severe toxics\textsuperscript{112} or concluding a dubious Remediation Contract as the relevant factors.\textsuperscript{113}

Alongside governing arguments pertaining to international investment laws, fair and equitable treatment aims to integrate and reconcile competing objectives.\textsuperscript{114} It requires a comprehensive balancing of all the relevant factors and interests.\textsuperscript{115} Importantly, the maxim of equity postulates that ‘one who seeks equity must do equity’.\textsuperscript{116} Therefore, it is logical to conclude that beyond the act of


\textsuperscript{112} Kimerling (n3), 657.

\textsuperscript{113} Ibid, 658.

\textsuperscript{114} Roland Kläger, ‘Fair and Equitable Treatment’ in International Investment Law, (Cambridge University Press 2011), 203.

\textsuperscript{115} Ibid, 204.

\textsuperscript{116} Peter Muchlinski, ‘Caveat Investors’? The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard’ (2006) 55 ICLQ 527, 532.
the host state, the conduct of the particular investor may also be a relevant factor.\textsuperscript{117} This implies that the particular conduct of the TexPet and Chevron may also be the relevant factor.

Among other duties,\textsuperscript{118} Muchlinski suggested that investors owe a duty to conduct business in a reasonable manner.\textsuperscript{119} According to Muchlinski, Chevron and TexPet have to act in the best interest of Ecuador and its economic development.\textsuperscript{120} Nevertheless, by causing severe social and environmental impacts, it might be considered that the companies failed to act in the best interest of Ecuador. For illustration, at the outset of the operation, TexPet set its own environmental standard but did not appropriately include environmental protection and monitoring.\textsuperscript{121} Moreover, it caused widespread and long-lasting environmental and social impacts such as deliberate discharges and emissions.\textsuperscript{122}

In 1995, the company signed Remediation Action Plan which might be labeled ‘cosmetic’. Under the plan, TexPet agreed to clean only 264 pools of the 1,000 pools which were opened up by the company.\textsuperscript{123} However, it was reported that 162 pools were not effectively cleaned.\textsuperscript{124} Furthermore, it was claimed that TexPet concealed hundreds of toxic waste pools covering them with...
topsoil and leaving them in the same pollutant state. Due to these reported actions, the Remediation Action Plan has been heavily criticized on the ground that it was concluded without meaningful participation by affected communities, transparency or other democratic safeguards.

By dishonoring the duty to conduct business in a reasonable manner, the investment tribunal, in the light of the ELSI case coupled with Noble Ventures Inc v Romania, may not protect Chevron and TexPet under the ambit of fair and equitable treatment. The ICJ in the ELSI case refused to protect the investor on the ground of management conduct. The ICJ emphasised the socially damaging effects of the investor's conduct and suggested that wider stakeholder interests may be relevant in determining how management is conducted. Correspondingly, the Tribunal in Noble Ventures Inc v Romania refused to apply the fair and equitable treatment for protecting Noble Ventures by referencing to the investor's conduct.

Notwithstanding, the aforesaid conceptually parallel of investment protection standard and environmental protection is questionable, , on the grounds of incomplete caselaw and arbitration biased toward investor protection. As claimed by Muchlinski, to date the case-law supporting a duty of investors to conduct business in a reasonable manner is still far from

125 Ibid.
128 Ibid, 628.
129 The ELSI case (n48) para 101; Ibid, 549.
130 The Noble Ventures case (n49) para 103-113; Ibid, 550.
complete. On the other hand, arbitrators are appointed by the parties on a case-by-case basis and therefore depend on the preferences of parties. Coupled with the very broad and making no explicitly reference to sustainable development, investment tribunals tend to focus on the protection of investors rather than protecting host state polices. In relation to the Ecuador-United States BIT, the foregoing concern is not dramatic. The BIT does not refer to sustainable development. This means that its preamble, which is a very important interpretation instrument of the BIT, also makes no apparent reference to sustainable development.

Hence, there is a possibility that the arbitrators would exclusively focus on the protection of investor. Nonetheless, it must be highlighted that this dilemma is a concern pertaining to impartialness of the investment arbitration tribunal not the one directly stems from the contradiction between fair and equitable treatment and principles of environmental protection. Thus, it does not truly represent the incompatibility between investment protection standard and principles of environmental regulation.

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131 Ibid, 548.
133 Ibid, 628.
134 Without expressly mentioning sustainable development, the BIT’s preamble recognises the greater economic cooperation, the flow of private capital and the economic development, stable framework for investment and maxim effective utilisation of economic resources and the development of economic business. See the preamble of The Treaty between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment.
Although surrounding by the abovementioned concerns, it appears the ability of fair and equitable treatment to balance investors’ and the host state’s interest. In the light of equity, it integrates environmental consideration in the investment protection regime by, potentially, not protecting the investor who severely degraded the environment and caused social impacts. When the investor and the environment are simultaneously protected, it is more or less correct to say that fair and equitable treatment is conceptually compatible with sustainable development. For this reason, fair and equitable treatment, as a kind of economic laws, does not oppose the function of principles of environmental regulation.

**Conclusion**

With respect to the concept of sustainable development, as acknowledged and explained by the *Gabčíkovo-Nagymaros* case and the *Ogoniland case*, sustaining economic development through revenue accruing from the oil industry does not absolutely rule out the environment protection. Key stakeholders especially, the host state is responsible to carefully monitor and mitigate impacts of any economic development on the environment. Importantly, imposing environmental liability upon Chevron and TexPet - the polluter - is beneficial for environmental protection and the current free trade regime. This relationship exhibits the synergy between principles of environmental regulation and economic laws.

On the other hand, the foregoing supportiveness remains unchanged in the context of fair and equitable treatment. In the light of the *ELSI* case and the *Noble Ventures Inc v Romania* case, there is a possibility that the investment arbitration tribunal may refuse to protect the polluting investor on the ground of dishonoring the
duty to conduct business in a reasonable manner. As a result, environmental protection is being balanced and integrated in the investment protection regime. Hence, it addresses the conceptual compatibility between fair and equitable treatment and sustainable development. This cooperation exposes that economic laws does not protect investors who arbitrarily pollute and as such does not obstruct the principles of environmental regulation. Regarding the mutually supportive relationship in both domestic and international level, it is logical to conclude that, potentially, economic laws and principles of environmental regulation do not perform their functions at the expense of one another.
Introduction to the Evidentiary Principles of the International Court of Justice

Gunn Jiravuttipong, and Jirat Jitwarawong

Introduction/Abstract

The evidentiary principle and practice of the International Court of Justice ("ICJ") have been established and developed since its first contentious case, as can be observed not only from the ICJ's jurisprudence but also from the academic side. The evidentiary principle plays an important role in the determination of facts which affects the application of substantive legal norms and ultimately the decision of the dispute. Recently, there is an extensive amount of attention given to the recent development in the evidentiary principle. One important factor is an increase of fact intensive and highly complex cases before the court. The nature of these new cases requires the Court not only to answer questions of law but also to emphasise on the determination of facts. This article attempts to briefly examine the important evidentiary principles of the ICJ, since all of the details are impossible to be expressed in limited number of pages. The article will begin firstly by introducing the source of evidence law; while there is only a vague rule of evidence embedded in the Statute and Rules of Court, other sources will be sought to unfold the evidentiary principle. Secondly, the article will discuss about the burden of proof which is the duty of a party to produce evidence to prove its alleged claim. Thirdly, the standard of proof which is the degree of persuasion
required to make a determination of the facts claimed by the party will be explored. Lastly, the article will address the method of proof focusing on two particular types of evidence; reports and experts evidence.

**Sources of Law of Evidence in the International Court of Justice**

Law of evidence is normally regarded as a procedural law. However, it is important to note that there is no clear distinction between substantive law and procedural law in the realm of international law as opposed to what can be observed in most domestic legal system\(^\text{136}\). Therefore, sources of the international procedural law that are used by the Court are not different from those of substantive law, whether in the ICJ Statute or elsewhere\(^\text{137}\).

Other courts and tribunals may have a clearer and stricter evidentiary and procedural rule, such as the International Criminal Court which strictly follows its own Rules and Procedure of Evidence. However, the ICJ has a very vague rule of evidence embed in its statute\(^\text{138}\), particularly the Rules of Court which does not provide further clarification on this matter. Thus the Court is usually required to resort to other sources of law, most importantly, the general principle of law\(^\text{139}\) to performs its judicial function. An example of this usage can be found in *Corfu Channel* case; the Court gave reason in admitting circumstantial evidence adduced by the UK to find Albania's responsibility that the usage is a general principle “admitted in all systems of law, and its use is


\(^{138}\) Article 48 of Statute of the International Court of Justice.

\(^{139}\) Chester Brown, A Common Law of International Adjudication (OSAIL 2007), 88.
recognised by international decisions.140 Another example where general principle of law is resorted reflected from the use of the principle of *onus probandi incumbit actori* (the claimant bears the burden of proof), which is considered to be well-established by the ICJ to be a general rule applicable to general cases.141 It was also scholarly suggested that where there is no general principle in a strict sense, such as when civil law and common law system hold separate practice, international tribunals may select a principle based on common sense flowing from other general principles which is appropriate for the purpose at hand142. Additionally, the Court may also resort to customary international law a source of evidentiary law, however, establishing customary norm in this area is still problematic so it has never been invoked in any international tribunal.143

Therefore, when referring to a certain rule of evidence, it is important to trace to its source under international law, whether it is a treaty law, customary international law or general principle of law. In case where there is no explicit treaty law, judgment of the court is usually a useful place to find evidentiary rule applicable in such court. When using treaty law, the rule of treaty interpretation in 1969 Vienna Convention on the Law of Treaty is also important in determining the rule.144

**Burden of Proof**

When any question of fact arises in a dispute, unless it was earlier agreed by the party, it will need to be proved before the

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140 Corfu Channel Case (UK v. Albania) (Merits) [1949] ICJ Rep, 18.
142 C.F. Amerasinghe, (n2), 28.
143 C.F. Amerasinghe, (n2), 26.
144 C.F. Amerasinghe, (n2), 24.
court, normally by the party who has the burden of proof. The burden of proof is a duty of a party to produce evidence to prove its alleged claim. This procedural concept can be found in both civil and common law system but with some differences. In international law, international tribunals as well as the ICJ tend to apply the principles of burden of proof according to civil law system rather than the more complicated common law system\textsuperscript{145}.

The burden of proof applies only to ascertainment of facts since the Court has its own power to examine into the law \textit{proprino motu} without restriction to the parties’ opinion (\textit{iura novit curia})\textsuperscript{146}. The general principle of burden of proof is the above-mentioned principle of \textit{onus probandi incumbit actori} (the claimant bears the burden of proof). What it means is as its name suggested, those who claim any factual allegation will bear the burden to proof of such claim. The respondent in the case may have this burden as well, if he or she assert any claim against the applicant in return\textsuperscript{147}. In fact, a clear distinction between applicant and respondent in an international trial can hardly be drawn\textsuperscript{148} so it would be better to consider burden of proof by disregarding status of the parties as an applicant or respondent but rather by examining each specific claim separately.

\textsuperscript{145} Neill H. Alford Jr. “Fact Finding by the World Court” (1958) 4 Vill L. Rev. 85; C.F. Amerasinghe, (n2), 40.

\textsuperscript{146} E.g., Fisheries Jurisdiction (UK v. Iceland) (1974) ICJ Rep, para 17; Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA) (1986) ICJ Rep, para 29; This is not to say that proving the law is not necessary in presenting the claim. It is still a critical part of the argument, especially in case of proving existence of customary international law: Asylum Case (Colombia/Peru) (1950) ICJ Rep, 14-15.


\textsuperscript{148} Neill H. Alford, (n30), 84.
If such burden is not fulfilled, the Court will dismiss the relevant assertion which often results in losing of the claim. However, this principle is not of an absolute character. Exceptions can be found in certain circumstances such as when establishing negative facts about treatment by public authority or proving effectiveness of local remedies. The ICJ has usefully described this principle in *Diallo* case as follows:

"The determination of the burden of proof is in reality dependent on the subject-matter and the nature of each dispute brought before the Court; it varies according to the type of facts which it is necessary to establish for the purposes of the decision of the case."

With this description in mind, one who wants to challenge the general principle will be expected to come up with a reason why subject-matter of the case requires an exceptional determination of the burden. The Court will have the final say regarding the allocation but it is also crucial for the party to clarify the applicable scope of the principle as well as extension and substance of exception or maybe even to come up with an established exception applicable in a given circumstance to override the general principle if needed. An outcome of the finding may vary. It may be able to cause a shift or share in burden,

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150 Ahmadou Sadio Diallo (n6), para 56.

151 C.F. Amerasinghe, (n2), 79-81.

152 Ahmadou Sadio Diallo (n6), para 54.

impose an adverse inference on the nonproducing party\textsuperscript{154} or other result yet to be discovered. Policy argument plays a significant role here. The burden bearer, even with intention to discharge its burden, must survey how its argument can contribute and affect general cases\textsuperscript{155}, for it will always be the Court's concern.

**Standard of proof**

As explained in the preceding paragraph, facts forming any cases are established from evidence submitted to the Court. Thus, it is necessary to have a criterion indicating of which point would the Court render a decision to believe that a particular fact indeed happened and the degree of persuasion required to reach such decision is called "standard of proof".\textsuperscript{156} Whilst a strong tendency exists that a standard of proof for criminal cases rests on the standard of "beyond reasonable doubt" which is widely applied in international criminal tribunals.\textsuperscript{157} The ICJ treats this subject


\textsuperscript{155} For example, while identifying perpetrator in cyberattack can be problematic, proving innocence in such case will be difficult as well. Reversal of burden of proof in this circumstance can lead to numerous innocent countries being wrongly convicted. See Marco Rossini 'Evidentiary Issues in International Disputes Related to State Responsibility for Cyber Operations' (2014) Texas Journal of International Law Vol.50 Symposium Issue 2, 248. <https://ssrn.com/abstract=2611753> Accessed on 10 July 2017.

\textsuperscript{156} Markus Benzing, (n14), 1265, para108.

with obscurity due to an absence of treaty provisions\textsuperscript{158} and general principle of law that shows no unified clarification of the concept.

In general, the standard of proof depends on the nature of the issue. There is “a general agreement that the graver the charge, the more confidence must there be in the evidence relied on.”\textsuperscript{159} This pattern was reflected from the Bosnian Genocide case which “the court has long recognised that claims against a state involving charges of exceptional gravity must be proved by evidence that is fully conclusive”\textsuperscript{160}. Although the Court never explains why an allegation of crime with exceptional gravity requires an evidence of a higher degree of certainty\textsuperscript{161}, bearing the logic flows from this judgment, it can be concluded that the evidentiary standard is applied proportionally to the severity of dispute that the same standard would be applied for the same degree of allegations.\textsuperscript{162} Observation of the Court’s jurisprudence may provide some rough guidance to factors that contribute to the varying standard of proof applied by the Court.

1. The Particular function exercised by the court: Declarative and Determinative.

The Court will apply a lower standard of proof when it exercises Declarative function. Declarative function deals with the

\textsuperscript{158} Markus Benzing (n14).
\textsuperscript{160} Bosnia Genocide, (n18), para 209.
\textsuperscript{162} Roscini, Marco, (n20), 249.
request to define a territory or maritime boundary, or declaring sovereignty over territory.\textsuperscript{163} For example in the Frontier Dispute case, the Court used the standard "balance of probability"\textsuperscript{164} which inferred that lower standards were applied and even accepted low probative-value evidences which were difficult to produce.\textsuperscript{165} The same is also found from Judge Shigeru Oda's separate opinion in Case concerning sovereignty over Pulau Ligitan and Pulau Sipadan, stating that he applied a lower standard although neither parties had submitted strong evidence to support their claims.\textsuperscript{166} These findings reflect that a relatively lower standard of proof applies for Declarative function.

On the other hand, the Determinative function is exercised to decide whether a disputing party breaches its legal obligation\textsuperscript{167} which can be found in cases involved with state responsibility. To be able to pronounce a positive determination, declaring that the party is in breach, the Court requires a relatively high standard of proof.\textsuperscript{168} This can be observed from Bosnian Genocide case where "fully conclusive"\textsuperscript{169} evidence was required and Corfu Channel case where a "degree of certainty"\textsuperscript{170} is necessary.

\begin{footnotesize}
\begin{enumerate}
\item Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras and Nicaragua Intervening), [1992] ICJ Rep, 506, para 248.
\item Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), [2002] ICJ Rep, Declaration of Judge Oda, 687.
\item Pulp Mills (n6), Separate Opinion of judge Keith, para 8.
\item Kolb Robert, (n30), para 830.
\item Bosnia Genocide, (n18), para 209.
\item Corfu Channel case, (n5), 17.
\end{enumerate}
\end{footnotesize}
2. The manner in which the obligation claimed had occurred.

Generally, a higher standard of proof is demanded to prove an act of commission than an act of omission due to its more reprehensible nature. In Corfu case, the Court dismissed UK's claim on an act of commission that relied on circumstantial evidence on the ground that it lacked sufficient evidence. Contrarily, the Court accepted such evidence to prove an act of omission in the same case.

Apart from the factors above, there are also other factors contributing to the variation of standard of proof. For instance, the phase of the proceeding; where a lower standard of proof is required in order to grant provisional measure than to determine the merit.

Overall, standard of proof applied by the ICJ still remains inconsistent. Although the Court has been recommended to establish a consistent and transparent standard, another interesting question arises if a certain standard exists, will it be adjustable to cases unprecedented to the Court, for example; a case regarding cyber-attack which is extremely technical and difficult to prove the fact like the identity of attackers.

172 Corfu Channel case, (n5), 16.
173 Corfu Channel case, (n5) 15, 18.
174 Del Mar, K, (n36), 117.
175 Markus Benzing (n14), 1265, para 108.
176 Oil Platforms, (n24), 234 (separate opinion of Judge Higgins), 286-87 (separate opinion of Judge Buergenthal).
177 Roscini, Marco (n27), 233.
Method of proof/Means of proof

The fact-finding process entails an assessment of the evidence; whether it has sufficient weight to establish the fact according to the standard required. The Court is said to rely on the principle of free assessment\textsuperscript{178}, it will identify relevant documents, assess their probative value and draw conclusions from them as appropriate\textsuperscript{179}. There is no exhaustive list of the means of proof or any hierarchy between different types of evidence.\textsuperscript{180}

Despite the lack of solid rule, some standards regarding the assessments of particular evidences have stemmed from the judgments. This includes preferences for direct evidence\textsuperscript{181}, evidence unfavourable to the producing party\textsuperscript{182}, evidence unchallenged by impartial persons\textsuperscript{183}. On the other hand, there is cautious treatment in evidence emanating from a single source.\textsuperscript{184}

Among various types of evidence, this article aims to explore two types of evidence including reports and experts. In normal circumstances, documentary evidence presented before the court needs to be scrutinised for its reliability.\textsuperscript{185}

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\textsuperscript{178}“within the limits of its Statue and Rules, [the Court] has the freedom on estimating the value of the various elements of evidence: Military and Paramilitary Activities in and against Nicaragua, (n11), 40, para 60.

\textsuperscript{179}Pulp Mills (n6), 14, para 168.

\textsuperscript{180}Markus Benzing, (n14), 1249 para 51.

\textsuperscript{181}Armed Activities on the Territory of the Congo (Democratic Republic of the Congo/Uganda), (2005) ICJ Reports, 201, para 61.

\textsuperscript{182}ibid.

\textsuperscript{183}ibid.

\textsuperscript{184}ibid.

\textsuperscript{185}An clear example the court has stated the reliability criteria is “the value of reports from official or independent body depends, among other things, on (1) the source of the item of evidence (for instance partisan, or neutral), (2) the process by which it has been generated (for instance an anonymous press report or the product of a careful court or court-like process), and (3) the quality or character of the item (such as statements against interest, and agreed or uncontested facts)”, Bosnia Genocide, (n18), 43,135, para 227.
\end{flushright}
evidence will be subjected to harsh deliberation, for example; press report and media coverage which will be considered as reliable only when it is wholly consistent and concordant to the main facts and circumstances of the case\(^{186}\) and that they are not derived from a single source.\(^{187}\)

Although international organisation reports may have superior credibility because of its nature as a neutral and qualified source\(^{188}\), not every international organisation report will be considered reliable. For example, the Court in the *Armed Activities* case did not give weight to a report made by the Secretary-General as it “relied on secondhand reports”.\(^{189}\)

Judgments of other international tribunals has been accepted as evidence of great probative value because it has already been heavily scrutinised by such judicial body as reliable.\(^{190}\) However, fact-finding in different stages of proceeding may not have the same degree of credibility.\(^{191}\)

Expert opinion is essential recourse for the Court in fact-finding process in cases that require the Court to examine technical issues such as science, history and geography. In the evaluation of

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\(^{187}\) *Armed Activities case (DRC/Uganda)* (n46), 168, 225, para 159.

\(^{188}\) Stating that, the reports originate from “disinterested witness” and produce by UN commission of inquiry, peacekeeping mission or other subsidiary organs, and are inspired by direct knowledge and involvement with the situation at field or stem from international consensus of states regarding the occurrence of certain event.” Tomka, H.E Peter and Proulx, Vincent-Joël, The Evidentiary Practice of the World Court (December 2, 2015); Juan Carlos Sainz-Borgo (ed) Liber Amicorum Gudmundur Eiriksson (San José, University for Peace Press 2016, Forthcoming); NUS Law Working Paper No. 2015-010, 12. Available at <SSRN: https://ssrn.com/abstract=2698459> Accessed on 10 July 2017.

\(^{189}\) *Armed Activities case (DRC/Uganda)* (n46), 201, para 63.

\(^{190}\) *Armed Activities case (DRC/Uganda)* (n46), 201, para 61.

\(^{191}\) *Bosnia Genocide*, (n18), 133-4, para 220-223.
the weight of expert opinions, the Court considered “the neutrality and qualifications of experts, as well as the methodology used.”

Another criterion in evaluation is the different categories of experts. The Court has a preference to relied on the appointed experts under Article 50 whereas there is limitation in relying on expert appointed by parties as part of their delegations under Article 43(5) as they are not subjected to cross-examination which is an important procedural safeguard to maintain the due process of adjudication. This applies similarly to internal experts which the Court consults without the knowledge of the parties. This practice is criticised for the lacks of transparency, openness, procedural fairness and ability for parties to comment upon the evident.

Another type of expert that appeared in the recent Whaling case and Road and Certain Activities case are experts that appear as witnesses or “witness-experts” submitted by the parties in accordance with Articles 57 and 63 of the Court’s rules. The Court took opportunity to introduce new procedures such as the exchange

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192 Corfu Channel Case (n5), 21.
194 Article 50 of the international court of justice statute, empower the court to “entrust any individual, body, bureau, commission, or any other organization that it may select, with the task of carrying out an inquiry of expert opinion Corfu Channel Case (n5), 21; Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America), Appointment of Expert, Order of 30 March 1984, [1984] ICJ Rep, 165.
197 Pulp Mills Pulp Mills (n6), 108 and 114-15 (Judges Al-Khasawneh and Simma, Joint Dissenting Opinion).
of expert statement, cross-examination of experts witness by the other party and judges, strict schedule in evidence submission.198 Thus, improving the Court’s engagement of evidence and transparency which it has been criticised in previous cases.

Many proposals have been made to enhance scientific evidentiary parameters in scientific related cases. One of the main suggestion is for the Court to resort to existing power under Article 50, in other words, the use of Court-appointed experts which the Court seems to be reluctant to use.

Other suggestions are to bring practices from other international tribunals such as the World Trade Organisation practices, establishing of scientific advisory body199, appointing experts to assist the court in the production of documentary evidence.200

**Conclusion observation**

Throughout the article, we have reviewed the case law of the Court which provided us with certain principles and rules of the evidence law. Overall, the Court is said to use flexible approach when dealing with the matter and it can be seen that many evidentiary principles and practices are being developed as for the concept of the burden of proof and the method to weigh particular types of evidence as explained above. However, there is still room for further clarification on most of the principles such as the sources of international evidentiary law and the standard of proof for certain types of claims.

198 Mbengue Makanemoise (n62), 538-9.
200 In the Matter of an Arbitration Between Guyana and Suriname, Award of the Arbitral Tribunal, 17 September 2007, paras 47 and 55 and Order No 1 of 18 July 2005.
It can be expected that the evidentiary principle and rules will likely become more important in future cases. Many scholars and practitioners have made suggestions to improve the evidentiary parameters. The Court itself has also attempted and will continue its work to clarify evidentiary rules and standard to become more transparent. Especially for the application of expert evidence in scientific cases, which the Court has to deal with in recent years and will likely face more challenges in adjudicating them. The evidentiary principles and rules will contribute to the judicial proceeding of the ICJ which will ultimately make it a more effective and reliable international dispute settlement setting for the international community.
THE IMPLEMENTATION OF INDONESIA’S RIGHTS AS ARCHIPELAGIC STATE UNDER UNCLOS REGIME IN THE CASE OF CHINA’S CLAIM OVER TRADITIONAL FISHING RIGHTS AT WATERS OF NATUNA ISLAND

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ABSTRACT

This paper is aimed to understand and analyze the implementation of Indonesia’s rights as an archipelagic state in the case of China’s claim over traditional fishing rights at waters of Natuna Island. It is a normative research by using secondary data.

Indonesia as archipelagic state has several rights including to exclude other states, especially China to claim over traditional fishing rights at Exclusive Economic Zone of Natuna Island. Based on the aforementioned analysis, the conclusions were that the fulfillment of elements stipulated by Article 51 of UNCLOS is required, such as having bilateral agreement with Indonesia, the recognition of existing traditional fishing rights and its status as neighboring states. As China does not fulfill the aforementioned elements, it is thus invalid to claim traditional fishing rights at

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waters of Natuna Island and Indonesia as an archipelagic state as well as coastal state has the sovereignty to exercise its rights.

A. INTRODUCTION

Indonesia as a country which consists of more than 17,000 islands, deserve the title as Archipelagic State under The United Nations Convention on the Law of the Sea (UNCLOS) Regime. As an archipelagic State, Indonesia possesses the rights that are stipulated by UNCLOS. UNCLOS itself has become customary international law, in which even if a state is not a party to the convention, it would still bind the state anyway. Speaking of rights of archipelagic state, it is clearly stipulated on Article 47, in which Indonesia, has the right to draw archipelagic baselines, with some mechanisms written in the convention.

Natuna Island as part of Indonesia’s islands under the same administrative of Riau Island Province has become the center of attention since its potential dispute with China, in which it falls within China’s ninde-dash line.\(^\text{202}\) China used the Nine-Dashed Line (NDL) to mark areas at Natuna Island sea, in which thirty percent of Natuna Islands is a potentially disputed zone.\(^\text{203}\)

The main interest would be the natural resources from Natuna Island, such as fish. Illegal fishing within Indonesia’s Exclusive Economic Zone has happened several times, for instance, on May 2016, Gui Bei Yu Ship 27088 from China was caught fishing illegally in Indonesia’s Exclusive Economic Zone at


\(^{203}\) Ibid.
Natuna Island sea.\(^{204}\) China claimed that it was their traditional fishing right and the sea area was included in the "nine-dashed line", which is not recognized by Indonesia.

Therefore, in this paper, we would analyze further related to the rights of archipelagic state possessed by Indonesia and the current issue related to the traditional fishing right claimed by China and how the implementation of UNCLOS in this matter can solve the potential dispute between the two countries.

**B. METHODOLOGY**

This journal would be a normative research by using secondary data, secondary data is data which can be obtained through any kind of text books, articles, and any other literatures.

There would be no field observation to obtain the data and information. The data would be obtained through primary and secondary source of data such as the international law, customary international law, treaties, court judgment, thesis, or other literature sources that might be useful for this journal. The collection of data would be a documentary study or literature study. Therefore, this legal research would depend on the data available on the text.

In this research, the obtained data would be analyzed by using qualitative data analysis. Qualitative data analysis is a method to draw a conclusion using several qualitative data having different perspective, thinking, argument, or opinion which has been collected. The qualitative data analysis would not involve any statistical technique, rather the process would result a conclusion from the interpretation of various qualitative data.

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C. Indonesia's Rights as Archipelagic State under UNCLOS Regime

Indonesia is recognized as an archipelagic state based on point (a) of Article 46 of UNCLOS, which defines archipelagic State as a state constituted wholly by one or more archipelagos and may include other islands. Meanwhile, archipelago means a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such.205

A state which qualifies as an archipelagic State under Article 46 of UNCLOS may exercise the right to draw archipelagic baselines in accordance with Article 47 of UNCLOS. In addition to the qualifications as an archipelagic State, there are three elements, which are first, there must be a group of islands which may include parts of islands, interconnecting waters, and other natural features; second, these features must be closely interrelated, in a way that they form an entity; third, the entity must be one with three types of characteristic, namely an intrinsic geographical entity, an intrinsic economic entity, and an intrinsic political entity.206 Worth noting is that continental States, though they may possess archipelagos defined by Article 46(b), do not qualify the status of “archipelagic States”.207 As a result, they do not enjoy the

205 Point (b) Article 46 of UNCLOS
corresponding rights and obligations as archipelagic States, e.g. drawing archipelagic baseline.\textsuperscript{208}

As stipulated clearly on Part IV of UNCLOS, that specifically governs regarding Archipelagic States, on Article 47, it clearly stipulates regarding how an archipelagic state could draw their archipelagic baselines based on the regulations stipulated in section 1, 2, 3 and 4 of the Article, which are:

1) An archipelagic State may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago provided that within such baselines are included the main islands and an area in which the ratio of the area of the water to the area of the land, including atolls, is between 1 to 1 and 9 to 1.

2) The length of such baselines shall not exceed 100 nautical miles, except that up to three per cent of the total number of baselines enclosing any archipelago may exceed that length, up to a maximum length of 125 nautical miles.

3) The drawing of such baselines shall not depart to any appreciable extent from the general configuration of the archipelago.

4) Such baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them or where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the nearest island.

\textsuperscript{208} Ibid.
And with the emphasis on the section five of Article 47 which states that the system of such baselines shall not be applied by an archipelagic state as to cut off from high seas or the exclusive economic zone the territorial sea of another state. Additionally, section six stipulates that If a part of the archipelagic waters of an archipelagic State lies between two parts of an immediately adjacent neighboring State, existing rights and all other legitimate interests which the latter State has traditionally exercised in such waters and all rights stipulated by agreement between those States shall continue and be respected.

Considering the conditions mentioned by two aforementioned sections, Indonesia is evident that it does not violate the two sections and in the very first place, Indonesia has never had agreement with China in regards to the existing rights that they claimed as traditional fishing rights at Natuna Island. As a matter of fact, China, which is located 2,265 Nautical Miles\(^2\) while Malaysia which is considered as one of Indonesia's neighbor located only 776 Nautical Miles\(^2\) and so China cannot be classified into category of neighboring state that Indonesia can possibly cut off its exclusive economic zone the territorial sea. Thus, Indonesia as an archipelagic state has exercised its rights and done its obligations as stipulated above.

Further, it is explained by Article 49 regarding the legal status of archipelagic waters that based on section one that the sovereignty of an archipelagic State extends to the waters enclosed by the archipelagic baselines drawn in accordance with Article 47, described as archipelagic waters, regardless of their depth or distance from the coast, in which it indicates that Indonesia, as the

\[\text{accessed March 21, 2017}\]

\[\text{accessed March 21, 2017}\]

\[\text{accessed March 21, 2017}\]
archipelagic state has a full sovereignty over its archipelagic water based on its archipelagic baseline without regarding the depth or distance from the coast. The full sovereignty here means that Indonesia has the right to exclude any states that enter into their archipelagic waters, even exclude any states to exploit the natural resources contained in the said archipelagic waters.

Indonesia has several rights regarding the archipelagic sea lane passage under the UNCLOS regime, inter alia:

1. An archipelagic State may designate sea lanes and air routes there above, suitable for the continuous and expeditious passage of foreign ships and aircraft through or over its archipelagic waters and the adjacent territorial sea;

2. All ships and aircraft enjoy the right of archipelagic sea lanes passage in such sea lanes and air routes;

3. Archipelagic sea lanes passage means the exercise in accordance with this Convention of the rights of navigation and overflight in the normal mode solely for the purpose of continuous, expeditious and unobstructed transit between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.\(^{211}\)

(...)  

Indonesia as an archipelagic state has the sovereignty over its archipelagic water, Indonesia has a power to control the sea lane passage over its archipelagic water and even the air route above it, it means that Indonesia can determine which route is suitable for any foreign ships/aircraft to pass Indonesia's archipelagic water. All ships/aircrafts have the right to enjoy the archipelagic sea lane

\(^{211}\) UNCLOS Art. 53
passage or air route over Indonesia's archipelagic water, however they still need to comply the designated sea lanes and air routes over Indonesia's archipelagic water which have been designated by Indonesia. The ships or aircrafts that may enjoy the right of passage over archipelagic water have to be in a continuous, expeditious, and unobstructed transit.

In response to the case of China's claim, Indonesia may argue that they have the right and power to designate the sea lane passage over their archipelagic water, and thus, they may execute any foreign ship that violate their sovereignty over their archipelagic water and territorial water.

**D. The Legal Status of Natuna as an Island and its Consequences**

The first question that emerges before explaining regarding the China's claim over waters at Natuna Island, is the legal status of Natuna Island itself, whether Natuna is an island recognized by International Law of The Sea under UNCLOS Regime. Moreover, the consequences of its legal status of an island. According to the Foreign Minister, Indonesia's ownership on Natuna Islands was already registered at the United Nations (UN) and all parties, including China, never raised an objection.212

1. Minister of Foreign Affairs of Indonesia, Retno Marsudi admitted that there was overlap in continental boundaries between Indonesia and Malaysia related Natuna Islands.

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However, she added, the problem had been resolved and registered at the UN.

2. Meanwhile, related to the overlapping in Exclusive Economic Zone (EEZ) with Malaysia at the West and Vietnam at the North, according to the Minister, it is still under negotiation.

Further, it is supported by List of Geographical Coordinates of Points of the Indonesian Archipelagic Baselines based on the Government Regulation of the Republic Indonesia no. 38 of 2002 as amended by the Government Regulation of the Republic of Indonesia no. 37 of 2008\(^\text{213}\) and UNCLOS annexes; Government Regulation No. 61 of 1998 on the list of geographical coordinates of the base points of the archipelagic baselines of Indonesia in the Natuna Sea\(^\text{214}\)

Natuna is factually considered as an island referring to the PCA award between Philippines and China, that in Tribunal Consideration for Article 121 (3) of UNCLOS “Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf” points out several important elements, as follows: • “Cannot” – means that the capacity of a fitur laut to have an ability to sustain human habitation or economic life objectively, this ability can be seen


from its current feature and whether in the future could have the competency to *sustain human habitation or economic life*.\(^{215}\) In order to define an island as being able to “*sustain human habitation or economic life*”?

There are three aspects in the word “sustain”, as follows:

1. Ability to provide;

2. Temporal qualification: supplies is not temporary and in a “sufficient period of time” and;

3. Qualitative Standard: the existing supplies fulfill the minimum standard for habitation.\(^{216}\)

In the word “*human habitation*” itself, tribunal also has their criteria such as that “sea feature” must be conducive for humans to inhabit, not to merely survive, such as:

- The number of humans are not small and do not stay temporarily;
- The sea feature must have a conducive environment to maintain its live, not only to survive but also to fulfill the daily needs for people in a long-term period.\(^{217}\)

“*On their own*” means that independent in supporting and supplying the needs without transfusion in importing stuff from outside the island and “*Economic Life*” is defined as their capacity to produce, distribute and conduct a transaction to support the local

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\(^{215}\) *South China Sea Arbitration (Philippines v China) Awards, PCA 2013*, p. 483.

\(^{216}\) *South China Sea Arbitration (Philippines v China) Awards, PCA 2013*, p. 486-487.

\(^{217}\) *South China Sea Arbitration (Philippines v China) Awards, PCA 2013*, p. 492.
population. Thus, as considering the aforementioned elements mentioned by the PCA Award, it is evident that Natuna can be classified as an island and indeed it has been registered as it is. Therefore, Natuna Island shall have Continental Shelf or Exclusive Economic Zone on their own, as they do not satisfy the qualifications as a rock under section three of Article 121 of UNCLOS.

**Exclusive Economic Zone at Natuna Island**

The exclusive economic zone (EEZ) is a 200 nautical mile zone extending from a coastal State's baseline in which the coastal State has priority of access to living resources and exclusive right of access to non-living resources. Indonesia as the coastal State of EEZ nearby the Natuna Island has rights and jurisdiction according to the provision of UNCLOS. Nevertheless, a third State also has a freedom over the EEZ of a coastal State, it can be seen on the Article 55 of the UNCLOS which provides that:

Specific Legal Regime of the Exclusive Economic Zone. The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention.

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The rights of a coastal State are regulated in the Article 56 of the UNCLOS, which provides that the coastal State has “sovereign rights” to explore and exploit the natural resources in the EEZ as well as other “activities for the economic exploitation and exploration of the zone, such as the production of energy from water, currents and winds.” The EEZ regime gives coastal States sovereign rights over three main resources, (1) non-living resources on the seabed, subsoil and superjacent waters, (2) living resources of the seabed, subsoil and superjacent waters and (3) other economic activities related to the economic exploitation and exploration of the zone. With regard to living resources, the coastal State has sovereign rights to explore and exploit them but it also has certain obligations with respect to the management of conservation of the living resources in its EEZ. Article 62 (1) of the UNCLOS provides that the coastal State shall promote the objective of optimum utilization of the living sources, it might be considered as one of the obligation of coastal State in the EEZ. Article 61 (1) and Article 62 (2) of the UNCLOS impose an obligation on the coastal State to determine the allowable catch of the living resources in its EEZ and its own capacity to harvest the living resources.

Where the coastal State does not have the capacity to harvest the entire allowable catch, it shall, through agreements or other arrangements and pursuant to the terms, conditions, laws and regulations, give other States access to the surplus of the allowable catch, having particular regard to the provisions of articles 69 and

221 See Article 56 (1), Ibid
223 Ibid, p.8
224 Ibid.
70, and especially developing countries. Nevertheless, if the coastal State is very dependent on the exploitation of the living resources of its EEZ, the obligation to give an access to other States may be discarded.

The other rights and duties of other States are regulated in the Article 58 of the UNCLOS, *inter alia*, the freedoms referred to in Article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms. In exercising their rights and performing their duties in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State. Therefore the coastal State may determine the laws and regulations in regards to the other States conduct in exercising their rights in the EEZ of a coastal State in accordance to the UNCLOS provision.

In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention. Thus, despite of the sovereign rights that has been mentioned before, a coastal State is also obliged to respect the rights and duties of the other States.

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Concerning the rights possessed by Indonesia as a coastal state in regards to China's claim over traditional fishing rights at exclusive economic zone of natuna island, Indonesia is legally allowed to exclude other states to gain benefits from the natural resources contained therein, particularly fish. In addition to that, Indonesia also has the obligation to respect the neighboring states' traditional fishing rights at waters of Natuna Island. However, whether China is one of those neighboring states who could claim such right, would be elaborated in the next chapter.

**E. China's Claim over Traditional Fishing Rights at Waters of Natuna Island**

Traditional fishing rights are fishing rights granted to certain groups of fishermen of a particular State who have habitually fished in certain areas over a long period, these rights must be based on habitual practice for long time and inherited from the previous generation.\(^{229}\) Thus, referring to the aforementioned definition, China's claim on traditional fishing rights at Natuna Island must be proven by the existing practice of such right at Natuna Island by China and it must be proven that it derived or given by the previous generation in a long time.

However, referring to UNCLOS as the legal basis for the dispute pertaining international law of the sea, traditional fishing right itself is not clearly defined in UNCLOS. Therefore, pertaining China's claim over traditional fishing rights based on international law, it is vague in that regard. Yet, it is only mentioned in section

one of Article 51, which states that without prejudice to Article 49, an archipelagic State shall respect existing agreements with other States and shall recognize traditional fishing rights and other legitimate activities of the immediately adjacent neighbouring States in certain areas falling within archipelagic waters. For example, Malaysia that has traditional fishing rights recognized by Indonesia over the Indonesian water, the agreement between them is basically regarding which species that can be taken or that have to be protected.\textsuperscript{230}

Considering the article, it is apparent that Indonesia, in the very first place, has to be in an agreement with China, if China indeed has traditional fishing rights at Natuna Island. As a matter of fact, China and Indonesia do not have such agreement governing China's traditional fishing rights around Natuna Island. And another element would be, that Indonesia shall recognize traditional fishing rights of neighboring states in certain areas falling within archipelagic waters, in which this condition is not met in the particular case.

For instance, Indonesia-Australia has an agreement about traditional fishing rights among these neighbouring states. Both states already signed the agreement since 1972.\textsuperscript{231} However, it is known that Australia no longer admits Indonesia's Traditional Fishing Right in several areas like Ashmore Reef, Cartier Islet, Scott Reef, Seringapatam Reef, and Browse Islet.\textsuperscript{232}

\textsuperscript{230} MOU 74, Record of Discussion 76, Treaty 1982
\textsuperscript{232} Harmen Batubara, Perbatasan, Australia Merampas Hak Nelayan Tradisional Indonesia di Pulau Pasir (2016) <http://www.wilayahperbatasan.com/perbatasan-
Moreover, it is further stipulated that the terms and conditions for
the exercise of such rights and activities, including the nature, the
extent and the areas to which they apply, shall, at the request of any
of the States concerned, be regulated by bilateral agreements
between them.

Yet, there is no such bilateral agreements between the two states,
that would mean the article cannot be applied to the case of
Indonesia and China.

The requirements that must be satisfied in order to successfully
establish historic rights are, *inter alia*, long-established activities,
and the continuous exercise of these activities that are recognized
by other States. From this requirements, it can be concluded that
China must have a long-established activities of fisheries at Natuna
Island, and China must obtain a recognition of such rights from the
other States, especially Indonesia, since Natuna Island is part of
Indonesian territory, however in fact there is no such long-
established activities or any historic fishing activities conducted by
China at Natuna Island. Indonesia is also denying that China has
traditional fishing rights, by saying that Indonesia only has a
bilateral agreement on traditional fishing rights with Malaysia.

Considering the aforementioned factors that can be classified as the
requirements to recognize China’s traditional fishing rights, which
are having bilateral agreement with Indonesia related to the
existing traditional fishing right and long-established activities that

\[\text{australia-merampas-hak-nelayan-tradisionalindonesia-di-pulau-pasir:}\> \text{accessed 22 February 2017}\]

233 Tunisia/Libya, supra note 7, at paras 98-99; Fisheries Jurisdiction (United Kingdom

234 Estu Suryowati, ‘Susi: Klaim China Ihwal Perairan Natuna Sebagai ‘Traditional
Fishing Ground’ Tidak Berdasar’ Kompas (Jakarta, 2016)
are recognized by other States, are fairly not fulfilled since there is no such agreements and Indonesia does not recognize China's traditional fishing right at waters of Natuna Island.

F. CONCLUSION

As a matter of fact, Indonesia does not recognize China's traditional fishing right and pertaining traditional fishing right itself, it is not regulated clearly in UNCLOS. China's claim in this matter is invalid since referring to Article 51 of UNCLOS that Indonesia shall respect existing agreement and recognize traditional fishing rights and other legitimate activities of the neighboring states in certain areas falling within archipelagic waters, in which China does not meet any of the aforementioned elements in the article.

Further, in order to successfully establish historic rights are, *inter alia*, long-established activities, and the continuous exercise of these activities that are recognized by other States, in which it is evident that China failed to establish such rights since Indonesia does not recognize China's traditional fishing rights. In short, Indonesia as an archipelagic state as well as a coastal state that has exclusive rights over Exclusive Economic Zone at waters of Natuna Island to exclude other states, including China to claim the rights, particularly traditional fishing right over the natural resources contained therein.

BIBLIOGRAPHY

**Laws & Regulations**
National legislation - DOALOS/OLA - United Nations,

*Government Regulation No. 61 of 1998 on the list of geographical coordinates of the base points of the archipelagic baselines of Indonesia in the Natuna Sea*
The List of Geographical Coordinates of Points of the Indonesian Archipelagic Baselines Based on the Government Regulation of The Republic of Indonesia Number 38 of 2002 As Amended by The Government Regulation of The Republic of Indonesia No. 37 of 2008


**Jurisprudence**

*South China Sea Arbitration (Philippines v China) Awards, PCA 2013*

Tunisia/Libya, supra note 7, at paras 98-99; Fisheries Jurisdiction (United Kingdom v Iceland), Merits, Judgment, (1974) ICJ Reports 3.

**Books, Articles, Journal**


Batubara, Harmen *Perbatasan, Australia Merampas Hak Nelayan Tradisional Indonesia di Pulau Pasir* (2016) 
accessed 22 February 2017

MOU 74, Record of Discussion 76,Treaty 1982. 2011


<http://www.cnnindonesia.com/nasional/20160624092606-75-


Suryowati, Estu ‘*Susi: Klaim China Ihwal Perairan Natuna Sebagai “Traditional Fishing Ground” Tidak Berdasar*’ *Kompas* (Jakarta, 2016)
Websites


The Constitutional and legal framework in Thailand since the 22 May 2014 coup d'état and Thailand's international human rights obligations\textsuperscript{235}

Sanhawan Srisod and Kingsley Abbott, human rights lawyers, Thailand

Background

Thailand's constitutional and legal framework has been significantly altered following the 22 May 2014 military coup d'état, staged by the Thai military, using the name ‘the National Council for Peace and Order’ (NCPO). After the coup, the 2007 Constitution was suspended and replaced with an interim Constitution that gives the military ultimate power over the country, military officers were provided enhanced criminal investigation powers, and the jurisdiction of military courts was extended to civilians for certain offences. 22 May 2017 is the 3\textsuperscript{rd} anniversary of the coup but much of the post-coup legal framework, which is inconsistent with Thailand's obligations under international law, remains in place.

After the coup, on 8 July 2014, Thailand stated that it would derogate under Article 4(1)\textsuperscript{236} of the International Covenant


\textsuperscript{236} Article 4(1) of the ICCPR states that in time of ‘public emergency which threatens the life of the nation’ and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations.
on Civil and Political Rights (ICCPR), ratified by Thailand in 1996, in respect of: Article 12(1) (liberty of movement); Article 14(5) (right to have a conviction and sentence reviewed by a higher tribunal); Article 19 (freedom of opinion and expression); and Article 21 (freedom of peaceful assembly).237 These derogations remain in place today.

Since 22 May 2014, the NCPO has issued at least 207 general orders (178 in 2014, 17 in 2015, seven in 2016, and five in 2017) and 125 announcements (122 in 2014, one in 2015, and two in 2016)238, including the banning political gatherings of five or more people;239 limiting media freedom;240 summoning individuals to military camps and penalizing those who fail or refuse to report themselves;241 and ordering the prosecution of civilians in military courts for certain offences.242 The Head of

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under the present Covenant to the extent strictly required by the exigencies of the situation.
237 Full text of Thailand’s 8 July 2014 derogation, please see: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&en#EndDec It refers to derogating “specifically in Article 12 (1), by the announcement of a curfew which was lifted on 13 June 2014; Article 14 (5), only where a jurisdiction has been conferred to the Military Court over Sections 107-112 of the Penal Code and the offences against the internal security of the Kingdom; Article 19, by the prohibition of broadcasting or publishing certain content, particularly those inciting conflict and alienation in the society, false or provoking messages, and Article 21, by the limitation of political gathering. These restrictions are under constant review and are progressively lifted.”
239 NCPO Announcement No.7/2557 and HNCPO Order No.3/2558.
240 NCPO Announcement No.15/2557.
241 During 22 May and July 2014, the NCPO issued 37 orders (NCPO Order No.1, 2, 3, 5, 6, 13, 14, 15, 16, 18, 19, 23, 25, 29, 30, 31, 34, 35, 36, 42, 43, 44, 46, 48, 49, 50, 52, 53, 57, 58, 61, 63, 65, 68, 82 and 86/2557) to officially summon 472 individuals to report themselves to the military.
242 NCPO Announcements No.37/2557, 38/2557, 50/2557.
the NCPO has also issued at least 130 orders, detailed in paragraph 6.

Recently, on 13 and 14 March 2017, the UN Human Rights Committee - the international expert body charged with supervising the implementation of the ICCPR - reviewed Thailand’s implementation of and compliance with the provisions of the ICCPR, in light of Thailand’s second periodic report under Article 40 of the ICCPR (Thailand’s ICCPR Review in 2017). Following its consideration of Thailand’s record, the Committee issued its Concluding Observations\(^2\) in which the Committee expressed concern and made recommendations on several issues, including on the current constitutional and legal framework, the practice of prosecuting civilians before military courts and the practice of arbitrarily detaining persons who were exercising their right to assembly and/or expression.

I. 2014 Interim Constitution\(^2\) and 2017 Constitution

Article 44

Article 44 of Thailand’s interim Constitution, promulgated on 22 July 2014, gives the Head of the NCPO power to give any order

\(^2\) See also: Human Rights Committee, Summary Record for the 3349th meeting (Second Periodic Report of Thailand), CCPR/c/THA/3349, 13 March 2017; UN Human Rights Committee, Summary Record for the 3350th meeting (Second Periodic Report of Thailand), CCPR/c/THA/3350, 14 March 2017; and UN Human Rights Committee, Concluding Observations, CCPR/C/THA/CO/2, 26 April 2017.

deemed necessary for “...the benefit of reform in any field and to strengthen public unity and harmony, or for the prevention, disruption or suppression of any act which undermines public peace and order or national security, the Monarchy, national economics or administration of State affairs...” It also states that any order issued under Article 44 - known as a 'Head of the NCPO (HNCPO) Order’ “...is deemed to be legal, constitutional and final...”

Since the interim Constitution was promulgated, the Head of the NCPO has issued at least 130 HNCPO Orders (one in 2014, 48 in 2015, 78 in 2016, and 24 to date in 2017).245 The orders include some that directly restrict the rights of people in Thailand while others concern bureaucratic processes, for example, orders providing for the acquisition of land for the establishment of Special Economic Zones bypassing the usual environmental and social checks and balances provided for in domestic legislation; granting military officers sweeping powers of investigation, arrest and detention; and prohibiting the gathering of five or more persons for a political purpose.246

Article 47

Under Article 47 of the interim Constitution, the orders and announcements of the NCPO and its Head given since the coup and up until the Cabinet takes office “...regardless of their legislative, executive or judicial force...” are also “...deemed to be legal, constitutional and final”, and are not subject to judicial review. Citing this Article, Thai courts have refused to review the


246 For example, HNCPO Order No. 17/2558, 3/2558, 5/2558, and 13/2559.
legality and constitutionality of orders issued under Article 44 and by the NCPO.247

Article 48

Article 48 of the interim Constitution states that all acts of the NCPO in relation to the coup, including any acts by people connected to the NCPO, even if the acts are illegal, “...shall be exempted from being offenders and shall be exempted from all accountabilities.” Thai courts have upheld the NCPO’s lack of accountability under Article 48.248

2017 Constitution249

The current Constitution, which was promulgated on 6 April 2017, reaffirms the constitutionality and legality of all NCPO and HNCPO orders, announcements and acts both past and future. Article 279 of the draft Constitution provides that all NCPO orders, announcements and acts including the HNCPO orders “...already in

247 For example, Judge advocate v Sombat Boonng-anong, Pending case no. 24A/2014, Court decision of 23 January 2015; Judge advocate v Worrachet Pakeerat, Pending case no. 32A/2014, Court decision of 26 January 2015; Judge advocate v. Chaturo Chaisaeng, Pending case no. 31A/2014, Court decision of 13 February 2015; and Judge advocate v Jittra Kotchadet, Pending case no. 28A/2014, Court decision of 6 March 2015.


force prior to the date of promulgation of this Constitution or will come into force... irrespective of their constitutional, legislative, executive or judicial force, shall be considered constitutional and lawful and shall continue to be in force under this Constitution.” Article 279 of the draft Constitution also holds that NCPO orders and announcements may only be repealed or amended by the passage of an Act.

Article 265 of the 2017 Constitution ensures that the powers of the Head of the NCPO and the NCPO under the 2014 Interim Constitution shall remain in force until the Council of Ministers newly appointed following the first general election, which the Government currently projects will be held in 2018, takes office.

Remarks:

The sweeping, unchecked powers provided for in the 2014 Interim Constitution – confirmed by the 2017 Constitution – are inconsistent with the fundamental pillars of the rule of law, the separation of powers and human rights, including equality, accountability, and predictability of the law.

The denial of access to justice and immunity from accountability for human rights violations provided for by Articles 47 and 48 is inconsistent with Thailand’s international obligations including under the ICCPR. Article 2 of the ICCPR guarantees that any person whose rights are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity, and that such a remedy shall be determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the
legal system of the State. The authorities are required to develop the possibilities of judicial remedy.

During the Human Rights Committee’s 2017 review of Thailand, it asked Thailand to comment on: 1) the use of Sections 44, 47, 48 (Interim Constitution), and Section 279 (of the 2017 Constitution); 2) the plan to review all NCPO and HNCPO orders and announcements in order to determine which ones should be revoked and which should pass into law; and 3) the involvement of the independent experts and civil society in the process. Thailand did not provide detailed replies to each question but stressed that all orders issued by the NCPO were “carefully reviewed with the aim of minimizing their impact on the enjoyment of civil and political rights.” In its Concluding Observations, the Human Rights Committee expressed its concerns about the interim Constitution and orders issued by the NCPO under Section 44 saying it was “particularly concerned about Section 44” and “also concerned about Section 279 of the new draft Constitution” and recommended Thailand, within one year, to review all measures adopted under the interim Constitution, “in particular Sections 44, 47, 48”, in light of its obligations under the Covenant, and in order to make sure that all measures to be adopted under the new Constitution, “including Section 279”, will be consistent with ICCPR.

II. **Martial Law, HNCPO Orders No. 3/2558 and 13/2559**

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250 The Committee requested Thailand to provide information on the implementation of these recommendations within one year of the adoption of the Concluding Observations.
On 20 May 2014, two days before the coup, the military imposed nationwide Martial Law. On 1 April 2015, nearly a year after imposing Martial Law nationwide, the NCPO lifted Martial Law from most provinces in Thailand, except in places where it was already imposed prior to 20 May 2014. The Martial Law was replaced by the HNCPO Order No. 3/2558, later augmented by HNCPO Order No. 5/2558, which gives appointed military officers the same power the military has under Martial Law. On 29 March 2016, the Head of the NCPO also issued HNCPO Order No. 13/2559 which provides appointed military officers similar powers provided for in Martial Law and HNCPO Order No. 3/2558 for certain categories of crimes.

Currently, by invoking these orders, military officers have power, amongst others, to summon individuals to report or meet with local authorities on military bases, arrest, detain and search suspects (without warrants) and to hold them in places not officially recognized as places of detention for up to seven days, and to ban any political gathering of five or more persons. These orders are inconsistent, inter alia, with the rights to be free from arbitrary detention, freedom of expression, right to association and peaceful assembly, and the right to liberty and security of the person.

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252 Martial law was already in force in 31 provinces and 185 districts of Thailand’s 77 provinces, including most of the provinces along Thailand’s border with Myanmar, Lao PDR, Cambodia, and Malaysia. The southern border provinces of Pattani, Yala, and Narathiwat, have a well-documented history of human rights violations.
Martial Law

Martial Law provides the military with superior powers over civil authorities. Section 15 bis of Martial Law gives “the military authority” powers to arrest and detain any person up to seven days without a warrant for interrogation, in the discretion of military personnel, if there is a sufficient reason to “suspect that any person is the enemy or violates the provisions of this Act or the order of the military authority…” When the authorities exercise these powers they are not required to bring detainees before a court at any stage of their detention.

Section 11 of the Martial Law grants military officers power to prohibit “any assembly and meeting”, and the “issuance, disposal, distribution or dissemination of any book, printed matter, newspaper, advertisement, verse or poem”.

HNCPO Order 3/2558

Pursuant to Section 6 of HNCPO Order 3/2558, in cases where, in the discretion of military personnel, “there is a reasonable cause to suspect” and “with appropriate evidence” that a person has committed four categories of crimes, including the offence of lese-majeste, offences against internal security, offences in violation of the law on firearms and offences in violation of NCPO’s announcements or orders, the military officers shall have the power to “summon such person to report to them for questioning or to give a deposition” It also allows for the administrative detention of persons for up to seven days in a place not officially recognized as a place of detention, without charge. When the authorities exercise
these powers they are not required to bring detainees before a court at any stage of their detention.

Section 12 of the HNCPO Order prohibits the “unlawful assembly or political gathering” of a group of five or more persons for political purposes. Those who violate this order are liable to a term of imprisonment not exceeding six months or a fine not exceeding ten thousand baht, or both, unless permission has been granted by the Head of the NCPO or an authorized representative.

HNCPO Order 13/2559

Pursuant to HNCPO Order 13/2559, military officials have the power to take action to prevent and suppress 27 categories of crimes against individuals they view as ‘influential figures’ whose behavior and actions “pose a dangerous threat to peace and order”, or “undermine the social and economic system of the country”.

Section 4 of the HNCPO Order grants the military authority with the powers to authorizing the deprivation of liberty of the suspects for interrogation when, in their discretion, “there is a reasonable ground to suspect” and “with reasonable evidence”. Under this Section, the suspect can be held for up to seven days in a place that is not officially recognized as a place of detention without requiring that they be brought before a court.

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254 Including crimes against public peace, liberty and reputation, immigration, human trafficking, narcotics, and weapons.
Remarks:

The practice of detaining persons without charge and without habeas corpus is inconsistent with Thailand’s international obligations including under the ICCPR. Pursuant to Article 9 of the ICCPR, the deprivation of liberty is subject to certain conditions, and even initially lawful detention may later become arbitrary and contrary to law. To be considered lawful, such detention should never be arbitrary (Article 9(1)), information of the reasons must be given (Article 9(2)), anyone arrested or detained on a criminal charge shall be brought promptly before a judge and shall be entitled to trial within a reasonable time or to release - and the denial of bail should be the exception (Article 9(3)), court control of the detention must be available (Article 9(4)) as well as compensation in the case of a violation of human rights (Article 9(5)).

In its General Comment No.35,255 the Human Right Committee has stated that “the notion of “arbitrariness” is not to be equated with “against the law”, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.” Further, the detention of civilians in a place not officially recognized as a place of detention, including inside a military facility, is inappropriate, unreasonable, and unnecessary - and therefore arbitrary.

The Human Rights Committee has repeatedly stated that persons detained for longer than 48 hours without being brought before a judge is deemed to have been arbitrarily detained – any

255 Human Rights Committee, General Comment 35, Article 9 (Liberty and security of person), CCPR/C/GC/35 (2014).
delay longer than 48 hours must remain absolutely exceptional and 
be justified under the circumstances.\textsuperscript{256} Article 9 of the ICCPR, 
which also applies to persons who are administratively detained, 
states that detainees must be brought “promptly” before a judge and 
are entitled to trial within a reasonable time or to release.\textsuperscript{257}

The requirement under international law that a detained 
person should be brought promptly before a court not only allows 
the detainees to challenge the lawfulness of the detention but also 
protects his or her physical safety by affording them the 
opportunity to raise any incident of torture or other ill-treatment 
with the court and for the judge to observe the detainee’s physical 
condition.

With regard to the right to bring proceedings for release 
from unlawful or arbitrary detention \textit{(habeas corpus)}, the 
Committee has held that such right “applies to all detention by 
oficial action or pursuant to official authorization, 
including...military detention, security detention, counter-terrorism 
detention, ... and wholly groundless arrests ....and other forms of 
administrative detention.”

The banning of public gatherings of more than five 
persons for political purposes is also inconsistent with Thailand’s 
international obligations including Article 21 of the ICCPR \textit{(right} 
to peaceful assembly), which Thailand derogated from pursuant to 
Article 4 of the ICCPR. However, as also concluded by the National

\textsuperscript{256} UN Human Rights Committee, General Comment No. 35, CCPR/C/GC/35, para. 33.  
\textsuperscript{257} Concluding Observations of the Human Rights Committee: Jordan, 
CCPR/C/79/Add.35; A/49/40, paras. 226-244; Observations finales du Comité des 
droits de l’homme Maroc, CCPR/C/79/Add.44, para. 21; Concluding observations of 
the Human Rights Committee: Viet Nam, CCPR/CO/75/VNM, para. 8; Concluding 
observations of the Human Rights Committee: Cameroon, CCPR/C/79/Add.116, para. 
19.
Human Rights Commission of Thailand (NHRCT) in its report dated 24 November 2015, the situation in Thailand did not constitute “a public emergency threatening the life of the nation”. In other words, the derogations from such Articles does not comply with the rationale and scope of Article 4 of the ICCPR and, as a result, the enforcement of any law that limits people’s human rights are measures that are inconsistent with Thailand’s obligations under the ICCPR.

In its General Comment No 29, the Human Rights Committee stated that, “measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature.” In the same General Comment, the Committee went on to state that, “a fundamental requirement for any measures derogating from the Covenant, as set forth in Article 4, paragraph 1, is that such measures are limited to the extent strictly required by the exigencies of the situation […] and [must reflect] the principle of proportionality”.

During Thailand’s ICCPR Review in 2017, noting that Thailand had not derogated from Article 9 of the ICCPR, the Committee asked Thailand to provide the legal basis for the practice of detention without judicial review in unofficial places of detention, including, in particular, with respect to those detentions conducted pursuant to the Interim Constitution and HNCPO Orders No. 3/2558 and 13/2559. The Committee also expressed their concern on the provisions under which individuals have been detained.

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imprisoned for participation in unauthorized political gatherings of five or more persons, in particular Article 12 of HNCPO Order No. 3/2558, and stressed that the notion in General Comment No.35 on liberty and security of persons, which provides that “arrest or detention of punishment for the legitimate exercise of the rights as guaranteed by the Covenant (ICCPR) is arbitrary”.

In its Concluding Observations, the Committee expressed concern about reports of the arbitrary detention of hundreds of individuals exercising their right to assembly and/or expression, and the practice of detaining, without charge and without *habeas corpus*, persons for long periods of time, and recommended that Thailand should (i) immediately release all victims of arbitrary detention and provide them with full reparation; and (ii) bring its legislation and practices into compliance with Article 9 of the Covenant, taking into account the Committee’s General Comment No. 35.

In addition, the Committee was also concerned at the “excessive restrictions imposed on the freedom of peaceful assembly since the military coup of 2014, in particular the strict banning of any political gathering of more than five people” and “is particularly concerned about the arrest of hundreds of people for having organized or taken part in peaceful gatherings”.

The Committee also urged Thailand to effectively guarantee and protect the freedom of peaceful assembly and avoid restrictions that do not respond to the requirements under Article 4 of the Covenant. In particular, it should refrain from imposing detention on individuals who are exercising their rights and who do not present a serious risk to national security or public safety.
III. NCPO Announcements 37/2557, 38/2557, 50/2557, and HNCPO Order 55/2559

After the coup, NCPO Announcements No. 37/2557, 38/2557, and 50/2557 expanded the jurisdiction of military courts to certain offences, including purported violations of NCPO orders, national security crimes including a sedition-like offence, possession and use of war weapons, and the overly broad and vague crime of lèse majesté. As of December 2016, between 25 May 2014 and 30 November 2016, at least 2,177 civilians were prosecuted in 1,716 cases in military courts located throughout Thailand, including 1,577 cases related to the possession and use of war weapons.

While the practice of prosecuting civilians before military courts is being phased out through HNCPO Order No. 55/2559, issued on 12 September 2016, the Order only applies to offences committed on or following the date on which the Order came into force and not to past or pending cases. As of December 2016, at least 416 civilian cases remain in military courts; and

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264 ICJ, ‘Thailand: ICJ welcomes Order phasing out prosecution of civilians in military courts but government must do much more’ (2016) <www.icj.org/thailand-icj-
528 arrest warrants for individuals alleged to have committed crimes prior to HNCPO Order No. 55/2559 remain valid,\textsuperscript{265} and therefore any persons arrested in the future on the basis of those warrants will be subject to proceedings before a military court.

**Remarks:**

The use of military courts to try civilians is inconsistent with international law and standards. Article 14 of the ICCPR provides that everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. However, the Thai military justice system is separate from the civilian justice system, accountable only to the Ministry of Defense which is responsible for its administration. This given rise to the concern on the independence of judges in military courts.\textsuperscript{266} In addition, at the military court of first instance, only one of the three adjudicators has to be a legally trained member of the Judge Advocate General Office. The other two must be commissioned officers.\textsuperscript{267}

There are also reports that the right to a fair trial guaranteed by Article 14 of the ICCPR are not implemented during trials by the military courts. Based on the joint submission of the ICJ and TLHR to the Human Rights Committee in view of its review of the implementation of the ICCPR by Thailand, dated 6 February 2017, it stated that, in practice, numerous violations of the right to a fair trial and various “procedural irregularities” have


\textsuperscript{266} Art. 5, Act on the Statute of Military Courts (B.E. 2498).

\textsuperscript{267} Arts. 26 and 27, Act on the Statute of Military Courts (B.E. 2498).
taken place in military courts where civilians are being prosecuted, including, *inter alia*, “the passage of several months before a copy of the indictment is provided to an accused”; “the failure to make hearings accessible to the public in certain cases, including by an explicit order in lèse majesté cases or as a result of the fact that the court is located on a military base or because of the small size of the courtroom”; “refusal to allow the public to take notes”; “the conduct of inquiries and sentencing hearings in camera”; “the absence of stationed judges”; and “the long administrative delays due to the inability of military court personnel to process the sharp increase in the case-load”.

The Human Rights Committee has determined that the use of military courts to try civilians will only be legitimate if “the regular civilian courts are unable to undertake the trials... [and] other alternative forms of special or high-security civilian courts are inadequate to the task and... recourse to military courts is unavoidable”.268

In its General Comment No.32, on Article 14, the right to equality before courts and tribunals and to fair trial, the Human Rights Committee has held that the trial of civilians in military courts may raise “serious problems as far as the equitable, impartial, and independent administration of justice” 269 is concerned. International standards provide that military courts lack


269 Human Rights Committee, General Comment 32, CCPR/C/GC/32, para. 22.
the competence, independence, and impartiality to prosecute civilians and in principle should not be used except in strictly exceptional cases.\textsuperscript{270} Resorting to military jurisdiction should be limited to military matters or personnel.\textsuperscript{271} However, in all cases, including the prosecution of military personnel, the jurisdiction of military courts should be set aside in favor of the jurisdiction of the ordinary courts to conduct inquiries into serious human rights violations such as extrajudicial executions, enforced disappearances and torture, and to prosecute and try persons accused of such crimes.\textsuperscript{272}

During Thailand's ICCPR Review in 2017, the Committee asked what measures Thailand envisaged taking to transfer the remaining cases to the ordinary courts and to review the judgments handed down by the military courts to date. Thailand replied that there were several legal and procedural obstacles to this, i.e.··First, transferring cases was time-consuming and would not benefit the parties. Proceedings would have to start again from scratch, and suspects' and defendants' rights might be affected. Secondly, in some ongoing cases, a number of persons had already pleaded guilty and would thus be prosecuted twice for the same crime. Thirdly, there was no legal provision for the transfer of cases from military to civilian jurisdiction, which could lead to problems during the appeals process.”

The Committee stated that despite the obstacles cited by Thailand, the transfer of cases to civilian jurisdiction would

\textsuperscript{271} OHCHR, Report of the Special Rapporteur on the independence of judges and lawyers (7 June 2012), A/HRC/20/19.  
“arguably be advisable in the light of concerns regarding, inter alia, the composition of military tribunals and an alleged failure to respect the right to counsel”. Thailand replied that military court procedures were in line with the Criminal Procedure Code, which guaranteed the right to a fair trial in accordance with international standards, and in practice, the Criminal Procedure Code applied in approximately 85% of cases, while in the remaining 15% of cases, where the defendants were military personnel, specific military procedures applied. The Committee requested additional information about measures to be taken to surmount the obstacles mentioned by Thailand regarding the transfer of all cases involving civilians from military to civilian courts, which does not appear to have been provided by Thailand.

In its Concluding Observations, the Committee expressed concern about reports of hundreds of on-going cases and arrest warrants against civilians that remain to be adjudicated before the military jurisdiction, civilians who were convicted by military courts and did not enjoy the right of appeal when the alleged offences arose under the Martial Law, and reports that all guarantees provided for by Article 14 are not implemented during trials by the military courts, and recommended that Thailand should: (i) ensure that all trials before military courts are exceptional and take place under conditions that genuinely afford the full guarantee stipulated in the Covenant; (ii) take the measures necessary to accept transfer requests from military courts for offences committed prior to 12 September 2016; (iii) transfer all such pending cases to civilian courts; and (iv) provide the opportunity for appeal in civilian courts of cases involving civilians already adjudicated under military jurisdiction.
Conclusion

The new legal and constitutional framework put in place after the 22 May 2014 coup, in particular Articles 44, 47 and 48 of the Interim Constitution, Article 265 and 279 of the 2017 Constitution, the use of Martial Law, HNCPO Orders No. 3/2558 and 13/2559, NCPO Announcements 37/2557, 38/2557, 50/2557, and HNCPO Order 55/2559, is inconsistent with the rights guaranteed by international laws binding on Thailand, including under the ICCPR and ignores the fundamental pillars of the rule of law, namely equality, accountability and predictability. Despite international pressure to repeal or amend these laws, and while international standards dictate that Thailand may not rely on provisions of its internal law to justify a failure to comply with its obligations under international law,\textsuperscript{273} much of the post-coup legal framework which is inconsistent with Thailand's obligations under international law remains in place today. It is now past time for Thailand to review this framework and amend or, where appropriate, repeal, all laws and NCPO orders and announcements, which are inconsistent with Thailand's international human rights obligations.

ASSET ACQUISITION:
A FORGOTTEN FIELD WITHIN INDONESIAN LEGAL SYSTEM (COMPARATIVE STUDY BETWEEN INDONESIA AND SINGAPORE)

Authors:

Raissa Yurizzahra Azaria Harris

ABSTRACT

In order to strengthen their finance, many business entities in Indonesia resorts to asset acquisition. As the practices have become common, many business entities will seek for a comprehensive legal basis on asset acquisition. Therefore, this writing aims to analyze the laws and regulations of asset acquisition under Indonesian legal system. The comparative study with Singaporean legal system is deemed as necessary, since the goal is to formulate strategies based on the good practice in Singapore.

This writing uses normative approach which focuses on the reliance of the documents and legislations. It relies on many regulations, including the regulations on acquisition, asset acquisition, company, monopoly and unfair competition. The analysis will be made based on the difference and similarities between the two legal systems. Accordingly, recommendation is

274 Students of International Undergraduate Program Faculty of Law, Universitas Gadjah Mada, Indonesia
given based on the findings from Singaporean legal system in order to support the legal development in Indonesia.

Under Indonesian legal system, there are numerous laws and regulations that provide the definition of the term ‘acquisition’. However, the term ‘acquisition’ mostly refer to shares as its object, and none of the provisions explicitly recognize the ‘asset acquisition’. While, Article 102 of Act No. 40 Year 2007 on Limited Liability Company also does not explicitly mention asset acquisition, its interpretation leads to the basis of asset acquisition. Recalling the absence of procedural law on asset acquisition, then it is presumed to follow the regulation on shares acquisition. On the contrary, Singapore recognizes two objects of acquisition which are shares and asset. Singaporean legal system emphasizes significant differences between shares acquisition and asset acquisition. Subsequently, Singaporean legal system acknowledges asset acquisition as one of the type of acquisition, therefore there is a comprehensive laws and regulation concerning asset acquisition. It is believed that Indonesia needs to learn from the good practices of Singapore, and therefore conduct the efforts to strengthen the regulation on asset acquisition. Explicit recognition toward asset acquisition is strongly suggested and can be implemented by giving precise definition and its procedural regulation. Separate provisions between asset acquisition and shares acquisition shall also be made to distinguish between the two different procedures. Additionally, as asset acquisition is closely related to monopoly and unfair competition, further review on the threshold of the notification for asset acquisition is needed in order to avoid monopoly and unfair competition.
A. INTRODUCTION

In 2015, ASEAN states entered ASEAN Economic Community which resulted to the more competitive business. It is unavoidable effect for business entities that the free flow of goods and services may have significant impact to their business. Consequently, business entities look for alternative to strengthen their finance, secure the market shares, and develop their product. While some of the business entities start from internal measures such as increasing their capital, some also seek for external measures.

Under Indonesian legal system, there are some options for external measures which can be done such as merger, acquisition and consolidation. It shall be understood that these terms may differ depending on the state, for example under the legal system in Singapore\textsuperscript{275} and United States of America,\textsuperscript{276} both only use the term ‘merger’, and Japan has several terms that cover different method, including acquisition of a business.\textsuperscript{277}

The external measure which is extremely popular in the business practice is acquisition, which is defined as.\textsuperscript{278}

\begin{itemize}
\item Any transaction in which a buyer (limited to a corporation) acquires all or part of the assets and business of a seller (also limited to a corporation) or all or part of the stock or other securities of the seller, where the transaction is closed between a willing buyer and a willing seller. Included within the general term of
\end{itemize}

\footnotesize
\textsuperscript{275} Article 54 of Competition Act
\textsuperscript{276} 7 Clayton Act, 15 U.S.C. § 18
\textsuperscript{277} Corporation Law, Anti-Monopoly Act
\textsuperscript{278} Charles A. Scharf et al., 1985, Acquisition, Merger, Sales, Buyouts and Takeovers, Prentice-Hall, New Jersey, p. 4
‘acquisition’ are more specific forms of transactions such as merger, consolidation, an asset acquisition, and a stock acquisition.

Many business entities resort to merger and/or acquisition to develop and strengthen their company since it is deemed as having more impact rather than any internal measures. These business entities then rely to the prevailing laws and regulation in conducting merger and/or acquisition. The lack of legal certainty will therefore harm the business practice. It is unfortunate that the lack of legal certainty has emerged in Indonesia as there is no clear regulation on asset acquisition. Therefore, this writing is aimed to analyze the laws and regulations of asset acquisition under Indonesian law. Subsequently, Singaporean legal system is chosen since Singapore is deemed as the most developed country in South-East Asia and therefore will be used as comparative study.

B. METHODOLOGY

The objective of this writing is to find a conclusive finding on the best practice of Singaporean legal system, and subsequently formulate recommendations for Indonesian legal system based on the finding. In order to achieve the objective, the Author compare the legal system of both states and try to identify the issue within Indonesian legal system that can be improved by learning from Singaporean legal system.

This writing uses normative approach which focuses on the reliance of the documents and legislations. Accordingly, the main data used in this writing is a primary legal material which is laws and regulations of each state. It relies on the regulations on acquisition, asset acquisition, company, monopoly and unfair competition. The analysis will be made based on the difference and similarities of the aforementioned regulations. The difference is beneficial to see the lack within Indonesian legal system that can
be improved by adopting Singaporean legal system, while the similarities can be used to affirm the similar stance between the two states.

It is hoped that the analysis can result to the comprehensive conclusion that shows the gap between Indonesian and Singaporean legal system, and provide strategies and recommendation for the development of Indonesian legal system.

C. Asset Acquisition under Indonesian Law

Under Indonesian legal system, there are numerous laws and regulations that define the term ‘acquisition’ itself, *inter alia*:

a. Article 1 (11) of the Act No. 40 Year 2007 on Limited Liability Company;

b. Article 1(3) of the Government Regulation No. 27 Year 1998 on Merger, Consolidation and Acquisition of Limited Liability Company;

c. Article 1(4) of the Government Regulation No. 28 Year 1999 on Merger, Consolidation and Acquisition of Bank.

Most of the regulations use the term ‘takeover’ instead of ‘acquisition’, even though there are some regulations that use ‘acquisition’ such as the Government Regulation No. 28 Year 1999 on Merger, Consolidation and Acquisition of Bank. The difference of the term used, however, does not have any significant legal impact since it refers to the same legal action as defined in each laws and regulations. The problem occurs when the definition within the aforementioned laws and regulations limits the object of the acquisition. Article 1(3) of Government Regulation No. 27 Year 1998 on Merger, Consolidation and Acquisition of Limited Liability Company states that “Takeover is a legal action
conducted by legal entity or individual to acquire either all or the majority of shares of a company that will result to the alteration of the company’s control.”

Therefore, as can be seen from the definition above that the acquisition is limited to the takeover of shares. The limitation of the object of acquisition is further emphasized under Article 125 (1) and (3) of Act No. 40 Year 2007 on Limited Liability Company which prescribes that acquisition shall be done by way of taking over the shares. While there is a comprehensive laws and regulations regarding acquisition of shares, the limitation of the object of acquisition may result to a vacuum of law as the trend is changing. Many entrepreneur now resort to acquisition that does not necessarily involve only shares, but rather they take over the asset of other company. The acquisition over asset of a company may have the same legal consequence of shares acquisition which is the transfer of control of a company to other legal entity and/or individual who acquire such asset. Here, the asset which is acquired is not limited to tangible asset but also intangible asset such as intellectual property rights. One of the asset acquisition case in Indonesia is the case of PT Medco Energi Internasional (LLC).\(^{279}\)

Within this case, in 2015, PT Medco Energi Internasional (LLC) acquired the asset of a Swedish-based company, Lundin Indonesia Holding B.V, which operated in Indonesia. The asset acquired by PT Medco Energi Internasional (LLC) was a non-operator participation right in Lematang Block and operator participation right in South Sokang and Cendrawasih VII Block, along with Joint Study agreement over Cendrawasih VIII Block.

Unfortunately, Indonesian legal system is lacking when it comes to the regulation on asset acquisition. Accordingly, it becomes a shortcoming of Indonesian legal system since it is as if this field is forgotten by the government, yet many business entities are aware of the practice of asset acquisition. In order to open possibility for the business entity to conduct asset acquisition, many legal scholar refers to Article 102 of Act No. 40 Year 2007 on Limited Liability Company as the legal basis for asset acquisition. While Article 102 of Act No. 40 Year 2007 on Limited Liability Company does not explicitly mention asset acquisition, its interpretation leads to the basis of asset acquisition.

Article 102 of Act No. 40 Year 2007 on Limited Liability Company:

(1) The Board of Directors shall be obliged to request the GMS approval to:

a. transfer the Company's assets; or

b. secure the Company's assets, which constitutes of more than 50% (fifty percent) from the total net assets of the Company in 1 (one) transaction or more, either separate or inter-related.

(2) The transaction as referred to in paragraph (1) letter a shall be the transfer of the Company's net assets which occurs within the period of 1 (one) accounting year or other longer period as stated in the articles of association of the Company.

(3) The provision as referred to in paragraph (1), shall not apply to the action to transfer or secure the Company's assets, which is performed by the Board of Directors as the implementation of the Company's business activities in accordance with the articles of association.
(4) The legal action as referred to in paragraph (1) shall remain binding for the Company even though without any approval from the GMS, as long as the other party has a good faith in conducting such legal action.

(5) The provision on quorum and/or the adoption of resolution of GMS as referred to in Article 89, shall apply mutatis mutandis for GMS resolution to approve the action of the Board of Directors as referred to in paragraph (1).

Pursuant to this article, it gives possibility to the transfer of company asset as long as it is in accordance with the authority given to the Board of Directors. As there is no procedural laws that regulate about the asset acquisition, then it is presumed to be the same as shares acquisition.

Komisi Pengawas Persaingan Usaha (KPPU) as a body which has authority to supervise and regulate the merger, acquisition and consolidation sets notification threshold for the entity who wish to conduct the said legal action. KPPU further recognizes the acquisition that involves asset as can be seen in KPPU Regulation No. 1 Year 2009 on Pre-Notification of Merger, Consolidation and Acquisition. It is stated under Article 4 that the party can give prenotification if it fulfills the threshold, “[…](c) asset acquisition or other transaction that result to the transfer of control effectively, (d) acquisition that results to the value of asset or sales or market shares fulfils the threshold prescribed under article 3.”

D. ASSET ACQUISITION UNDER SINGAPOREAN LAW

Unlike Indonesia which uses the term merger, acquisition and consolidation that refers to different legal action. Singaporean
The legal system recognizes only the term ‘merger’ which can be used interchangeably with ‘acquisition’. Within its development, the merger and/or acquisition under Singaporean law is often referred as ‘Merger and Acquisition (M&A)’.280

The regulation concerning merger under Singaporean legal system can be found in various laws and regulations, the main basis is Singapore Competition Act 2007. The definition of merger under Singaporean law is stated under Article 54 of Competition Act which is:

For the purposes of this Part, a merger occurs if —

(a) 2 or more undertakings, previously independent of one another, merge;

(b) one or more persons or other undertakings acquire direct or indirect control of the whole or part of one or more other undertakings; or

(c) the result of an acquisition by one undertaking (the first undertaking) of the assets (including goodwill), or a substantial part of the assets, of another undertaking (the second undertaking) is to place the first undertaking in a position to replace or substantially replace the second undertaking in the business or, as appropriate, the part concerned of the business in which that undertaking was engaged immediately before the acquisition.

Based on the above definition, Singapore does not limit the object of acquisition and thus open the possibility for asset acquisition. Subsequently, it recognizes two objects of acquisition

namely shares and asset. There are, however, several difference between shares acquisition and shares acquisition under Singaporean law. First, asset acquisition allows a specified asset to be acquired, while in shares acquisition, all the entire company including its asset and liabilities will be acquired depending on the amount of shares bought. Second, there is a need to get consent of other party consent when conducting asset acquisition that involves licensing or distribution agreement. Third, under Singaporean law, in order to conduct asset acquisition, the party which buy the asset must be a local company or a foreign company that has been registered in Singapore. Fourth, asset acquisition is often deemed to be more complicated as it requires the transfer of ownership over the asset concerned.

Regardless the object of acquisition, all the acquisitions conducted within Singapore jurisdiction is observed by Competition Commission of Singapore (‘CCS’). The existence of CCS is important to avoid merger and/or acquisition that may lead to unfair competition and/or monopoly. Therefore, CCS has the authority to investigate, make decision and also to give sanction in accordance with Competition Act.

The significant difference between Singaporean and Indonesian legal system also lies on the obligation to give report. While Indonesian government requires the legal entity and/or individual that wish to conduct acquisition to file a report to the authority if it fulfils the threshold, Singapore government uses

281 Wong Partnership, ‘Mergers and Acquisition: Buying a Singapore Company or Business’, undated, p. 1

282 Articles 1(6), 4, 7 of KPPU Regulation No. 1 Year 2009 on Pre-Notification of Merger, Consolidation and Acquisition
voluntary system. Here, Singapore law does not require the parties that involve in the merger and/or acquisition to give notification to CCS. Nonetheless, the party may conduct self-assessment and notify CCS accordingly only if there is concern that such merger and/or acquisition may be in breach of the prevailing laws and regulations.

E. CONCLUSION

There are several significant differences on the regulation regarding asset acquisition between

Indonesian legal system and Singaporean legal system. The most significant and substantial difference lies on the definition itself. Indonesian legal system does not explicitly recognizes asset acquisition, therefore in order to look for its basis, there is a need to do an interpretation of the law. On the contrary, Singaporean legal system clearly acknowledges asset acquisition as one of the type of M&A. Subsequently, -unlike Singapore,- Indonesian legal system lacks in regulating the specific procedure and legal implementation of asset acquisition. This condition may lead to legal uncertainty, hence harming its practice and may inflict dispute between stakeholders.

Therefore, it is strongly recommended that Indonesia learns from Singapore (and other states that have comprehensive regulation on asset acquisition) to improve its legal regime. First, Indonesian legal system needs to give an explicit recognition toward asset acquisition, by way of, *inter alia*, giving precise

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definition and its procedural regulation. Second, recalling its different feature, Indonesia shall distinguish between asset acquisition and shares acquisition. Thus, learning from good practices of Singapore, there must be separate provisions between asset acquisition and shares acquisition. Third, in order to strengthen the law on monopoly and unfair competition, Indonesia must review the threshold of pre-notification for asset acquisition. The aim is to have the asset acquisition regulation in line with law on monopoly and unfair competition, therefore Indonesia can avoid asset acquisition practice that may lead to monopoly and unfair competition.
Problem Schemes in Implementing Thin Capitalization Rules in Thailand

Anirut Somboon*

Abstract

The payments of dividends and interest to shareholders and lender inherently have different tax exposure. In a worldwide tax system, interest paid is typically treated as a deductible expense in the tax computation. To exploit such advantage, multinational enterprises would set up a company in a source country with excessive debt in order to shift profits derived therefrom in form of interest to be received in a low tax rate jurisdiction. This arrangement is called thin capitalization and has been abrasive to source country tax base for a long time.

Many countries, especially developed countries, implemented ‘thin capitalization’ rules to protect their own tax bases and fit to their economic contexts. The rule generally determines to what extent the interest payment for corporate debt would be a deductible expense for tax purposes. Various implementation approaches have posed distinguishable consequences, also problem schemes, for discussion.

However, Thailand, as a developing country, has no specific tax rule to properly govern thin capitalization. Some people points out that analogy with the existent provisions under tax law shows somewhat insufficient to deal with this kind of tax avoidance. Conversely, others are anxious that implementing such
rules might cause the decrement of inducement to invest in Thailand, as any of developing countries may concern likewise.

This article mainly focuses on tax matters regarding thin capitalization and the unfiled loophole of existent tax laws in Thailand – probably similar to in other countries where thin capitalization rules have not been enacted – used by a number of multinational enterprises, including potential problems of implementing the rules. It will also differentiate equity and debt financing and provide background of thin capitalization together with taxation implication thereon, in addition to occasionally proposing comments.

**Keywords**: debt financing, thin capitalization, tax avoidance

### I. Background of thin capitalization and taxation implication

Financial resource for business formation basically is categorized into two fundamental types: debt financing and equity financing.\(^{284}\) Equity financing typically means a method of financing in which a company issues and buy shares of its stock to investors and, in return, receives funds from the investment. The investors will become its shareholders who obtain ownership interests in the company. On the other hand, debt financing means borrowing money for the company's operation and the existing shareholders do not lose their proportion of ownership rights and

interests. Debt financing normally requires the borrower or the debtor to adhere to strict conditions or covenants in addition to the obligation to pay debt, principal and interest, at specified dates and the failure thereto would lead to horrible consequences. In most countries, the interest payable by the debtor can be treated as a deductible expense in the corporate income tax computation. In other words, the effective interest cost is less than the stated interest in tax perspectives. An excessive level of debt, however, could decrease its creditworthiness.

Further, the choosing of corporate financing, between equity and debt, may differently affect to the rights and duties of a company and its shareholders as follows:

(1) The ownership, in case of equity financing, any shareholders are entitled to participate and vote in the General Meeting of the company for carrying on and propelling the company’s business, as part of the company owners. On the contrary, the lender or creditor, in case of debt financing, does not have rights to control the company but a mere right to claim for debt payment.

(2) For distribution of profits rather than the increment of share value, in equity financing, any shareholders is entitled to obtain their ownership interests in form of dividends payable once the company incurred net profits and dividends are declared by a resolution passed in a general meeting or paid, from time to time, by the discretion of directors. On the other side, the lender is entitled to, and the borrower is liable to, the repayment of principal amount including interest at the fix due as agreed by the parties.

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285 Civil and Commercial Code, S 1201 (Thailand).
On consequences of financial failure, the liability of the shareholders is limited to the amount, if any, unpaid on the shares respectively held by them. Should the company incur loss and become bankrupt, the shareholders would have liabilities not excess their shares held. On the other hand, in aspect of debt financing, not merely does the lenders not have any joint liability with the company thereto, but they are also able to claim principal and interest once the company became bankrupt.

In the tax viewpoints, a financial structure, heavily weighted toward debt and the main reason for having such a structure not based on economic efficiency or profitability of the company, is called low capitalization or thin capitalization, generally undertaken in order to gain the tax advantage of deducting interest as an expenses. In essential, tax rule in any countries allows a deduction for interest paid or payable in the tax computation of net profits, whereas dividends cannot be considered as deductible expenses, due to its function which it is distributed after calculation of Corporate Income Tax ("CIT") and net profits. Shareholders tend to use debt financing rather than equity financing since the higher debt a company has, the lower taxable profits will be. The advantages of debt financing, moreover, would be a lower risk assumption, a return on investment independent of the result of the company, possible exploitation of the leverage effect, and etc.

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286 Civil and Commercial Code, S 1096 (Thailand).
Multinational enterprises are normally in an endeavor to structure their financing arrangements to maximize these benefits. Not only can they establish a tax efficient mixture of debt and equity in borrowing countries, and also the arrangement influences the tax treatment of the lender receiving the interest profoundly. Tentatively, it may be structured in a way that allows the interest to be received in jurisdictions that do not tax the interest income, or which the interest is subject to tax at the low rate. 

Furthermore, tax systems of most countries typically collect tax on interest income at the rate lower than capital gains. It has persuaded multinational companies to change, through thin capitalization method, accruing the profits from business income to interest income paid by related company for the purpose of decrement of tax burden. 

This hidden equity capitalization commonly arises where the company is financed by the corporate group or the related company. Besides intercompany loan, it can also arise where a fund is provided to the company by third parties, especially financial institutions, with guarantees or other forms of comfort provided to the lender by affiliated companies or its overseas parent.

Non-resident investors derive essential benefits from undertaking thin capitalization. A subsidiary in source country would save a number of costs of tax compliance on income generation and mitigate tax levied upon remittance of profits to the oversea parent. Thin capitalization thereby diminishes economic

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291 Tiwa Joanjousong, Thin Capitalization Provision (Master’s Thesis, Faculty of Law, Chulalongkorn University, 2000), p. 66.

double taxation on business revenue from the direct investment in foreign countries, *i.e.*, CIT on business profits and withholding tax ("WHT") from distribution of dividends to its parent. The advantages thereof to multinational investors however are uncertain depending on tax systems implemented in each country. Regardless of whether home country provides tax exemption on revenue derived from source country and whether its tax collection is applied to accrued or deferred basis, multinational investors tend to undertake thin capitalization due to the tax benefits therefrom.

Thin capitalization means the capital with an ostensibly greater proportion of debt against equity. It is a favorable tool used for tax abuse through excessive interest deductions to reduce pre-tax income before tax computation. Many countries, especially developed countries, currently introduces their thin capitalization rules to against such excessive debt financing of companies and delegates tax authorities to detect disproportionate use of leverage and prevent a potential loss of tax income with regard to cross-border financing structures.\(^{293}\) Nevertheless, rules of preventing excessive debt financing or thin capitalization rules in those countries presently are gradually not efficient since some types of thin capitalization are complicated and incompletely thwarted, such as, back-to-back loan method, disguised borrowings, horizontal Z, etc. Unable to prevent all types thereof, thin capitalization rules introduced by developed countries at least impede the convenience of such arrangement and fairly protect their own revenues from taxation and tax equality between foreign companies and domestic companies which have scarce benefits from the arrangement.

Conversely, in Thailand, there is no specific legal provision designed to resolve tax abuse from thin capitalization. Existing provisions of tax law, i.e., in Revenue Code, Royal Decree, Ministerial Regulation, Director-General Announcement, Departmental order, are not sufficient to effectively respond this kind of tax avoidance. Tax base erosion from this arrangement has not been solemnly resolved.

II. Problems of the application of existent provisions on thin capitalization in Thailand

In accordance with Civil and Commercial Code of Thailand (“CCC”), the minimum of authorized capital is not stipulated for company, and in addition, any three or more persons may promote and form a limited company. Further, every promoter must merely subscribe to at least one share of which the amount shall not be less than THB 5. Thus, even having only an authorized capital in amount of THB 15, a limited company in Thailand can be established and engage in its desirable business. For any foreigner who wishes to commence the operation of business in Thailand, the minimum capital shall not be less than THB 2,000,000 or not less than THB 3,000,000 for the business which requires permission, and the ratio of the capital and loans to be used in the permitted business shall be 1:7. There is

294 Civil and Commercial Code, s 1097 (Thailand).
295 Civil and Commercial Code, s 1100 (Thailand).
296 Civil and Commercial Code, s 1117 (Thailand).
297 Foreign Business Act B.E. 2542 (1999), S 14 para 1 (Thailand).
298 Foreign Business Act B.E. 2542 (1999), S 14 para 2 (Thailand).
299 Foreign Business Act B.E. 2542 (1999), s 18(1); Ministerial Regulation No.2 B.E. 2516 (1973) issued under the Announcement of the Revolutionary Party No. 281 B.E. 2515 (1972) art 1(Thailand).
however no legitimate measure prescribed in Thailand Revenue Code ("TRC") to counter the arrangement of thin capitalization.

In practice, investors normally cannot set up their companies or operate their businesses by complete or very high level of debt financing from financial institution without a guarantee, suretyship or collateral. An interrelated company debt financing would be made, instead. A limited company thereby does not need to be registered with high level of authorized capital, afterwards the directors may then makes a loan agreement with or receive debt financing from an interested entity or an affiliated company to borrow funds. From the legal point of view, even if the companies are separate legal entity for legal and tax purposes, those administrations, managing controls and interest enjoyments may remain undistinguished due to their relationship. Under the said arrangements, whether there is collateral would not matter to related companies.

In tax aspects, equity financing faces a 28 percent effective tax rate on business profit and distribution thereof. It is subject to 20 percent CIT on business profits\textsuperscript{300} and 10 percent WHT on payment of dividends.\textsuperscript{301} Suppose the company has business profits of THB 100, the amount is deducted THB 20 for CIT liability. The amount after CIT remains THB 80. Once the general meeting of shareholders has a resolution to pay dividends, THB 80 dividends further shall be subject to WHT at the rate of 10 percent. Therefore, total tax liability on the distribution of profit is 28 percent of the total amount of business profit. On the other hand, debt financing has a mere 15 percent effective tax rate of interest. The borrower company shall be subject to pay WHT at the rate of 15 percent of

\textsuperscript{300} Royal Decree No. 530/2554 (Thailand).
\textsuperscript{301} Revenue Code, s 50(2)(e) (Thailand).
the gross amount of interest when the payment of principal and interest to the lender company is made.\textsuperscript{302} On comparison, the equity financing have much more tax burden than debt financing. For tax mitigation, investors would plan to use a high level of debt financing rather than equity financing. The following table demonstrates the difference between tax burdens thereon.

Comparative tax exposures on remunerations for equity financing and debt financing:\textsuperscript{303}

\begin{tabular}{|l|l|}
\hline
\textbf{Equity} & \textbf{Debt} \\
\hline
1,000,000 & 1,000,000 \\
\hline
Taxable Profit & Profit \\
150,000 & 150,000 \\
\hline
Corporate Income Tax & Interest \\
(20\%) & (7.5\%) \\
30,000 & 75,000 \\
\hline
Net Profit & Taxable Profit \\
After Tax & \\
120,000 & 75,000 \\
\hline
\end{tabular}

\textsuperscript{302} Revenue Code, s 50(2)(a) (Thailand).
\textsuperscript{303} Arthit Satthavorasit, ‘Thin Capitalization in Thailand’ lecture taught at the Faculty of Law, Thammasat University, January 2014.
<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dividend</td>
<td>120,000</td>
</tr>
<tr>
<td>Corporate Income Tax</td>
<td></td>
</tr>
<tr>
<td>(20%)</td>
<td>15,000</td>
</tr>
<tr>
<td>Withholding Tax (10%)</td>
<td></td>
</tr>
<tr>
<td>Net Profit After Tax</td>
<td></td>
</tr>
<tr>
<td>60,000</td>
<td></td>
</tr>
<tr>
<td>Interest</td>
<td></td>
</tr>
<tr>
<td>75,000</td>
<td></td>
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<tr>
<td>Withholding Tax (15%)</td>
<td></td>
</tr>
<tr>
<td>Net Interest</td>
<td></td>
</tr>
<tr>
<td>63,750</td>
<td></td>
</tr>
<tr>
<td>Dividend</td>
<td>60,000</td>
</tr>
<tr>
<td>Withholding Tax (10%)</td>
<td></td>
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<tr>
<td>6,000</td>
<td></td>
</tr>
</tbody>
</table>
As above demonstrated, debt financing or thin capitalization may reduce the effective tax rate and company's costs. As a result, from lower incidence of tax, many developed countries have lost plenty of revenues from the taxation that they
should gain. The developed countries thus introduce their own thin
capitalization rules against the excessive debt financing. However,
there is no provision of TRC stipulating a measure to control the
amount of debt in company but solely the assessment of interest
which may not be efficient to prevent thin capitalization.

The existent TRC provision merely delegated an
assessment official to assess interest that is lower than the market
price without reasonable cause.\textsuperscript{304} Hence, the provision of lending
with the higher rate of interest than the market price without
reasonable cause is excluded. In practice, thin capitalization is
undertaken by and between interrelated parties, \textit{i.e.}, a parent lends
its subsidiaries, with interest higher than market price in order to
shift business profits from the subsidiary in Thailand to the parent
offshore in form of interest for the purpose of lower tax exposure.
Consequently, in nearly all of thin capitalization, an assessment
official has no power to assess the high amount of interest in
accordance with the market price on the date of transfer. This
provision therefore would be unable to prevent this arrangement.
The assessment official however might apply the transfer pricing
rules to cap interest deductibility where the interest is charged
higher than market price that independent contracting parties
determine in good faith.\textsuperscript{305} This is probably able to limit the rate of
deductible interest but not a level of debt.

Additionally, in accordance with an accounting standard, expenses
are recognized in an actual basis and for the purpose of making
profits or for business. Tentatively, the payment for that purpose is
also treated as deductible expense in the tax point of view. As the
law stated, expenses expanded not for the purpose of making

\textsuperscript{304} Revenue Code, s 65Bis (4) (Thailand).

\textsuperscript{305} Departmental Instruction No Paw 113/2545 (Thailand).
profits or for the business shall not be allowed as expenses in the calculation of net profits.\textsuperscript{306} Normally, interest paid on loan made to operate business activities is generally considered as expenses for business purpose and cost of making business profits. The payment of interest therefore shall be a deductible expense in the calculation of net profit and loss, pursuant to this provision of law. Furthermore, in Thailand, there was a case that the defendant, a subsidiary company, had allegedly unnecessarily borrowed funds from its parent in order for its business operation rather than carrying on the business with its own available equity which would be sufficient. The Supreme Court held that such loan was merely made improperly but legally. Hence, if interest was in accordance with the market price on the date of lending, any assessment official would have no authority to prohibit the recognition of interest payment as the expenses for the purpose of making profits or for the business. Accordingly, the payment of interest shall be a deductible expense in the calculation of net profits and loss of the company.\textsuperscript{307}

Besides inter-company transaction, in case where assessment official applies measures responding transfer pricing, there is a bound since the provisions of law emphasize the calculation of remuneration that a company pays to its own equity. Moreover, existing law states that part of the salary of a shareholder or partner who is paid in excess of appropriate amount shall not be allowed as expenses in the calculation of net profits.\textsuperscript{308} This measure is for countering profit shifting from the company to its shareholders or partners. The remuneration for assets which a

\textsuperscript{306} Revenue Code, s 65Ter (13) (Thailand).
\textsuperscript{307} Supreme Court Dika No.6501/2534.
\textsuperscript{308} Revenue Code, s 65Ter (8) (Thailand).
company or juristic partnership owns and uses,\textsuperscript{309} the payment of interest to equity, reserves or funds of the company or juristic partnership itself\textsuperscript{310} are restrict deductibility in the calculation of net profits for tax purposes. For instance, in situation that headquarter located in foreign country lends money to its branch in Thailand, the interest paid from the branch to the headquarter is remuneration for own equity and the interest then cannot be a deductible expense for calculation of net profits subject to tax in Thailand.\textsuperscript{311} However, if both countries entered into double tax agreement ("DTA"), the interest paid would not be remuneration for their own equity as a result of separation of legal entities by effect of DTA.

The mechanism of calculation of net profits also indicates that cost of purchase of asset and expense related to the purchase or sale of asset is a deductible expense, but only the amount in excess of normal cost and expense without reasonable causes shall not be permitted to deductibility for tax purposes.\textsuperscript{312} Considering interest paid for remuneration of loan agreement, this debt however is not the cost of purchase of asset or expense related to the purchase or sale of asset. But, the amount of interest paid unreasonably high may not be a deductible expense for calculation of net profits. For example, in case of loan taken to purchase equipment needed for the business, interest on such loan may be included as part of cost of purchasing asset but in practice, it may be difficult to prove the purpose. The interest for loan taken to normal operation of company, which even seems the remuneration for debt becoming equity, is a deductible expense. Tax authorities

\begin{itemize}
\item \textsuperscript{309} Revenue Code, s 65Ter (10) (Thailand).
\item \textsuperscript{310} Revenue Code, s 65Ter (11) (Thailand).
\item \textsuperscript{311} Supreme Court Dika No.811/2519.
\item \textsuperscript{312} Revenue Code, s 65Ter (15) (Thailand).
\end{itemize}
then cannot determine whether such equity is substituted by debt. TRC further stated that any expense payable from profits received after the end of an accounting period shall not be allow to deduct in calculation of net profits.\textsuperscript{313} The payment of interest is normally made at the time prescribed in the loan agreement; neither from business profits nor after a company receives profits, unless the parties agree otherwise. Interest thus is a deductible expense in the calculation of net profits.

In addition, the provision of law in Thailand stipulated that “a company or juristic partnership incorporated under foreign laws and not carrying on business in Thailand but receiving assessable income under Section 40 (2) (3) (4) (5) or (6) which are paid from or in Thailand, shall be liable to pay tax. The payer of income shall deduct corporate income rate and remit it to the local district office together with the filing of tax return in the form prescribed by the Director-General within 7 days from the last day of the month in which such income is paid.”\textsuperscript{314} Since interest is an assessable income under Section 40 (4) and financing by loan is frequently made by interrelated parties, thin capitalization is inevitably subject to this provision. A borrowing company in Thailand thereby has a responsibility of deducting from the amount of interest paid to lending foreign company which is liable to pay tax. The latter typically is a taxpayer liable to pay tax but in this situation, Thai Revenue Department (“TRD”) could not impose the company situated outside Thailand territory to comply with TRC. The provision thus shifts a burden of remitting tax on such income to an income payer in Thailand. In case where the parent oversea lends to its subsidiary in Thailand, the subsidiary shall have an obligation to deduct 15 percent from a sum of the interest before paid to the

\textsuperscript{313} Revenue Code, s 65Ter (19) (Thailand).
\textsuperscript{314} Revenue Code, s 70 (Thailand).
parent. If the foreign company rendering service of lending to any company in Thailand has its branch office in Thailand, the former may be considered as carrying on its business in Thailand, under the force of attraction principle. Although, its branch office in Thailand does not concern with the loan agreement made between the offshore headquarter and another company in Thailand, the Court held that its headquarter has carried on business in Thailand, if the branch office in Thailand has engaged in the business of providing loan service. 315 Nevertheless, if the headquarter in foreign country entered into the DTA with Thailand, this foreign company may not be considered as carrying on business in Thailand even its branch located in Thailand in accordance with the provision of DTA. Besides, a mere opening of a bank account in Thailand is not determined as having business operation in Thailand.

Moreover, TRC states that “for a company or juristic partnership incorporated under foreign laws which has an employee, an agent or a go-between for carrying on business in Thailand and as a result receives income or profits in Thailand, such company or juristic partnership shall be deemed to be carrying on business in Thailand and the person who acts as an employee, an agent or a go-between for the business, whether he is an individual or juristic person, shall be deemed to be the representative of the company or juristic partnership incorporated under foreign laws and shall have the duty and liability to file a tax return and tax payment, with respect to only the mentioned income or profits.” 316 And, “a company or juristic partnership disposing its profits or other type of money that it set aside from profits or is deemed to be profits from Thailand shall pay income tax by

315 Supreme Court Dika No. 1535/2520.

316 Revenue Code, s 76Bis (Thailand).
deducting from such disposed amount of money in accordance with the corporate income tax rate for the company and juristic partnership and shall remit it to the local Amphur office together with the filing of tax return in the form prescribed by the Director-General within 7 days from the date of disposal. The provisions also apply to a situation that a branch of foreign company generates and disposes income in Thailand to its offshore headquarter and a case where the latter borrows funds from a foreign financial institution for the business of its branch in Thailand. Regardless of whether the branch directly makes repayment of principal and interest to the financial institution or the headquarter advances the payment and the branch reimburses to its headquarter, the Court held that these transactions are the disposing of income in form of interest arising in Thailand to the lender located in foreign country and the branch of foreign company is liable to pay tax at the rate of 10 percent of the disposed amount.

Furthermore, Thailand has rules against profits shifting from CIT high rate source countries to other countries which collect CIT at the lower rate or are free of CIT, or against profits shifting for the purpose of profit allocation in between their affiliated companies in order to reduce their tax burdens. Tax advanced pricing arrangement ("APA") is a bilateral agreement made by and between the taxpayer and TRD to provide in advance with the transfer pricing issues for intra-group of companies' transactions for a certain period with appropriate methodologies, terms and conditions. The objective of APA is to prevent any potential disputes, or problems of double taxation that may be caused by a transfer pricing reassessment. The taxpayer may enter into

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317 Revenue Code, s 70Bis (Thailand).
318 Supreme Court Dika No. 522/2536.
319 Departmental Instruction No. Paw 113/2545 (Thailand).
Bilateral APA with TRD so as to ensure that the APA is consistent with the TRC and to eliminate double taxation according to DTAs between Thailand and other jurisdictions. The execution of APA is also to counter tax avoidance and evasion and to enhance knowledge and understanding between the taxpayer and TRD together with indication of certain tax liabilities. Basically, problems incurred by transfer pricing and thin capitalization to source countries might be resolved by the APA. Nevertheless, APA is mainly provided to fix particular problems arising from transfer pricing. Shifting profit through the payment of interest can be committed even at market value or at the value fixed by APA. Thin capitalization may not be influenced from the constitution of APA.

As aforementioned, the existent provisions and measures in accordance with Thai laws could not govern and efficiently prevent thin capitalization for purpose of tax avoidance. Those may be insufficient to protect the rights of source country to taxation on income derived from and in Thailand. Without a particular thin capitalization rule, there is an uncertainty in the enforcement of laws to resolve this kind of tax avoidance. Tax law in Thailand should be amended and added such rule to fill up the loophole therein and ensure the equality in taxation upon business profits in whatsoever forms.

**III. Thin capitalization rules and problems of implementation**

For the purposes of taxable profits calculation, thin capitalization rules generally limit the amount of debt that may enjoy interest expense deductibility. The payment of interest on the excessive limited amount of debt shall not be deductible in the calculation. Many countries implemented their own rules to counter
thin capitalization ostensibly for tax avoidance. The rules implemented might be divided into various approaches and problem schemes incurred in respect of the implementation thereof might be discussed as follows:

**Arm's Length Approach**

In some countries, *i.e.*, South Africa and Australia, the maximum amount of allowable debt is limited to the amount of debt that an independent lender would be willing to lend to the company.\(^{320}\) For instance, the amount of debt that a borrower could borrow from an arm's length lender or a lender unrelated to a borrower. Any borrowing cost on the excess arm's length debt amount shall not be deductible for tax purpose. The arm's length approach typically considers the specific attributes of the company in determining its borrowing capacity or the amount of debt that company would be able to obtain from independent lenders. An arm's length approach requires the taxpayer company and tax authority to establish the amount of debt which a thirdparty lender would be willing to lend to the company. This approach emphasizes the amount of debt that third party lenders, at arm's length, would be willing to lend to the specific company in question and takes into account the specific attributes of that company. The approach can also take into consideration of the amount of loan which the borrower, at arm's length, would be willing to borrow.

A problem of the arm's length approach is a difficulty in determination of an appropriate amount of debt.321 To what extent unrelated lenders should lend to others of which the conditions are extremely various may not be fairly specified by tax authorities. In Thailand, TRD might not be ready for this approach since there is no specific measure regulated for guideline and enforcement. This approach requires a high degree of tax authorities’ discretion to determine the proper treatment for each of factual situations. Due to the requirement of a mere discretion of tax authorities, one might also point out that the arm's length approach could persuade to corruption and bribery.

**Ratio Approach**

The maximum amount of debt on which interest may be allowed to deductibility for tax purposes is limited by a predetermined ratio that is prescribed in tax laws or regulations. The ratio or ratios used regardless of whether it may or may not reflect an arm’s length position. This approach determines the amount of deductible interest expense by reference to a specified ratio, such as the ratio of debt to equity. The rules might allow interest payments on debt of up to two times of the total amount of equity invested in the affiliated company. Any additional interest would not be deductible for tax purposes. 39 The government authorities in China, for instance, jointly published a Circular on the Relevant Taxation Policies in connection with the

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Pre-Tax Deduction Standard for the Interest Expenses Paid to the Affiliated Parties of Enterprises which provides two ratios: first, a 5-to-1 debt-to-equity ratio for financial institutions and second, a 2-to-1 debt-to-equity ratio for others. The portion of interest on the debt exceeding the thresholds shall not be deductible, unless the company can prove that financing was arranged at arm’s length.322

Apart from the complicacy of considering a suitable ratio,323 problems with the fixed ratio approach are that it is not flexible and might not reflect economic reality. Developing countries, such as Thailand, have needed the investments from developed countries for job creation, technology transfer and economic development. This fixed ratio approach would probably reduce a number of incentive to invest in Thailand. It also may cause an unfavorable effect to the free trade market and deter the expansion of businesses which is growth potential but lack of their own funds. A fixed ratio approach may not consort with the capability of taxpayers in Thailand and may render unacceptability.

**Dividend Deduction or Zero Rate Approach**

Tax benefit is considerably one of main factors having impact on investors’ decisions to use debt financing rather than equity financing. The payment of interest is considered as expense deductible over net profits, while the declaration of dividends cannot be deductibility in calculation of the net profits for tax purposes. The limitation of thin capitalization by considering dividends as deductible expenses would replace traditional

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economic double taxation elimination at a level of shareholder, through tax credit or exemption, with the deductibility of dividends distribution from the net profits at a level of company. In accordance with this approach, dividends are treated as expense similar to interest and there is no corporate tax charged on the profit distribution, as implemented in Spain and Greece.42 This approach is called “Dividend Deduction” or “Zero Rate”. Net profits thereby not distributed to shareholders and kept for business operation have CIT burden at the rate of 20 percent at the level of company, pursuant to Thai tax system. In the meantime, net profits distributed to shareholders have no tax burden at a level of company but are subject to personal income tax (“PIT”) at progressive tax rate, the highest of which is 35 percent.

Problems of “Dividend Deduction” or “Zero Rate” approach are as follows: the company which most of its shareholders liable to PIT at the marginal rates of 20 percent or less would be persuaded to distribute its net profits to shareholders in order to reduce tax burden on its business profits. Conversely, the company of which the shareholders pay PIT at the marginal rates of 20 percent or more would prefer not to distribute its business profits in form of dividends but keep it with the company in order to increase its capital and be subject to CIT at the rate of 20 percent, so as to keep away from the higher rate of PIT. Therefore, the incidence of tax between interest and dividends would still be different. Instead, investors may select to be derived business profits in form of interest which is subject to WHT at the fix rate of 15 percent for the purpose of tax burden deduction. Moreover, in the eyes of the TRD and Thai government, the amount of revenue received from taxation through “Dividend Deduction” or “Zero Rate” approach
would be lower than a current measure of taxation through the dividend tax credit method.

**Reclassification as Dividends Approach**

Rather than denying interest deductibility, some countries, *e.g.*, Germany, Russia and Switzerland, reclassify the excess interest as dividends.\(^{324}\) In accordance with this approach, tax liability on interest payment is changed to be similar to dividends. For instance, if it is implemented in Thailand, interest payment will not be liable to mere WHT at the 15 percent, \(^{325}\) but instead, the payment will be included in the PIT computation at the progressive rate. However, in this approach, interest would still be an expense deductible in calculation of net profits and loss for the paying company, while the declaration of dividends cannot be considered as a deductible expense. The approach might not pivot the incentive from the arrangement of excessive debt financing to equity financing due to the difference in their tax exposure.

**Earning Stripping Rule**

This rule was introduced by the United States of America and was enacted under the Internal Revenue Code. In accordance with the provision,\(^ {44}\) a tax deduction may not be allowed for an U.S. company’s interest paid, if the company’s debt-to-equity ratio exceeds 1.5 to 1. Any amount disallowed is however limited to the amount of the company’s excess interest expense which is greater than 50 percent of the business’s earnings before interest, tax, depreciation and amortization (”EBITDA”).\(^ {326}\) The amount of interest disallowed is carried over and treated as disqualified

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\(^{325}\) U.S.C § 163 (US).

interest paid in the next succeeding tax year. Moreover, if a company has excess limitation carry forward in a tax year, the excess limitation is carried forward and used to offset excess interest expense in the next 3 succeeding tax years. A special rule applies to loans issued through a partnership in which the company holds an interest to prevent avoidance of the interest limitation rules. In addition, to prevent avoidance through affiliated group members, all members of an affiliated group are treated as one taxpayer.327

This rule has been criticized by many of U.S. large companies that it is excess restrictive. The U.S. Internal Revenue Service (“IRS”) issued new proposed regulations to make the rule soften by many of transaction exemptions.328

There currently are many approaches implemented across countries and even if one approach of thin capitalization rule was implemented in one country, the same can be adopted by other countries with adjustment thereof so as to be properly fit with their own economic contexts. For instance, the fixed ratio approach is implemented differently among countries, Canada uses a debt-to-equity ratio of 1.5-to-1,329 whilst a developing country like Kenya uses a debt to equity approach and employs a 3-to-1 debt-to-equity ratio.49 Due to the differences in economic system and society of each country, thin capitalization provisions have been variously

implemented. Whenever Thailand desires to adopt thin capitalization provision for the purpose of tax avoidance prevention, government and tax authorities would have to research economic system and society prior to design and implement its own thin capitalization rule in order to resolve problem schemes efficiently and productively.

Thai tax system currently does not adopt any of aforementioned thin capitalization rules to solve the tax base erosion and profit-shifting (“BEPS”) problems. One might argue that the 1-to-7 ratio of the capital and loans in accordance with Ministerial Regulation No. 2 B.E. 2516 (1973) is sufficient to counter thin capitalization and there is no need to implement a specific rule in tax law. Nevertheless, such an existing ratio is just a condition for foreign companies carrying on businesses requiring permission to comply with. It was not designed for tax purposes of limiting expense deductibility and would not govern this complicated matter. In comparison with one of ASEAN Economic Community’s country which is similar to Thailand, Indonesia regulated thin capitalization rule to essentially limit the amount of tax deductible borrowing cost arising from the debt to a maximum debt-to-equity ratio of 4-to-1, which has become effective since the fiscal year 2016. The rule was implemented to limit the erosion of an Indonesian company’s tax base through the payment of excessive interest on debt from related parties.330

The implementation of rules even might reduce the incentive to invest in the source countries, especially developing countries. Thin capitalization however should be countered to protect source country tax base and domestic companies. Should

any country seek the investment from foreign company, it would be better if the specific promotions can be officially provided by its government rather than ignorance to this conduct of tax avoidance.

Conclusion

From the tax policy aspects, it is found that multinational enterprises tend to set up subsidiaries rather than a branch for the separation of entity and in order to allocate or shift profits between related companies. The formed company financed by debt would be able to enjoy interest expense deductibility in the tax computation, while equity financing generally has more tax burden, once the profits have been distributed to investors. The formation of company with an ostensibly greater proportion of debt against equity, not based on economic efficiency or profitability of the company, would be assumed that it was arranged for the exploitation of tax loopholes. This is called thin capitalization which has been corroding the source countries tax base for a long time.

Many countries, e.g., the United States, China, Indonesia and etc., implemented their own rules to counter this kind of tax avoidance. There are various approaches being implemented across countries. Even if a rule was implemented in one country, it could be deviated to properly fit to the specific economic context and used in another country. Nonetheless, the problems each scheme incurred in respect of the implementation thereof can be raised and criticized from time to time, i.e., inducement to bribery or excessive restrictiveness. Moreover, one might argue that the implementation of the rules can reduce the incentive to the investment from foreign company in the developing countries and an investor whose business actually lacks of funds and need to be financed by loan
would be suffer from non-allowance of expense deductibility under the rule which may be implemented. These would be principal reasons of why developing countries, such as Thailand, Vietnam, Malaysia and etc., are not eager to counter thin capitalization. Thin capitalization rule however is inherently adjustable and should be implemented to mainly protect source country tax base.

In the consequence of Thai law which has no specific provision regarding thin capitalization rule, the problem the schemes incurred from thin capitalization has never been solved effectively and properly. Not only does such a matter stimulate tax base erosion but also render tax authorities and taxpayers to get confused of the application and enforcement of the existing unclear provisions to govern thin capitalization. Any person in tax system may not desire to deal and comply with such kind of law. Double standard of law enforcement would further occur from time to time and probably ignites bribery and corruption.

Hence, Thailand should design or adopt suitable thin capitalization provision in order to counter and resolve the problems that will be incurred or have been incurred. Even impossible to perfectly fix all of those, the implementation of thin capitalization rule in whatsoever approaches would be better than analogy to the unclear existing provisions of law most nearly applicable. There would not be the best approach as long as there still is difference in taxation system across countries. A fit approach however could be found and implemented so as to fill the loopholes in Thai tax law. In accordance with the basic criteria of good tax, the proposed thin capitalization rule should at least satisfy the following: the equity to taxpayers, the efficiency to be complied by taxpayers, the convenience for taxpayers to pay, and the economy of tax collection that the amount of administrative costs should be or less than 5 percent of the revenue gained. This will be the great
challenge for legislators and tax authorities to make the change happen.
Foreword from
Academic Advisor

In 2016 the United Nations General Assembly held a special session on the international drug problem. The United Nations Office on Drugs and Crime issued its World Drug Report after this session documenting in detail the scale of the challenge. The figures are stark. The UNODC World Drug Report 2016 states baldly that there were an estimated 207,400 drug-related deaths in 2014. That translates to 43.5 deaths per million people aged 15-64. This far exceeds the number killed by guns or terrorists.

If we were dealing with trafficking in a slow-acting poison that had the potential to kill and maim millions, would there be a debate about criminal sanctions? But some people think that drugs are not a problem. The apologists for drug users and proponents of legalisation claim that some drugs (eg marijuana) are no worse than tobacco and therefore should be decriminalized. The logic is flawed. Just because some deleterious substances like nicotine and alcohol cannot be eradicated, it does not follow that we should make more drugs freely available. Countries that have failed in their basic responsibility to provide a healthy environment for their people preach the gospel of “liberalisation” and legalization, as if those were a panacea for the ills that beset their societies. This is a seductive siren song, especially for criminal and terrorist organisations that would clearly benefit from being able to peddle drugs openly.

The trafficking of drugs is a crime of choice. One does not peddle heroin in the heat of passion or on ideological grounds or out of religious fanaticism. Crimes like these are fueled purely by greed. No one should lose sight of this. Different countries have different approaches to tackling the drug problem. Some may decry the harshness of the penalties prescribed for drug offences. The
question is: has a softer approach worked? And the ultimate question is: who takes responsibility for the ruined lives that drug abuse brings?

Ordinary citizens have a right to live in a society where their children are not at risk of being targeted by drug pushers. A government that cannot provide that security has failed in its primary responsibility to the people.

Walter Woon
Academic Advisor
Comparison of and Cooperation on Drug Issues between Macau and Mainland China

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Abstract: Drugs are constantly spreading to different social strataums and becoming more rampant around the world. The value of drugs trade has reached 500 billion dollars, making it second only to arms trade. In 2014, there was an estimated 207,400 drug-related deaths, corresponding to 43.5 deaths per million, amongst people between 15 and 64 years old.

The special geographical location and opening-up policy of Macau make it an important transportation hub for drug trafficking outside Mainland China. Hence, the mechanism of cooperation between Macau and Mainland China needs to be improved, to tackle drug issues.

Macau and Mainland China are seen as important transit points for drug transportation from the notorious ‘Golden Triangle’ region to Europe. The even more serious issue is that drug trafficking could induce drug consumption. Once drug consumption occurs on a certain scale, it will certainly cause further stimulation on the manufacturing and transportation of

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drugs, resulting in the formation of a vicious circle of drug-related crimes. Macau is an important window to China under the ‘one country two systems’ 333 policy and ‘opening up’ policy. 334 Thus, combating transnational drug crime is imperative. This research focuses on drug issues in Macau and Mainland China. The article will contrast the laws on drug-related crimes of Macau to that of Mainland China, in order to seek effective cooperation and propose rational measures.

I. Comparison between Macau and Mainland China on Drug Issues

Admittedly, Macau was governed by Portugal for a long time. The laws are thus greatly influenced by that of Portugal and the continental law system. We need to probe into the similarities and differences between Macau and Mainland China’s legislations on drugs in order to promote bilateral cooperation.

(a) Comparison of the Concepts of Drugs

Macau defines ‘drugs’ as follows: ‘Narcotic Drugs and Psychotropic Substances given by the current conventions of Macau, and the relevant material modified by regulation or its preparation, and other substances from the attached tables of this

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333 A constitutional principle formulated by Deng Xiaoping, the Paramount Leader of the People’s Republic of China (PRC), for the reunification of China during the early 1980s. He suggested that there would be only one China, but Macau could retain its own capitalist economic and political systems, while the rest of China use the socialist system. Under this principle, each of the two regions could continue to have their own political systems, legal, economic and financial affairs, including external relations with foreign countries.

334 A policy of China which was created in the early 1980s to allow the entry of foreign-funded companies into China in the four Special Economic Zones.
law... While in Mainland China, the law provides as follows: ‘The term “narcotic drugs” as used in this Law means opium, heroin, methylaniline (ice), morphine, marijuana, cocaine and other narcotic and psychotropic substances that can make people addicted to their use and are controlled under State regulations’.

The two mentioned definitions reflect different modes of legislating. One uses the samples mode, which conveys concepts by listing items one by one; it is clear but difficult to achieve comprehensiveness. The other mode is the generalized norm mode. It summarizes the common features of the concepts, which makes it more logically comprehensive, but may be too abstract for law enforcement agencies.

The concept of drugs in Macau uses the stipulation by samples mode to enumerate specific kinds of drugs, one by one. The advantage of stipulation by samples mode is concrete, clear and definite law; it is easy to operate judicially as well. In 2014, five new kinds of drugs were added into the attached tables of the law. Two years later these attached tables had twenty additions and modifications. But the types and the range of drugs are changing more quickly nowadays. As lots of new kinds of drugs are springing out, scientists, in recent years, have found and shown that some medicine also have special addictive characteristics. The samples from conventions and attached tables cannot keep up with the current situation. The rapid changes and developments undermine the stability of the law. Compared to the legislation of Macau, the

335 Prohibit the illegal production, sale and consumption of narcotic drugs and psychotropic substances Law No. 2009/M (Macau)
336 Xing Fa Penal Code, art 357 (People’s Republic of China)
338 ibid
legislation of Mainland China defines the drugs concept better as it offers emphasis and comprehensiveness by combining the generalized norm mode with the samples mode. Such method could highlight important drugs by giving some examples and also avoid logical omissions of the types of drugs, reducing the need to amend the laws too frequently in order to keep up with the emergence of new drugs.

(b) Comparison of the Types of Crimes

There are six similar crime types between Macau and Mainland China. They are the crimes of smuggling, trafficking, transporting and manufacturing of drugs; possessing illegal drugs; cultivating illicit narcotic plants; luring, soliciting, cheating others into taking drugs; sheltering others taking drugs; and supplying unlawful narcotics or mental drugs.

The differences lie mainly in the related crimes for the illegal acts which encourage drug-related crimes. For example, the drug law of Mainland China sets up the crimes of harboring, transferring, or concealment of drugs; and smuggling articles used for the purpose of making drugs and coercing others into drug taking. On the other hand, Macau sets the crimes of illegal possession of drug equipment and allowing others to produce, sell and consume narcotic drugs and psychotropic substances in public or meeting areas. Setting these drug-related crimes help nip the crimes at their buds. The two regions could draw from each other on this point.

339 Xing Fa Penal Code, art 347 (People’s Republic of China); Macau Law 10/2016 on Prohibition of unlawful production, trafficking and smuggling of narcotic drugs and psychotropic substances (Amend Act No. 17/2009); 10 Xing Fa (n 6), art 351
340 ibid, art 353
341 ibid, art 354
342 ibid, art 355
Another obvious difference is, taking drugs is also be a crime in Macau offenders are sentenced to imprisonment for three months to one year or fined. However, taking drugs is not regarded as a criminal behavior, but rather an illegal act in Mainland China. In Mainland China, drug users can be detained for no more than 15 days and may be fined no more than 2,000 yuan, drug addicts will have to go through compulsory detoxification. These punishments are much more lenient than that of Macau. Nowadays, in Mainland China, drug related problems are getting more and more serious. In 2015, a total of 1,062,000 persons were identified and punished for using drugs, 531,000 new drug users were also discovered, totaling up to a nationwide increase of 20% and 14.6% respectively, in one year. The age of drug users are noticeably lower as well. Of the current 2,345,000 drug users nationwide, 43,000 or 1.8% are under the age of 18. Additionally, numbers of assaults and casualties involving drug users have increased. In 2015, 336 nationwide extreme cases and incidents caused by drug abuse, involving violent assaults, suicide, self-inflicted injuries, and even drugged driving, were reported; and 349 drug users were captured in connection with such cases. From this worrying situation, more and more lawyers in Mainland China are appealing to make ‘taking drugs’ also an accusation in the criminal law regulations. The leading reasons presented are listed below:

Firstly, from the societal aspect, drugs bring severe diseases which threaten the human health. For example, marijuana, the most commonly abused illegal substance impairs memory and learning, the ability to focus, attention and coordination. It also increases heart rate, harms the lungs and increases the risk of

psychosis in vulnerable abusers. Cocaine is a short-acting stimulant, which may lead users to take it numerous times in a single session. Cocaine use can lead to severe medical consequences relating to the heart and the respiratory, nervous, and digestive systems. Heroin is a powerful opioid drug that produces euphoria and feelings of relaxation. It slows respiration, and its use is linked to increased risks of serious infectious diseases, especially when taken intravenously. Forty-nine thousand drug addicts died until the year 2014, in China, which resulted in a 500 billion yuan economic loss for the Chinese government.

Secondly, as taking drugs is the origin of drug-related crimes, it is believed that criminalizing the taking of drugs could deter criminals. Now that innocents are also taking drugs, drug addicts are becoming even more unscrupulous. The increasing number of consumers incentivize drug makers and drug traffickers to break the law despite knowing of the harsh punishments. If taking drugs is made a crime in the penal law, people who attempt to take the drugs would be deterred, leading to reduced consumption and a smaller market. This mechanism has a historical basis. The Shanxi-Hebei-Shandong-Henan border area governed by Deng Xiaoping and Liu Bocheng, stipulates, ‘a person who takes drug more than three times should be punished by death’ in its penal law. This area became a model for drug control in China and even other parts of the world in a very short time. Although the punishment may seem severe for our modern day society, it could


prove that setting up the crime of taking drug has the effect of deterring drug-related criminals.

As setting up the crime of taking drugs may promote and strengthen drugs control efforts, Mainland China could learn from Macau's policy.\textsuperscript{346}

\textit{(c) Comparison of the Criminal Penalty Systems}

\textbf{1) The Fine Systems}

Mainland China adopts the unlimited fine system. Fines without limits brings difficulty to the law enforcement agencies and gives the judges too much discretion, leading to a lack in unified standards of application. This goes against realizing justice, and the authority of the judiciary will be severely weakened. Macau's fine system calculates the fines by days. The system gives the upper and lower bounds of fine, which ranges from 500 MOP to 10,000 MOP. The courts consider the property, income, dependency obligations and other circumstances relating to the payment capacity of the criminals, then declare an amount and ask them to pay it day by day. This underlying principle of this system is that 'all shall be equal before the law.' With the existing large gap between the rich and the poor of the various regions in Mainland China, the introduction of this system could improve the justice system.

Protection of Minors

Both in Mainland China and Macau, drug addiction is a trend amongst the younger groups; thus, there is an urgent need to contain the damages of drugs on minors and safeguard their healthy growth.

In the penal code of Mainland China, heavier punishments will be given to those who take advantage of minors and use them to smuggle, traffic, transport, or produce drugs, as well as those who sell drugs, seduce, instigate, cheat or force minors to take and inject drugs. Apart from the penal code, judicial interpretation also give more details to the legislation.

Firstly, behaviors which incite minors to hold illegal drugs belong to legal circumstances which impose heavier punishments. Article 5 provides, ‘using or abetting minors to illegally possess drugs shall be determined as a serious circumstance’. Also in Articles 7 and 8, when minors are used or abetted to commit drug crimes, the number of convictions and sentencing standards can be lower than the usual standards; this aims to reflect strict punishments.

Secondly, behaviors of using minors as criminal objects are directly judged as convictions. For instance, in Article 12, the behavior of sheltering minors taking drugs is directly taken as the crime of sheltering others in drug taking, it is not necessary to meet other requirements in respect of the number of persons, the number of consequences, and the consequences of the crime. In Article

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347 Interpretation of the Supreme People's Court on Several Issues concerning the Application of Law in the Trial of Drug-Related Criminal Cases [Judicial Interpretation]

348 ibid
349 ibid
350 ibid
the unlawful supply of narcotics or mental drugs to minors is directly taken as the crime of unlawful supply of narcotics or mental drugs, there are no requirements as to the amount of narcotics or mental drugs involved.

Thirdly, trafficking drugs to school students is an aggravating circumstance. In Article 4, trafficking drugs to school students are recognized as ‘vile’ and aggravates the statutory sentences. Although Article 347 provides, ‘who sells narcotic drugs to minors shall be given a heavier punishment’ in the penal code, when the object is school students, the punishment becomes much tougher.

On the other hand, Macau only has three articles to protect minors from drugs. Under the ‘anti-drug law’, there are only three aggravating circumstances and one circumstance for heavier punishment under the three articles. For instance, the actor who tries to or attempts to deliver the plant, substance or preparation to minors will be punished by minimum level and 1/3 of the maximum of penalty.

It is obvious that on the issue of protection for minors, Mainland China has a more detailed legislation. The drug laws of Mainland China are rich in content, concrete in clauses and easy to operate; the severe punishments are committed to effectively protect minors from drugs. Macau could learn from Mainland China, to improve its legislation on the protection of minors from drugs.

\[\text{ibid}\]
\[\text{ibid}\]
\[\text{Xing Fa (n 6), art 347}\]
\[\text{\textquote{Supreme law: to school students should be more severe drug trafficking'}}\China\text{\textquote{News Network} (China, 16 April 2010) <news.xinhuanet.com/legal2016-04/07_c_128872230.htm> accessed 12 April 2017}\]
\[\text{Macau Law (n 7)}\]
\[\text{ibid}\]
II. Rationalization Measures

(a) Tolerance of Concept

The biggest challenge that both Mainland China's and Macau's judicial assistance bureaus encounter is to balance fighting against drug-related crimes and safeguarding the criminal's basic rights. This applies and relates especially to the issue of death penalty in Mainland China, in terms of inter-regional judicial assistance in criminal cases. From the perspectives of criminal law, Mainland China tends to punishment while Macau tends to educate. The death penalty is set up in Mainland China, but not in Macau. Such difference should not be tied to the perceptive differences towards human rights. This is purely a difference in the perspection of law because the people's right to live is not an absolute right and can be deprived under certain conditions (only if the deprivation is based on the justified acts of morality).357 So the problem as to whether the death penalty should exist is more associated with legitimacy and not the protection of human rights. John Locke defined law as a ‘social contract’ between the rulers and the ruled;358 as laws embody the unity of the government's view and the people's will, legitimacy is the ruled's acknowledgement of the power of the rulers.359

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359 Coicaud J M & Curtis D A (n 28)
If both the rulers and the ruled see the death penalty as necessary to their society, the existence of the death penalty has legitimacy and reasons. Considering the situation of Mainland China in the light of such understanding, as the death penalty reflects the will of the people, the government of Mainland China respects this will and sets it as a penalty; this respect of the government or the rulers show their care of the ruled’s human rights. Thus, death penalty is not contradictory to the protection of human rights, in this sense. Coordination in laws can be realized if the legal systems and legal cultures are respected. On the issue of ‘whether judicial assistance in criminal cases will be accepted or rejected’, assessments shall be conducted on the benefits which the assistance would offer and the damages it could bring. An example of a practice would be: when an actor escapes to Macau after being sentenced to death by the Mainland judicial authorities, Macau judicial authorities should assist the Mainland judicial authorities by transferring the actor back according to the request of the authorities. In such case, Macau should not adopt the principle of nonextradition in order to reject the transfer, because this principle appears in international law. Macau is only a region belonging to China, thus the principle of international law shall not be applied. For prisoners of drug-related crimes in Mainland China who may be sentenced to death but is awaiting trial, the Macau judiciary authorities should assist to hand over the actors. In such situation, the principle of priority acceptance should be applicable; this means that if Mainland China takes priority in accepting the case, Macau should assist to hand over the criminal(s). Thus, if Macau takes the priority to accept the case, it is not necessary to hand over the criminal(s), and the local law can be applied to carry out criminal sanctions on the criminal(s).
(b) Strengthening of Police Cooperation and Improvement of Mechanisms for Judicial and Police Cooperation

To improve the criminal justice assistance mechanism between Macau and Mainland China, cooperation between the two police forces is crucial. Macau and Mainland China could learn from the mechanism of ‘unified arresting’ from the regional judicial cooperation in the European Union. The ‘European Arrest Warrant’ is a new system of international cooperation in criminal matters within the EU. It is used to arrest or surrender fugitives instead of extradition. Mainland China and Macau could follow the example of EU and set up a system of ‘interregional warrant’.

This interregional warrant has high potential in practice. The European arrest warrants has possibilities to be implemented smoothly even though there is a need to overcome issues concerning state sovereignty and surmount numerous different political opinions. These issues are not worrying problems when it comes to the implementation of such mechanism between Mainland China and Macau. The 112 years of Portuguese rule cannot compare to the domination of China since the fifth century BC, for thousands of years. There are numerous similarities in lifestyle, culture, and value judgments between Macau and Mainland China. The differences between the two regions are much smaller than the differences amongst the states in the EU. Additionally, the issue of state sovereignty does not exist between Macau and Mainland China under ‘one country two system’ policy. Macau Basic Law also supports the regional warrant system, in Article 93, it is stipulated that Macau should maintain judicial

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relations with the judicial organs of other parts of the country, and they may render assistance to each other.

In the implementation of such assistance scheme, the requesting party shall issue an arrest warrant, and the requested party shall arrest and handover the suspects as soon as possible, after receiving the arrest warrant. A number of serious crimes should be stipulated.

During the operation, if the crime is serious enough, the requested party should take actions, including arresting and delivering the suspect or criminal, as soon as they receive the warrant for apprehension. Secondly, both regions should without delay set up a permanent inter-regional police agency and develop information technology for timely contact in exchanging information on drug-related crimes, and sharing resources. Lastly, they should also increase technical cooperation and joint training of police officers.\textsuperscript{361} The training should mainly include: the methods of detection of drug offenses; the routes and techniques used by drug offenders; the proceeds of crime and the transfer of property; the collection and judgment of evidence; etc.\textsuperscript{362} In order to achieve unified concepts and techniques of law enforcement to enhance the ability to jointly cope with and tackle drug-related crimes.

\textsuperscript{361} Chen Xiaoyu GU Yang, ‘Chinese Drug Crime Punishment and Prevention in the Frame of ‘One Country, Two Systems‘ In the Field of Criminal Judicial Cooperation in Mainland, Hong Kong and Macao’ (2011) p 39(5)

Abstract

In many countries around the world, recreational use of drugs is prohibited. Only a few countries actually allow its citizens to use drugs recreationally. Malaysia falls in the former category. Anyone found, not only using, but simply, storing or having in possession these recreational drugs can be faced with criminal charges. The punishments are not lenient as they can go up to the death penalty. From this, it could be seen that the issue of drug use is a very serious matter. However, recently, there has been a debate on whether the recreational use of drugs should be legalised, due to the unsuccessful attempts to reduce drug abuse cases in Malaysia. Some people are starting to agree that it may just be better to allow the use than restrict the people’s desire to freely use drugs. The
debate became even more heated after the introduction of a legislation to legalize weed in Canada by the Prime Minister, Justin Trudeau. Be as it may, free drug usage, as admitted by and known to many, can cause more harms than benefits. Year after year, criminal cases relating to drug usage haunts the police. Even with severe punishments, the users do not seem to be fettered. Thus, to tackle this problem, a critical examination as to whether the current legal framework on drug usage, in Malaysia, is sufficient will be conducted and the possible reforms will be proposed.

I  INTRODUCTION
The main law or statute that governs drug usage in Malaysia is the Dangerous Drugs Act 1952. Recreational drug use by a person is also criminalized under the Penal Code. These laws criminalize drug usage. Upon arrests by the police, with enough evidence, a person could be thrown into jail for their drug use. The organization that is responsible for monitoring drug cases and drug addicts is the National Anti-Drugs Agency, an initiative by the Government of Malaysia to keep track of illegal drug matters in Malaysia. Each year this agency will publish statistics on drug cases to the public. Displayed below is the comparison of statistics between the years 2013, 2014 and 2015.

363 Dangerous Drugs Act 1952, Act 234 (Malaysia)
364 Penal Code, Act 574 (Malaysia)
365 In Malay it is known as “Agensi Anti-Dadah Kebangsaan”
<table>
<thead>
<tr>
<th>Year/Category</th>
<th>2013</th>
<th>2014</th>
<th>2015</th>
</tr>
</thead>
<tbody>
<tr>
<td>New Addicts</td>
<td>13,481</td>
<td>13,605</td>
<td>20,289</td>
</tr>
<tr>
<td>Repeated Addicts</td>
<td>7,406</td>
<td>8,172</td>
<td>6,379</td>
</tr>
</tbody>
</table>

**Source:** Statistics by National Anti-Drugs Agency, Minister of Home Affairs.

Through looking at the statistics given, it can be inferred that the current legal framework in Malaysia on drug abuse is still insufficient. There is an increasing trend in the number of new-found addicts.

Laws that are not used are dead laws. For laws to be living and breathing, the need to be used; thus, enforcement by the authorities is very important. Perhaps, there is lack of enforcement of drug laws in Malaysia. The major reason for criminalizing drug abuse is to deter people from using drugs recreationally. Many problems, such as murder or theft committed by drug addicts who want more cash to buy their dose of drugs, could happen if drug abuse is not controlled. This will pose threats to the security of others and create disharmony in society. Therefore, drug abuse should, as much as possible, be stopped or reduced.

In a nutshell, the current legal framework on drug abuse in Malaysia is insufficient and potential solutions to overcome this problem should be explored.
II. DRUG RELATED ISSUES IN MALAYSIA

Through the examination of the legal framework in Malaysia for tackling drug issues, it is clear that the Dangerous Drugs Act\textsuperscript{366} is insufficient in overcoming such issues, as the number of drug addicts constantly increases each year. Despite being one of the only few countries that still use the capital punishment for drug abuse offences, this does not seem to put an end to the problems. The system does not only fail to prevent the increment of drug addicts in the country or drug related cases, but it also poses other issues. Drug laws in Malaysia have been questioned for its compliance with international law, protection of human rights and effects on judicial decisions. These issues will be addressed accordingly.

a) Non-Compliance with International Law

Punishments for drug related offences in Malaysia are all regulated by the Dangerous Drugs Act. This Act provides extensive coverage, ranging from the regulations to the punishments of the law on drug related offences. One section in particular, has caught the eyes of many. It is Section 39B(1) of the Act. In the section, it is stated that any person on his own or on behalf of another person shall not traffic in dangerous drugs, and in subsection (2) it is provided that anyone convicted under this section shall be punishable by death.

This provision has been under fire by many local or international organisations. These organisations seek to abolish mandatory death penalties. For example, Amnesty International is a strong advocate against death sentences and has been actively pushing for the

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\textsuperscript{366} \textit{Supra} note 1
abolishment of such punishment in Malaysia. One of the reasons behind their argument is that death penalty is against international law. The very first human rights declaration, which is the Universal Declaration of Human Rights, 367 has provided for the right to life, 368 right not to be subjected to arbitrary arrest, 369 detention and exile and the right to full equality to a fair and public hearing in determination of his rights and obligations of any criminal charge against him. 370 Besides, the International Covenant on Civil and Political Right (ICCPR) has also disallowed mandatory death sentences in its Article 6. 371 Despite the fact that the UDHR has no legal binding effect and that Malaysia is not a signatory to the ICCPR, it does not mean that Malaysia can be excluded from these rules. The laws on human rights are recognised as customary international law, which has binding effects on all states across the world. Accordingly, as its mandatory death sentence punishment is still maintained, Malaysia has failed to comply with international law. 372

b) Unjust decisions

The punishment of mandatory death sentence, under the Dangerous Drugs Act, has always been urged to be abolished through amendments. Some of the reasons given are that such law will bring unjust decisions. Judges are not given the discretion to decide on the merits of the case; but instead, if a *prima facie* case

367 Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR))
368 ibid, art 3
369 *supra* art 9
370 *supra* art 10
372 ‘Abolish mandatory death penalty’ The Sun (Kuala Lumpur, 11 December 2014)
can be proven that the accused possesses a certain amount of drugs then he or she will be subjected to the punishment under Section 39B. The failure to consider the element of mens rea in criminal cases will allow any person, even those who have no knowledge about the drugs, to be subjected to Section 39B.

This will certainly lead to many unjust decisions made by the court. In fact, there have been many occurrences of such events. For example, in the Iqah case, a single mother from Singapore was put on a death row in Malaysia for drug trafficking. She was tricked into carrying a luggage containing drugs, such as heroin. The High Court in that case decided that she was guilty as charged. The court did not need to consider the presence of mens rea as the law does not require the court to do so. This has created an unjust situation where a person who had no knowledge of the existence of such drugs cannot even defend herself, as the law does not allow such right. There has also been an increasing trend where women are used as scapegoats, by drug traffickers, to traffic drugs out of Malaysia. Such trend is worrying as innocent lives are involved, and there is nothing that can really be done to tackle the issue, unless the law is changed.

III IMPROVEMENTS THAT COULD BE MADE, TO TACKLE DRUG ISSUES

a) The death penalty punishment shall be made known to the public to instil fear and deter them from trafficking drugs
Trafficking means ‘the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug otherwise than under the authority of this Act or the regulations made under the Act;’ Any person who is found to possess certain amounts of drugs, will be presumed by the law to have committed the offence of drug trafficking. Also, any person is prohibited from drug trafficking. A contravention to this law will result in the death penalty, upon conviction.

The aforementioned provisions shall be vastly publicized to raise the legal awareness of the public. The contemporaneous law with regards to this matter is sufficiently strict. Yet, drug trafficking still take place constantly.

To tackle the issue of drugs, the first and most important step is education. Pertinent laws should be incorporated into syllabuses. Educators should effectively teach the pupils. Also, the public should be educated and equipped with the necessary legal knowledge. Media has a big role to play in this issue. Whenever there are convictions on drug traffickers, the media should amplify the news and make them headlines. The purpose is to make strong deterrences and incentivize people to avoid committing these crimes.

373 Section 2, Dangerous Drugs Act 1952 (Revised 1980), Act 234
374 Section 37 (da) of Dangerous Drugs Act 1952 (Revised 1980), Act 234
375 Section 39B of Dangerous Drugs Act 1952 (Revised 1980), Act 234
b) The law should be enforced with every drug trafficker caught

The Attorney General possesses the discretion to institute, conduct or discontinue any proceedings with regard to an offence.\textsuperscript{376} 

It is submitted that whenever there is sufficient evidence to prove the offence of drug trafficking, the Attorney General shall, with no hesitation, institute the judicial proceedings to ensure all the pertinent cases are subject to the final arbiter and no single one is able to escape the liability imposed by the laws.

c) Malaysia should cooperate with other countries on the issue of drug trafficking As part of ASEAN, the Malaysian government should strongly advocate against the issue of drug trafficking. Bilateral and multilateral agreements should be signed to strengthen the laws.

Cooperation may be in the form of dialogues amongst international communities. Also, experts can sit together to brainstorm and discuss potential policies to tackle the issues effectively and efficiently.\textsuperscript{377}

IV CONCLUSION

In conclusion, there is still a wide gap, which keeps growing, between the attempt to decrease drug abuse in Malaysia and the status quo, several recommendations to this are:

\textsuperscript{376} Article 145(3) of the Federal Constitution (Malaysia)

a) **Special drug courts (for example, Australia’s special drug courts)**

In Australia, some states have introduced specialised courts, on a trial basis, for offenders with drug and alcohol addictions. The difference between the Australia’s special drug courts and Malaysia’s courts is that supervision, programs and treatment are concentrated in one court under a single judge. A new sentencing order, the ‘Drug Treatment Order’ has been passed by these courts in Australia. In establishing such courts, they aim to reduce the level of drug-related criminal activities; breaches of conditional orders, such as bail, and conditional sentences; and imprisonment rates and the cost of the system through reducing the burden on the police, courts and correctional system. Besides, the drug courts also reward the drug court participants, instead of just imposing sanctions upon them. Rewards are given to any offender who has fully or substantially complied with the conditions attached to the drug treatment orders. The rewards include varying or cancelling the supervision and treatment orders. However, the court may confirm the treatment and supervision part of the order and may vary that same order by adding or removing program conditions or, alternatively increasing the frequency of treatment, degree of supervision or the frequency of drug or alcohol testing, if an offender has breached the conditions of drug treatment order without any reasonable excuse. Thus, it is highly recommended for Malaysian courts to follow the footsteps of Australia in establishing special drug courts that specialise in governing drug offenders. In Australia, the courts focus on three sentencing

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objectives, namely: rehabilitation, retribution and deterrence while Malaysian courts focus on retribution, deterrence and incapacitation. Although it cannot be denied that Malaysian courts do have a very consistent approach in sentencing the drug offenders, the objectives of the sentences should be modified so as to give opportunities to the drug offenders to mend his or her ways by focusing more on rehabilitating the drug offenders.

b) **Synchronisation of the Dangerous Drugs Act 1952 and the Dangerous Drugs (Special Preventive Measures) Act 1985**

In Malaysia, there are two acts that are enacted to govern the drug offenders, namely the Dangerous Drugs Act 1952 and the Dangerous Drugs (Special Preventive Measures) Act 1985. Under Section 39B of the Dangerous Drugs Act 1952, offenders will be given the death penalty and it is said that the drug barons who mastermind the trafficking are rarely apprehended as they do not physically carry the drugs themselves. Thus, there exists flaws in the legislation. The Dangerous Drugs (Special Preventive Measures) Act 1985 was enacted to resolve the issues that the Dangerous Drugs Act 1952 was not able to solve. When the Dangerous Drugs (Special Preventive Measures) Act 1985 was enacted, it had a lifespan of five years but it has been extended again and again because the problems of drug trafficking could not be solved. Thus, there is a need to synchronise the two acts because statistics have proven that drug trafficking cases do not decrease even when there are two acts which are intended to curb the menacing issue of drugs in Malaysia. Synchronisation of these two acts would be beneficial in controlling the drug trafficking.

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379 Dr Abdul Rani bin Kamarudin, ‘Preventive Detention Under The Dangerous Drugs (Special Preventive Measures) Act 1985: Are The Safeguards Real or Only A Smokescreen?’ (2003) 1 MLJ xxxiii.
acts is needed to deliver a better deterrent effect. The use of preventive laws is repugnant, by any standard. There is little, if any justification, for having them for the purpose of combating drug trafficking, much less for using them, whether then or now. Not only does it defies human rights, it is said that these acts lack transparency and accountability in justifying arrests and detentions. Hence, to curb the problem of drug menace, perhaps synchronisation of the acts is crucial in bringing about uniform and consistent results.

c) Take into account more factors before sentencing a person involved in drug use, for example the nature of the drugs, level of addiction, age of offender, prior records, etc.

- Nature of the drugs

In Malaysia, the Dangerous Drugs Act 1952 is very rigid and does not allow much room for the exercise of judicial discretion due to the ways Sections 39A and 39B are worded. If the quantity of drugs exceeds the specified amount, the court must first decide whether the accused is a trafficker or not. If the court finds the accused to be a trafficker then she or he will be subjected to the mandatory death sentence as imposed by Section 39B of the Dangerous Drugs Act 1952. A conviction under Section 39A, however, gives the court the discretion to impose a life imprisonment sentence or imprisonment for a term not less than five years and mandatory whippings of not less than 10 strokes. It is only under Section 39A that the mitigating and aggravating circumstances, by reason of quantity and quality
of the drug involved, become relevant. However, there are some instances where judges in Malaysia have taken into account the nature of the drugs when dealing with dangerous drugs cases. In the case of *PP v Badrulsham*, the Judge took into account the quantity and quality of the drug involved and held that the death penalty sentence was not applicable.

- **Level of addiction**

The Dangerous Drugs Act 1952 distinguishes a person deemed to be trafficking and a person who is a drug offender. A trafficker would be given the mandatory death penalty under Section 39B of the Dangerous Drugs Act 1952. The use of addiction as a determinant is only relevant when dealing with drug offenders. Thus, it can be said that it is difficult for drug addicts to plead for a discount in his/her sentence because the Dangerous Drugs Act 1952 regards addiction as an offence. Perhaps some amendments should be made to the wordings of the provisions in the acts so as to take into account the level of addiction of a person before sentencing him/her. This would be more just and fair to the offender and also allow him/her to mend his/her ways.

- **Prior record(s)**

In Malaysia, courts do not take into account prior records of the offender when the offender is charged with the more serious offences of cultivation, trafficking and having in possession in

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380 *Supra* at 16
381 (1988) 2 MLJ 585 (Malaysia)
excess of the stipulated minimum. In the cases of *PP v Puteh Nordin*, \(^{382}\) *PP v Oon Lai Hin* \(^{383}\) and *PP v Leong Swee & Ors*, \(^{384}\) the accused were first offenders but the courts had sentenced them to death. Malaysian courts are more accommodating to less drug offences. Carney sums up that in Australia, authorities generally take the view that deterrence takes precedence over a favourable record in cases of importation, supply, cultivation and trafficking (especially heroin). But aside from these cases, the courts attach weight to clean records or prior records, not including drug offences. First offenders are entitled to full consideration for rehabilitative measures and imprisonment is viewed as a last resort. Also, a clear periods between past offences and present charges are viewed as a mitigating factor.\(^ {385}\)

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\(^{382}\) (1981) 2 MLJ 292 (Malaysia)

\(^{383}\) [1985] 1 MLJ 66 (Malaysia)

\(^{384}\) (1981) 1 MLJ 247 (Malaysia)

\(^{385}\) Carney, Terry Ross: *Drug Users and the Law in Australia* (The Law Book Co Ltd 1987)
As Social Networking Services (SNS) markets are enlarging so rapidly nowadays, most entrepreneurs are seeking ways to commercialize their products online. The rapid growth is obviously caused by the fact that SNS’s influences on people are so powerful, as evident from the fact that people are highly obsessed with their mobile devices. SNS offer many advantages. Through SNS consumers no longer have to put as much time and effort into seeking and comparing available products; virtually everything is now made possible with just a few clicks; the
products are also shipped directly to their homes. However, when it comes to illegal drug markets, no social benefits are created.  

Due to the surging influence of SNS, illegal drugs are easily, and very secretly distributed. According to the UNODC World Drug Report 2016, the proportion of drug abusers who have engaged in purchasing illicit drugs was 25.3% in 2014, an extremely rapid increase from 1.3% in the year 2000. Teenagers have easy access to drugs nowadays due to their exposure to SNS. This results in serious social problems such as adolescents’ deviation and impeded growth. In fact, according to the National Police and Prosecutors Office, the number of sales of illegal drugs via SNS by Korean gangsters are growing rapidly, as the whole process of import, distribution and sales are usually controlled by them. The Prosecutors Office of Korea reported that the number of people

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386 According to the World Health Organization (WHO), illicit drugs have: 1) high dependence 2) tolerance 3) addiction and 4) withdrawal symptom - WHO (1993)

<http://www.busandrugfree.or.kr/bbs/board.php?bo_table=sub05_04&wr_id=51&page=1&stx=&sst=wr_hit&sod=asc&sop=and&page=1>

involved in drug-related crimes is estimated to reach 15,000, the highest number ever, by the end of 2016.\footnote{Bang, 2016. ‘SNS Illegal Drugs Sky-Rocketed, highest ever since’, Yonhap News}

Therefore, we, the Authors, would like to shed light on this recently emerging matter. In the very first section of this article, we will clarify the side effects of illegal drugs, focusing on the mental and physical effect on individuals. Further, we would estimate the social costs of addiction and withdrawal of illegal drugs via SNS. The above mentioned discourses will support our justification for the severe regulatory systems and laws which aim to achieve the complete eradication of illegal drugs, as they are being recognized and known for their serious threats and dangers to individuals and societies. Secondly, we would evaluate the efficiency of the current Korean countermeasures on this issue. The Prosecutors’ Office declared to implement the so called ‘e-robots’ to censor illegal drug-related posts, or any anonymous seller on the internet despite the controversies it brings.\footnote{ROK Prosecution Service, 2015 Drug Report (2015)} Due to the systematic procedure, there are chances that some (human) rights may be violated\footnote{By ‘human rights’, the authors are referring to the ‘rights to freedom’ and ‘right to pursue happiness’, both of which are declared in the Constitution of Republic of Korea.} through the censoring of posts. Thus we would inspect and analyze through utilizing the principle of the proportionality. Thirdly, we would take a glance into foreign cases such as that of the United States of America’s crackdown measures. Subsequently, we would attempt to figure out the most righteous and reasonable applications or modifications to the Korean mechanism, taking into consideration the impacts on the society. Lastly, as the conclusion,
we will propose possible solutions for the online illegal drug markets.

A. Effects on Individuals and the Society

As commonly known, illegal drugs such as cocaine and marijuana are highly detrimental to the human health. Firstly, its effects are critical to the mental health. According to UNODC Reports, illegal drug brings several symptoms such as hallucination, which is conceived as the perception in the absence of external stimulus. People who smoke cocaine happen to fall into intense depression and become addicted to it. As drugs are highly addictive and demand high tolerance, economically, those addicted to them would end up spending much more money than they can afford to. This would result in bad habitual purchases of drugs, from the society's point of view, and eliminate their opportunities to purchase other products. Also, as drugs bring about the state of paranoia and anger, those addicted to them can be very anti-social, further excluding their lives from the society and reducing interaction with others. In addition, drugs are known to be much more harmful to those suffering from heart diseases; increasing the chances of heart attack. Drug usage is also correlated to the academic performance. Students who often use drugs suffer from short-term memory, lack of concentration, reduced cognitive efficiency, etc. This gives rise to low academic performances, and increases the number of drop outs.

\[\text{392 UNODC (n 2)}\]
According to the social-cost approach, it costs much more money, and insurance premiums, to look after their health conditions. Governments have to increase their budget allocated for supporting cure-seekers, starting from regular medical checkups. Furthermore, with illnesses, the working age population and labor efficiency will be decreased. Decline in the total supply-demand, and competitiveness of corporations will doom the society. In fact, according to several researches, the cost of drug abuse in Canada is calculated to be 2.7 percent of the GDP, or US $40 per capita. 60 percent of the social costs were solely caused due to productivity losses resulting from diseases and premature death. More importantly, drug abuse frequently occur amongst juveniles;

According to several researches, the cost of drug abuse in Canada is calculated to be 2.7 percent of the GDP, or US $40 per capita. 60 percent of the social costs were solely caused due to productivity losses resulting from diseases and premature death. More importantly, drug abuse frequently occur amongst juveniles;

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393 Economic and Social Consequences of Drug Abuse and Illicit Trafficking
leading to very detrimental long-term effects. Furthermore, as illegal drug trafficking is highly possibly related with local gangs, it could enlarge opportunities of causing discords in the society. If not regulated, our society would obviously be much more vulnerable to increased number of crimes.

We, the Authors are aware that attempts to legalize the possession and consumption of illicit drugs are becoming a global trend. Portugal and several states in United States of America has made positive comments the idea. In such regions, people’s pursuit of happiness and freedom have become the values to be protected, when weighted to the issue of social security. Despite the trend, Republic of Korea has not yet conceived illicit drugs to be ‘OK’ for consumption, as reasoned above. This is why Republic of Korea has been legislating and maintaining laws such as ‘Criminal Law’, ‘Narcotics Control Law’ and many more. Finally, we can justify the implementation of hard-regulations on illegal drugs, as they are being recognized and known for their serious dangers to health and the society. We will now further discuss the updated resolutions on regulating the distribution of illicit drugs via SNS.

II Evaluation on the Efficiency of the Current Korean Countermeasures

As mentioned above, Republic of Korea has been recognized as a ‘Drug-Clean’ nation, one of the few nations in the world that are considered ‘drug-free’. However, with the development of the internet, and SNS, increasing numbers of

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394 Chuncheon, ‘Internet crowd collection ‘bit coin’ caught 70 people who deal in hemp trading’, Yeonhap News (South Korea, 24 April 2014)
<http://www.yonhapnews.co.kr/bulletin/04/24/0200000000AKR20170424070500062.HTML?input-1195m>
Koreans are able to contact foreign drug dealers, or even manufacture illegal substances such as methamphetamine themselves. In 2015, there was a case in which a former pharmaceutical employee with no drug related criminal record, made methamphetamine in his home, with knowledge and materials available on the internet.\(^{395}\) Also, with more and more people participating in ‘direct buying of foreign goods’, Korean officials say that many people are able to purchase drugs online and receive them through foreign shipping.\(^{396}\)

The even more troublesome fact is that the ‘source’ of these drugs are diverse – in the past, drugs mainly came from China; but recently, drugs are imported illegally from South Asian nations, Japan and even Mexico. As the world is becoming more and more globalized, mobility of people has increased – consequently, leading also to increased mobility of cultures, diseases and illegal drugs. As it is difficult to access drugs in South Korea, many foreign drug dealers are seeing South Korea as a market with high potential. Recent police investigations\(^{397}\) revealed that many North Korean refugees in South Korea and Jo-Seon people from China participate in drug smuggling – a clear evidence that shows the globalization of illegal drug trade.

The Korean government and police investigation services have already recognized this ‘trend’ and are trying hard to prevent citizens from getting close to illegal drugs. As a start, the Supreme Prosecutors’ Office (SPO) and National Police Agency (NPA) will

\(^{395}\) Gimbyeonghun, ‘Cyber drug trade through Internet and SNS’, Asia today article (South Korea, 24 August 2016) <http://www.asiatoday.co.kr/view.php?key=20160824010013108>

\(^{396}\) Economic and Social Consequences of Drug Abuse and Illicit Trafficking (n8)

\(^{397}\) ibid
initiate joint investigations to fight online drug trade. The joint investigations will focus specially on preventing negative transactions of drugs through smartphones’ instant chat applications and dark websites.

Also, Korean investigators are trying to develop a computer program, known as ‘e-robots’, to find and censor drug related posts or comments on the internet or SNS. The Prosecutors’ Office and the Police Agency hope that these robots will help to censor and prevent the import of drugs from overseas. However, there are many controversies regarding the use of ‘e-robots’. To start with, many experts express concerns regarding the effectiveness of the said ‘e-robots’. As they only censor and search for posts or comments in South Korean networking services regarding the drugs trade, the ‘e-robots’ may not be able to stop the actual trade from happening. In other words, the use of ‘e-robots’ is restricted only to South Korean networks. Considering the fact that many illegal drugs trade occur through overseas networks or servers, the use of ‘e-robots’ is highly limited, therefore the effectiveness of the scheme is questionable.

Officials reported that many online sites or SNS accounts are created in overseas servers – mainly servers in South East Asia, which makes it hard for investigators to further probe the sources and flow of drugs. The use of ‘e-robots’ might help arrest and investigate South Korean illegal drug consumers, but they will not be so helpful when it comes to the attempts to eradicate the flow.

398 Gimbyeonghun (n 10)

399 Gyeonghwan, Choi, ‘Cyber drug trade through Internet and SNS’, News1 (South Korea, 26 April 2016) <http://news1.kr/articles/2645518>
of drugs into South Korea – that is, the ‘e-robots’ will not be the ultimate solution for drug problems.

There are also concerns regarding the issue of ‘censorship’. Many activists voiced opinions regarding the use of ‘e-robots’ to censor SNS. Using ‘e-robots’ to censor or search SNS may be considered as a huge infringement of human rights. Even though the ‘e-robots’ may help investigators catch drug dealers, they may pose serious threats to individuals’ privacy and (freedom) rights in the society.

Also, Korean Customs are taking strict measures to prevent drug smuggling. For instance, South Korea’s largest airport, Incheon International Airport is said to enforce customs on all items. Airport officials report that they have installed the ‘Express Logistics Center’ to search and check all express items. Using x-rays and detecting dogs, the airport officials hope that these measures will help decrease the amount of drugs that is being smuggled to South Korea.

However, these measures are only limited to ‘airports and airline trade’ of illegal drugs. Considering the current situation in which the majority of illegal drugs are from China, many drugs are smuggled through shipping. Drugs smuggled through airplanes are detected quite easily compared to those smuggled through ships because people or luggages boarding airplanes must undergo security and customs checks. Although ports also have customs and security checks, they are lax, compared to those in airports. Also, as drug trades can happen ‘at sea’, whereas trade ‘on air’ is impossible, these issues should be fully addressed. Drug smuggling through ships are much more threatening than those via aircrafts.
Suggestions on possible tracking-system improvements

As mentioned in Part II, the problems with the Korean drug prevention system can be condensed down to: the lack of ‘e-robot’ authority and heavy focus on airport control.

Limited jurisdiction is the main cause of ineffectiveness in the current internet crackdown. ‘E-robots’ only have access to websites that have their domain in South Korea. Thus, websites that use Korean servers and receive Korean IPs are free from investigation if they detour their domain to another country, especially countries that are not cooperative with the NPA. This systematic problem should be solved through a shift in ‘e-robot’ policies, providing access to all forms of websites that Korean IPs mainly access to. This would make a significant difference because more than 65% of the websites that lead drug trades are detoured websites. Even websites with domains in Korea can easily change their domain history, making it appear as if it was a foreign one. Only the improved policy will be able to continue the crackdown.

Legislative evidence shows that such policy is realizable. On April 16th, 2015, the Korean government legislated a law that punishes all forms of uploads and downloads of pornography, with the sentence of up to 2 years.400 In addition, bounty policies are implemented for informers who reported pornography websites. Foreign porn websites are automatically blocked once the bounty report is proven to be true, and all the users of the websites (uploaders and downloaders) are sentenced. Applying this policy to narcotics control, all websites will be considered within the boundaries of Korea’s jurisdiction as soon as a Korean IP is caught accessing them. This jurisdiction does not grant legal rights to shut

400 Telecommunication Business Law’, National Law Enforcement Center (South Korea, 29 May 2016) <http://www.law.go.kr/lslInfoP.do?lslSeq=182052&efYd=20170330>
down or impose punishments upon the operators of the websites in charge, but grants the banning of access and posting of warning signs instead.

The KCSC stands for Korean Censorship Standards Commission, which is highly likely to have authority over SNS narcotic control.

Even the best controls will permit leakages of drugs. Thus, the government should also focus on offline narcotics control. In this sense, the general concept of Korean narcotics control is agreeable. Heavy concentration on airport controls prevents the primary existence of drugs in Korea. Drug controls at seaports are comparatively much more complicated because detailed checks will reduce the efficiency of product distributions. Unlike airports, seaports deal with heavy commerce that requires longer checks. In such sense, the government faces a dilemma for seaport narcotics control. Random inspections occur very rarely, which leave smugglers with more room to smuggle and less chances of getting caught. Increasing the number of inspections will reduce the efficiency for the ports' commerce; also, the possibility of discovering the smuggled drugs are severely low. Actually, Korea’s low demand on drugs already causes low smuggling rate;
which, in turn, ironically causes a relatively lax seaport control system. The Korean government currently solves this problem through intensifying drug-related crimes’ punishments.

Seaport control is also related with international investigations. Drug smuggling is committed by two different groups of people: exporters (dealers) and importers (addicts). In the latter group of smugglers, the importers are citizens of Korea, who are subject to the Korean law system. However, dealers are sometimes foreigners; they may not even be in Korea. In that case, the police department should cooperate with foreign police departments, or utilize the United Nations Office on Drug and Crimes network.\(^{401}\)

On the other hand, the United States Drug Enforcement Administration (US DEA) supports a different approach towards narcotics crime punishment. Heavy punishments are not considered as preventions by the US DEA, as addiction rate is already high. Most narcotics crimes in the US are committed by ex-convicts, which imply that the severity of the punishments will not deter them as their addiction has taken them over. In this case, rehabilitating the addicts is important; it is also a more fundamental step towards reducing drugs-related crime rates. Republic of Korea has a policy which offer aids to rehabilitating narcotics criminals. The Korean Association Against Drug Abuse (KAADA) has been taking actions to rehabilitate addicts by holding seminars, giving medical treatments, drawing up medical care manuals, etc.

Although each agency is working on their parts and implementing difference countermeasures, the good news is that the implementation of ‘strong punitive measures’ will still remain

\(^{401}\) UNODC (n 2)
an available option for the Korean government. Unlike the US, Korea's narcotic drug addiction rate is severely low. Only 0.002% of total crimes in Korea were labeled as narcotic crimes in 2011.\footnote{402 Korean National Police Agency, 2011. Annual Statistics on Crime} This means that severe punishments will likely operate effectively as a deterrent for the commission of drugs-related crimes.

**Conclusion**

Through the paper, the Authors have analyzed the status quo as well as why and how illegal drugs are easily, and very secretly distributed through SNS. They also predicted future possible harms of illegal drugs to our society. With the fact that narcotics control's effectiveness may be weakened through online jurisdictional problems of the internet, the Authors suggests the solutions that have once been introduced to control certain websites, by the National Censorship Standards Commission. However, because of the different issues related to justice, the sudden implementation of the KCSC's checks and controls on narcotic drugs may be seen as irrational. Adjustment process will be required for such implementation. Acknowledging the heavy concentration on airport control of drugs, the Authors also explained the necessity and rationality behind such imbalanced policy. A gradual and progressive change on narcotics control is necessary and is inevitable.
Indonesia’s War on Drugs: Due Process of Law in Capital Punishment for Drug Traffickers in Indonesia

Bima Danubrata Adhijoso

Muhammad Dzakir Gusti

ALSA National Chapter : Indonesia

I Introduction

Directly after being elected as the President of Republic of Indonesia in 2015, President Joko Widodo declared war on drugs (the “Declaration”). In conformity with this declaration, in 2016, four convicted drug traffickers, three of which were foreign nationals, were executed.\(^{404}\)

Facing the global trend to eradicate capital punishment, Indonesia is drowned in distress to stop its tough stance on capital punishment. However, despite receiving waves of condemnation from the international community, including human rights

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advocates and foreign governments, Indonesia is still determined to continue the employment of capital punishment. *Badan Narkotika Nasional* (National Narcotics Agency) notes that drugs has become a main problem in Indonesia with a striking number of casualties, 33 people per day. With this, the Indonesian government considers drug trafficking a serious crime and implements capital punishment for the perpetrators, regardless of their nationality.

The International Covenant on Civil and Political Rights (hereinafter “ICCPR”) asserts in Article 6 that capital punishment may be conducted only for the most serious crimes and such penalty needs to be carried out pursuant to the principle of due process of law. With regards to this, the Authors will examine whether the capital punishments implemented in Indonesia on drug traffickers fulfill the due process of law.

**II Legal Basis**

Law on narcotics is considered to be the only weapon to combat narcotics and drugrelated crimes which are threatening the order of societies around the world. Indonesia itself has been combating drugs since 1927, almost two decades before its independence. Following the ratification of the Single

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408 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 6
409 T Lindsey and P Nicholson, *Drugs Law and Legal Practice in Southeast Asia: Indonesia, Singapore and Vietnam* (1st edn, Bloombury 2005) p 47
Convention on Narcotic Drugs;\textsuperscript{410} the Indonesian government enacted ‘Law Number 9 of 1976 on Narcotics’\textsuperscript{411} which became the first law concerning narcotics in Indonesia. This law regulates the illegal trafficking, rehabilitation of drug addiction, and the role of doctors in treating patients with drug addiction.\textsuperscript{412} Nevertheless, throughout the era, this law is considered to be outdated and ineffective in combating drugs, mainly because of the absence of regulations concerning transnational drug trafficking. Recognizing such concern, Indonesia enacted ‘Law Number 22 of 1997 on Narcotics’, which then includes capital punishment as one of the punishments to be implemented for producers and traffickers of drugs in Indonesia.

In 2009, the Indonesian government enacted ‘Law Number 35 of 2009 on Narcotics’ with the amendment to make illicit trade of drugs a transnational crime. This new law complements its predecessor by intensifying the degree of protection against illicit drugs trade. Such protection can be seen in Article 77 which allows the usage of wiretapping in order to tackle illicit drugs trade.

At the international level, Indonesia is a signatory of the ICCPR,\textsuperscript{413} ASEAN Human Rights Declaration,\textsuperscript{414} and also part of the ASEAN Intergovernmental Commission on Human Rights.

\textsuperscript{410} UNGA, 1972 Protocol Amending the Single Convention on Narcotic Drugs, 1961, 9 December 1975 UN Doc A/RES/3444
\textsuperscript{411} Indonesian Law No 9 of 1976 on Narcotics, State Gazette No 36 of 1976, Supplementary State Gazette No 3086
\textsuperscript{412} ibid, arts 24, 32
\textsuperscript{413} ICCPR (n 6)
\textsuperscript{414} Association of Southeast Asian Nations (ASEAN), ASEAN Human Rights Declaration (18 November 2012)
III Analysis

Even before the Declaration, Indonesia has shown a systemized policy in combating drugs. This policy was crystallized by the National Narcotics Agency which has the authority to create national policy on drugs and monitor the implementation of drug related policies in Indonesia. In addition, the Indonesian government has started investing its resources and budget on establishing rehabilitation programs for drug addicts.

Recognizing that the crucial problem relating to drug abuse in Indonesia is transnational drug trafficking, the Indonesian government also put one step forward in strengthening its war on drugs by implementing capital punishment, without limiting it to only Indonesians.

With Indonesia’s geography which consist of 56,716 kilometers of coastline and numerous islands spanning across three time zones, Indonesia has vast numbers of remote and difficult-to-control areas that can easily be used as entry and exit points by traffickers and smugglers.

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415 Indonesian Law No 35 of 2009 on Narcotics, State Gazette No 143 of 2009, Supplementary State Gazette No 5062
416 ibid, arts 71, 72
417 ibid, arts 4, 54
419 Coleman Lynch, Indonesia’s Use of Capital Punishment for Drug-Trafficking Crimes (1st edn, YUP)
Since the Declaration, Indonesia has executed 14 capital punishments for convicted drugs traffickers,\(^\text{421}\) of whom 12 are foreign nationals.\(^\text{422}\) The extremely high percentage of foreign nationals is in line with the fact that Indonesia has become a major hub for drug trafficking, with large volumes of drugs being trafficked to Indonesia by transnational organized crime groups in an effort to meet current or possible demands of the large young population and, correspondingly, large market for drugs.

Most of the countries, which their nationals have been convicted as drug traffickers in Indonesia, have sent their ambassadors to negotiate and request the postponement, or a call off for the capital punishment.\(^\text{423}\) Some, in extreme ways, cut their economic aids to Indonesia to express their disagreement, following the execution(s). Australia, for instance, which one of its national was convicted for drug trafficking in Indonesia, showed its disagreement towards the execution by cutting approximately $600 million from the usual amount of aid given to Indonesia in

\(^{421}\) World Coalition Against the Death Penalty, ‘The Death Penalty For Drug Crimes In Asia’ (2015) FIDH


However, the Indonesian government stands firm in its decision to combat drug trafficking.

Amnesty International, a non-governmental organization focused on human rights, has shown its concern towards capital punishment in Indonesia following the execution of Hansen Anthony Nwaolisa and Samuel Iwachekwu Okoye, both Nigerian nationals, and now is trying to repeal another execution. Nevertheless, the Indonesian government struck back with public polls which showed a 75% rate of satisfaction with capital punishment. In addition to that, the Indonesian government has tried to confirm that its conduct is in accordance with international law, specifically Article 6 of the ICCPR.

According to Article 6 of the ICCPR, capital punishment may be imposed only for the most serious crimes and shall fulfill the due process of law. The elements of due process of law pursuant to precedence in Womah Mukong v. Cameroon and Freeman v. Hewit are (i) the verdict shall be reviewed by an competent, independent, and impartial tribunal; (ii) the review shall be conducted within reasonable time; and (iii) the right to counsel shall be provided. These same requirements also exist in Indonesian law, in Article 18 of ·Law

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\(^{425}\) Staff of Inside Indonesia, ‘Capital Punishment for Drug Traffickers in Indonesia’ *Inside Indonesia* <http://www.insideindonesia.org> accessed 19 February 2017

\(^{426}\) ibid

\(^{427}\) ICCPR (n 6)

\(^{428}\) ibid


\(^{420}\) Freeman v Hewit (1946) 329 US 230, 248
Number 39 of 1999. These three elements have been complied with by the Indonesian government, in executing convicted drug traffickers, and such rights are not provided to only Indonesian nationals but also to foreign nationals.

According to the ICCPR, an individual has the right to trial by a competent, independent and impartial tribunal established by law. The characteristic is that it must be independent of the executive, must personally hear the person concerned, and must be empowered to release the person arrested. In order to reach the verdict of capital punishment, the convicted drug traffickers in Indonesia shall go through three trials which are to be heard by the State Court, the High Court, and the Supreme Court respectively. The convicted also may pursue a plea for clemency from the President.

Through observing several cases on illegal drug trafficking in Indonesia that involve foreign nationals, the convicted drug traffickers, on average, has been brought before the Tribunal within 20 days of detention. The detention for a period

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431 Indonesian Law No 39 of 1999 on Human Rights, State Gazette No 165 of 1999 art 18
433 ICCPR (n 6) art 14(1)
434 HRC, General Comment 32, para 15
435 Manfred Nowak, UN Covenant on Civil and Political Rights, CCPR Commentary (1st edn, N.P.Engel 1993) pp 176-177
436 Indonesian Law No 48 of 2009 on Judicial Power, State Gazette No 157 of 2009, Supplementary State Gazette No 5076
437 Indonesian High Court Decision, ‘State v Gareth Dane Cashmore’, Award No 67/PID:2012/PT.BTN; Indonesian High Court Decision, ‘State v Gurdip Singh’, Award No 6/Pid2005/PT.BTN; Indonesian Supreme Court Decision, ‘State v Liu Che Sui’, Award No 2239 K/PID SUS/2012; Indonesian Supreme Court Decision, ‘State v Ataliat Joses Guambe’, Award No. 1923 K/Pid Sus/2012
up to 20 days is also in line with Indonesia Law Number 8 Year 1981 Concerning the Criminal Procedure, Article 25 (1). 20 days are deemed to be proportional due to the process of investigation which includes searches for evidences which are to be brought before the tribunal.

Further, when the final verdict of capital punishment is passed, the convicted drug traffickers' names will be put on the death row list and he will be notified of the date of execution 72 hours before the execution is scheduled. This time period is deemed to be reasonable due to the needs of the defendants to mentally prepare themselves, spend time with their family and complete their religious rituals.

When the convicted drugs traffickers are brought before the court for the final verdict of capital punishment, Indonesia also fulfills the third guarantee, which encompasses the right to counsel. They are granted with the rights to defend oneself, the right to be informed of the right to counsel, and the right to choose one's counsel. These rights also extend to drug traffickers that come from a foreign country, pursuant to the precedence of LaGrand Case and Avena and Others Case. From the cases, following the detention of another State's nationals, such State shall be informed and the detainee shall be afforded with consular assistance. In the process for the execution of Hansen Anthony Nwaolisa and Samuel Iwachekwu Okoye, these rights have been granted and protected by Indonesia.

438 Narcotics Law of 2009 (n 13)
440 LaGrand Case (Germany v. United States of America (Merits) (2001) ICJ Rep 466, p 77; Avena and Other Mexican Nationals Case (Mexico v. United States of America (Merits) (2004) ICJ Rep 12, p 50
441 Report: Two Nigerians Executed In Indonesia (n 30)
In addition to fulfilling the due process of law in implementing capital punishment in Indonesia, Article 2 of the Indonesian Law Number 1 Year 1946 Concerning the Criminal Code provides that, ‘The Indonesian statutory penal provisions are applicable to any person who is guilty of a punishable act within Indonesia.’ 442 The word ‘any person’ here refers not only to Indonesian citizen but also to foreign nationals in the territory of Indonesia. This principle of territorial sovereignty is recognized in the *Lotus Case* which outlines States’ rights to exercise its legal jurisdiction in its territory. 443

Hence, it is clear that the implementation of capital punishment in Indonesia did not violate the due process of law and its implementation is a clear stance of Indonesia’s territorial sovereignty.

**IV Conclusion and Proposition**

It is widely recognized that everyone has the right to life. However, with the emergence of illicit trade of illegal drugs in Asia, States shall take stronger measures in order to safeguard the safety of their nations from the danger of illegal drugs.

Capital punishment is often used by countries in Asia as a form of punishment for drug traffickers. Indonesia, through ‘Law Number 35 of 2009 on Narcotics’, has also implemented capital punishment for drug traffickers in Indonesia. Indonesia sees the effectiveness of capital punishment in eradicating and deterring trade of illegal drugs in Asia.

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442 *Criminal Law Code of Indonesia*, Indonesian Law No 1 of 1946 on Criminal Law Provision, art 2
443 *SS Lotus Case* (France v Turkey) (Merits) [1927] 927 PCIJ Series A, No.9, pp 46-47
However, it is still a concern that some of the countries implementing the capital punishment have not paid enough attention to the defendants’ rights to due process of law. The Authors, thus, propose and highlight the need to pay more attention and respect to the right to due process of law in order to uphold human rights and justice and protect the nation from the harms of illegal drugs.
Japanese Drug Issues: Focusing on the Young

Ayaka Enomoto

ALSA National Chapter: Japan

1. Introduction

Drug abuse means the use of medicine, originally intended for the treatment of diseases, for purposes other than medicinal, or to use drugs that are not pharmaceutically legal. In Japan, around 40% of cannabis abusers are under the age of 30 and it still remains to be abused mainly by the young. The terrible thing about drugs is they cause ‘dependency’. Moreover, the users develop ‘tolerance’ through repeated uses. Eventually, the users become unable to control the use of drugs at their own will. This essay will focus on the current problems with drugs use in Japan in order to improve the situation, by focusing on the young.

2. Drug Problem in Japan

A) What are the problems?

Common features of drug abuse are bad effects on the brain and dependency. Abuse of these drugs have serious physical and societal impacts.

With regards to the physical influences, the user suffers from stimulant drug psychosis and personality disorder. In addition, using cannabis (marijuana)\textsuperscript{445} harmfully affects vision, hearing and perception. If the user continues abusing it, symptoms of psychosis such as hallucinations and delusions will eventually develop.

For the impacts on the society, abusing drugs may result in the commission of crimes, family problems, occupation loss and economic problems. In fact, in Japan, car accidents caused by people considered to have used ‘dangerous drugs’\textsuperscript{446} have gained the public attention.

B) Law

This section will introduce some of the laws concerning drug control in Japan. In Japan, it is a crime ‘just to possess it’, even if the illegal drugs such as stimulants, cocaine, heroin, etc. are not used nor sold. This is due to the dangers of drugs. There are high possibilities of harm being done to others when drugs are used, and there are chances of them being used even if they are only possessed. The laws are simply trying to prevent damage by criminalizing it.

\textsuperscript{445}‘Cannabis’ refers to cannabis (Cannabis / Sativa el) and its products. However, this excludes mature stems of cannabis grass and its products (excluding resins) and seeds of hemp grass and its products (Art 1 of the ‘Cannabis Control Law’).

\textsuperscript{446}They are similar to drugs and stimulants, as they also cause euphoria and hallucinating effects. But they are not governed by laws such as the Drug Control Law. Previously, in Japan, herbs were separated into explicit herbs and legal herbs. We selected a new designation name to replace ‘demolished drag’–, Ministry of Health, Labor and Welfare of Japan, http://www.mhlw.go.jp/stf/houdou/0000051607.html, [Last visited 2017/06/10]
The Stimulant Drug Control Law (Act No. 252 of 1952)

This law is intended to prevent import, export, possessing and manufacturing of stimulant drugs and its raw materials, to prevent health hazards caused by abuse of stimulant drugs (stimulants). The purpose of the law is to allow necessary enforcements to be conducted on assignment and use of drugs.\textsuperscript{447}

Cannabis Control Law

This is a law concerning possession, cultivation, transfer, etc. of cannabis. This mainly focuses on banning unlicensed cannabis handling.

Regulations for cannabis handlers' licenses, obligations of cannabis handlers, supervision of cannabis handlers, penalties, and many other issues are covered by this law.\textsuperscript{448}

Narcotics and Psychotropic Control Law

Narcotics and the Psychotropic Control Law prevents the abuse of drugs and psychotropic substances. It is aimed at promoting public welfare by taking necessary measures such as providing necessary medical care to person in need and enforcing necessary regulations concerning production and distribution.\textsuperscript{449}

Others include: Opium law, Poisonous and Deleterious Substances Control Law, etc.

C) Number of arrest [Narcotics, stimulants, etc.]\textsuperscript{450}

\textsuperscript{447} Art 1 of the Stimulant Drug Control Law

\textsuperscript{448} Arts 5, 13, 18, 24 the Cannabis Control Law

\textsuperscript{449} Art 1 of the Narcotics and Psychotropic Control Law

\textsuperscript{450} Ministry of Health, Labor and Welfare Department of Medicine and Living Sanitary Affairs Monitoring guidance · Drug administration section, -Current
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Although the number of drug-related arrests in Japan is gradually decreasing, the change is not significant.

3. **Drug history in Japan**

Drugs were first used in Japan around the 1920s. However, it has become easily available ever since the 1950s. Below is the history of drug use in Japan up to the present day.

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Before 1945

Drugs (opium, cocaine etc.) were available, but only a few abused them.

1945~1954

There was a rapid increase in the number of stimulants abusers. At the peak, there were more than 50,000. Strong regulations and enforcements were implemented. The Stimulant Drug Control Law entered into force in 1951.

1955~1964

Instead of stimulants, drugs (heroin) became more prevalent. A lot flowed into the country via international smuggling routes. The young’s ‘sleeping pill’ and ‘painkiller play’ also became problematic. In 1963, penalties were strengthened and measures against drug addicts were introduced.

1965~1974

The abuse of thinner became prevalent among juveniles. It became a social problem.

The number of abusers which was around 2,500 in 1967 increased to over 20,000 by 1968. Concurrently, abuse of stimulant drugs amongst adults also started to increase.
rapidly. The majority of those arrested were involved with gangsters.

- 1975~1984

Abusers of stimulant drugs continued to increase. From 1975 onwards, the number was around 20,000 people. After 1983, the amount of stimulant drug seizure also increased. Abuse began to spread amongst citizens of the society. Many serious conditions, some of which are: drug abuse by females, thinner abuse by juveniles, cannabis use trends and cocaine contamination, continue to increase.

- 1996~Present

Known as the ‘third period of stimulant drug abuse’, in 1999 the amount of stimulant seizure exceeded 1 ton for the first time in history. At the same time, abuse by the young became clear. Also, in 2004, very severe situations, such as MDMA tablet type synthetic narcotics offenses and number of persons committing cannabis offenses have all reached record high.

4. Rehabilitation System

As drug problems relate to the security of the society, which is fundamental, measures taken by the government have always been progressing.

In July 2003, the Drug Abuse Promotion Headquarters formulated the ‘New FiveYear Drug Abuse Prevention Strategy’ aiming for the early termination of the third period of stimulant drug abuse. Nowadays, it is very important to detect and take countermeasures early since the seizure volume is increasing.
Comprehensive drug countermeasures are promoted based on the formulated ‘Emergency countermeasures for preventing drug smuggling’.\(^4\)

On the other hand, various supports are being offered to drug users. Below, the author will describe the supports currently provided in Japan, with analyses by referring to various literatures.

A) Physical symptoms management and medication therapy

Fundamentally, it is important to treat acute / chronic physical and psychiatric symptoms, deal with withdrawal period, and discontinue dependency.

Drug addicts tend to depend on some kind of medicine and become depressed if they are faced with even a bit of conflict or vague frustration. Antidepressants and anti-anxiety drugs are used to deal with these. But treatment for psychotic symptoms, which is mainly based on hallucinations and paranoia, requires hospitalization and the use of antipsychotics.

In general, drug addicts tend to be more dependent on other medicines, so the amount of anxiolytic and hypnotic drugs with high risks of dependence formation should be kept to a minimum. When the target symptom disappears, the gradual decrease of the amount of drugs / stop of drug prescription will be important.

B) Psychosocial approach

The fact that there are more young people using stimulant drugs and being dependent on other drugs means that there is less social interaction. Also, as the number of dependents increase, organic solvent (for example, thinner) addiction also increases. It is challenging, but the government shall work on attempting to increase ‘social participation’ rather than ‘reintegration’.

In general, to help drug dependents, it is important to recognize their dependence and the various problems related to it, in order to motivate them and try to solve it. Also, it is important to continuously support them so they do not succumb to the urge resulting from the withdrawal.

Understanding of the social background as well as related disorders are indispensable for coming up with approaches to tackle drug addiction. This also includes understanding the individual and maybe even his/her relationship with his/her family. The reason is because psychosocial and physical obstacles, including interpersonal relationships and economic problems, are causes for the ingestion of dependent medicines.

In order to cope with these problems, a ‘multifaceted’ approach that combines environment adjustment to patient conditions is important. Examples of some of the approaches include: individual psychotherapy, group psychotherapy, introspection therapy, family therapy and understanding of cognitive behavior, through cooperation with psychiatrists, internal medicine physicians, social workers, clinical psychologists, public institutions, self-help groups, families or colleagues at workplaces.

For young dependents, it is especially important for therapists to approach the family, as they care about each other and this will help promote mutual trust rebuilding. It is also important to consult with juvenile centers, mental health welfare centers,
specialized medical institutions, etc. as soon as possible, to seek cooperation. For juvenile addicts who do not try to hastily solve the problems, it is necessary to promote social participation while also utilizing the various social supports, from a long-term educational point of view. It is also important to encourage family members to participate in family therapy sessions.

I. Administrative agencies

The government formulated the ‘Fourth Five-Year Drug Abuse Prevention Strategy’ in August 2013. In July, the government also compiled the ‘Emergency Measures for Elimination of Abuse of Dangerous Drugs’.  

① To prevent people from abusing drugs by enhancing efforts to raise awareness amongst young people, families and communities and by boosting normative consciousness
② To strictly prevent relapse into drug abuse by supporting drug abusers through treatment, assistance with reintegration into society and provision of enriching support for their families

③ To eliminate illicit drug trafficking organizations, exercise thorough control over end-users and strengthen oversight of diversifying abusive drugs

④ To interdict entry of illicit drugs into Japan through strict crackdowns at borders

⑤ To promote international cooperation on interdicting drug smuggling

II. Private institutions

One non-profit organization (NPO) does a lot of activities, such as: telephone consultation on drug addiction, nationwide introduction of collaborative treatment agencies, rehabilitation of drug addicts, provision of accommodation and administrative facilities, operation of business, lifestyle support projects, independence support projects, nationwide consultation assistance projects for families with drug addicts, prisons, holding drug withdrawal guidance programs at juvenile training schools.

5. Young people

A) Drug Abuse by the Young

Young people are very curious, they take drugs with the very simple motivation of not wanting to be left out of the group.

For example, young people misunderstand cannabis, including easy-to-obtain thinner (organic solvent), to be ‘safe’ because of little physical dependence, and thus rely on stimulant drugs. Also, female high school and junior high school students misunderstand the stimulants to have positive effects, such as weight loss. Moreover, casualization of nickname such as ‘Speed’ and ‘Es’ dilute the feeling of resistance, increasing youth drug abuse. Synthetic narcotic is called ‘Ecstasy’; as it is colorful, it gives an illusion of it being fashionable and dilutes the young’s resistance and feelings of guilt when taking it.

B) The Reasons

In general, drug problems in minors or the young, such as the abuse of stimulant drugs and cannabis, are connected to delinquency and commission of crimes. However, the essence of the problem is rather the ‘relationship’ between the young and their family and friends. One of the main causes which drives the young people into using drugs is problems with their family members and friends. As they do not feel the sense of belonging, they seek for ways to escape from the stress and pressure.

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455 In this context, young people refers to minors.
In other words, it can be said that drug abuse /dependence is not an outward violence aimed at others or the society, but rather an inward self-harming behavior. In addition, problematic behaviors or occurrences such as withdrawal symptoms, self-injuring (wrist-cutting), eating disorders (refusing to or overeating), have increased in tendency in recent years. It seems to be more widespread than expected.

Wada and others conducted the ‘survey on nationwide junior high school students‘ awareness and actual situation on drug abuse‘ on junior high school students (between 12 to 15 years old). Results have shown that, throughout the country, lifetime experience rates of major drugs are decreasing year by year. Organic solvents were the highest, followed by cannabis and stimulants.

6. Analysis

Drug dependence is not solved only by the abusers‘ individual efforts. For example, as stated before, it is necessary to enact laws with strict punishments, prevent the circulation of drugs through government policies and provide treatments such as rehabilitation at private facilities. Specifically, penalties for suppliers should be

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increased first. Supports also should not only be granted to the individual but also to their families and the society. Long-term treatments may be necessary, not temporary ones, because drugs have a high repeat rate due to the dependence they create. More fundamentally, it is necessary to solve the problem that triggers drug taking, such as not being able to foster relationships with others. It is challenging to clean up as the problems are often very personal.

7. Conclusion

In Japan, injuries caused by car accidents resulting from drugged driving frequently occur and fill the media. From these incidents and the general public's knowledge of the risks of drugs, the term ‘dangerous drugs’ was coined. Although it may be impossible to eradicate drug abuse, the various mentioned measures should be utilized by the public and private sectors in their attempts to tackle the problem.
I. Introduction

The purpose of drug prohibition is primarily to prevent narcotic abuse which may lead to addiction and profligate behaviours that can impede national productivity. To ensure this does not occur, countries should strive for a completely drug-free citizenship because it is one of the keys to development and prosperity. Citizens should be physically and psychologically healthy to be productive and mobilised to work for national success. Legislations play vital roles in achieving this. The purpose which laws are implemented and enforced is to maintain order, which widespread addiction to largely non-beneficial substances could destroy and replace with significant financial and developmental detriments to society. Thus, it is imperative that drug laws are effective.
In addition to examining the effectiveness of Brunei's narcotic legislations, this article will also attempt to understand the extent of the nation's drug problem, the causes and offer possible remedies. Focus will be strictly directed towards the legal measures the Sultanate takes to tackle issues relating to the misuse of infamously harmful substances, e.g. meth, cannabis, heroin and cocaine. The article will attempt to answer the main question, 'whether or not Brunei's drug laws and their enforcement through the police forces and the Narcotics Control Bureau are effective enough in ending or at least reducing drug possession, abuse and trafficking in the country'.

II Background

An examination of Brunei's situation on drug-related issues is the first and most important part in answering the question.

Nature

The nature of the country's war on drugs is fairly complicated. In addition to recreational users, Brunei is also faced with international syndicates\(^4\) that are recruiting citizens, presumably, to be used to import narcotics into the country and corrupt non-users in order to stimulate profits.

Statistics from this decade alone (Fig. 1) show that the Sultanate is not even close to concluding its war on drugs.

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<table>
<thead>
<tr>
<th>Year</th>
<th>Arrest</th>
</tr>
</thead>
<tbody>
<tr>
<td>2010</td>
<td>547</td>
</tr>
<tr>
<td>2011</td>
<td>539</td>
</tr>
<tr>
<td>2012</td>
<td>450</td>
</tr>
<tr>
<td>2013</td>
<td>679</td>
</tr>
<tr>
<td>2014</td>
<td>610</td>
</tr>
<tr>
<td>2015</td>
<td>600+</td>
</tr>
<tr>
<td>2016</td>
<td>N/A</td>
</tr>
</tbody>
</table>

Fig. 1: Drug Arrests by Year, 2010-15

The nation saw its lowest number of drug arrests of all time in 2012. However, the number soared back up again in 2013 by 51 per cent, or 24 per cent from 2010 which held the previous record as the year with the most drug arrests of the decade. 679 arrests is not the highest Brunei has recorded, as that would probably be the 732 arrests in 2007, followed by 713 arrests and 701 arrests in 2002 and 2003 respectively.\(^{458}\) But the sizeable figure is a cause for concern since it logically suggests the occurrence of first-time or repeat offences.

According to a 2012 survey\(^{459}\) (Fig. 2), drug consumption constitutes the most common kind of narcotic offence, at 88 per cent, followed by drug dealing and drug trafficking at 5 percent and 4 percent respectively.

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\(^{458}\) Jatswan S. Sidhu, *Historical Dictionary of Brunei Darussalam* (2\(^{nd}\) edn, Scarecrow Press 2009) pp 73-4

\(^{459}\) Serbin et al., *Penyalahgunaan Dadah Dalam Kalangan Rakyat Tempatan di Negara Brunei Darussalam: Punca dan Penyelesaian* (BKN 2012)
Fig. 2: 2012 Survey on Categories of Committed Drug Offences, UNISSA-BKN Study  These statistics show that Brunei’s drug problems are, fortunately, not as grave as, for instance, those of the Philippines (with almost 2 percent of its total population being current drug users),\(^{460}\) Mexico (notorious for its unparalleled drug trafficking)\(^{461}\) and the United States (with

\[\begin{array}{|c|c|c|}
\hline
\text{OFFENCE CATEGORY} & \text{Amount} & \% \\
\hline
\text{Drug consumption} & 388 & 88\% \\
\hline
\text{Drug dealing} & 20 & 5\% \\
\hline
\text{Drug possession} & 6 & 1\% \\
\hline
\text{Drug trafficking} & 17 & 4\% \\
\hline
\text{Drug smuggling} & 3 & 1\% \\
\hline
\text{Drug processing} & 2 & 0.5\% \\
\hline
\text{All categories} & 3 & 1\% \\
\hline
\end{array}\]

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2.8 million people suffering from substance use disorder. Also, unlike the US, which is in the middle of an addiction to prescription opioids crisis, the Sultanate is mainly dealing with methylamphetamine which makes up the largest portion of drugs confiscated in 2013, at 90 percent, followed by cannabis as well as ketamine and Erimin 5. Furthermore, the government recently found that Brunei’s drug situation ‘remained under control’ and that it had not detected any manufacturing of illicit substances, adding to the idea that the country is principally beset with problems of narcotic use and trade.

The nation’s relatively low drug crime rate should be taken as an encouragement to completely eradicate this devastating epidemic in which, as previously mentioned, legislation plays a vital role.

Legislation

The Misuse of Drugs Act (Cap. 27) is the primary legislation for drug crimes in Brunei. The punishments it stipulates for using,


possessing or trafficking illicit substances are severe. They include heavy fines, lengthy prison sentences and even the death penalty.

Possession of the following carry the capital punishment:

- 50 grammes of methamphetamine;
- 500 grammes of cannabis;
- 15 grammes of heroin, ecstasy and morphine derivatives;
- 30 grammes of cocaine; or
- 1.2 kilogrammes of opium.

The act provides for these specific amounts as they far exceed the amounts presumed to be for purposes other than personal consumption, for example trafficking, which is provided for in Section 15 and includes: 100 g of opium, 3 g of morphine, 2 g of heroin and 15 g of cannabis. Possession of lesser amounts may still result in harsh penalties such as a minimum 20-year jail term and caning. The punishments are heavy when compared to, for example, Canada where 30 g of cannabis would only result in a maximum six-month imprisonment and/or fine of about CAD 1,000.\(^{465}\)

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217
These laws are strictly enforced. Just recently, a man was sentenced to death by hanging for possessing over six kilogrammes of cannabis.\textsuperscript{466} A rational decision, given that such massive amount is often for distribution. In October 2016, a local woman was sentenced to a three-year imprisonment after pleading guilty to consumption and possession of just 0.0860 g of meth\textsuperscript{467} pursuant to Section 6(a) of the Second Schedule of the Misuse of Drugs Act, further proving the Bruneian judiciary's dedication to the word of the law.

In the first case, a large quantity of cannabis was smuggled into Brunei from a bordering country and only discovered by authorities through tips from the public. Additionally, two of the Narcotics Control Bureau (NCB)'s major cases in 2012 involved quite significant amounts of drugs seized inside the country, raising the presumption that they were successfully trafficked across Bruneian borders.\textsuperscript{468} These call into question the effectiveness of the Sultanate's border control. This is not to say, however, that the nation's law enforcement is entirely hopeless. After all, in March 2016 the Bureau managed to detain a couple of locals suspected of

\begin{flushright}

\textsuperscript{467} Nazrin Asyraf and Fadley Faisal, ‘Woman gets 3 years jail for drugs’ \textit{Borneo Bulletin} (BSB, 23 October 2016) <http://borneobulletin.com.bn/woman-gets-3-years-jail-drugs> accessed 30 April 2017

\end{flushright}
drug trafficking as they tried to enter the country.\textsuperscript{469} It turned out that the detainees were in possession of cannabis weighing nearly 6 g. Further inspection at one of their residences found three more blocks of cannabis weighing more than 3 kg. Undoubtedly, this is one of the many victories for NCB. In 2013 alone, they made a total of 74 arrests at Brunei’s various border controls.\textsuperscript{470} That constitutes nearly 11 per cent of all the drug arrests executed that year.

In spite of this, narcotic offences are still on the rise. Some would account this to corruption in the government, i.e. officials accepting bribes to keep quiet about drug smuggling activities, which is not a wholly unsubstantiated idea. In August 2015, a customs officer was convicted of corruption and graft after accepting money from a man who had smuggled fuel in exchange for the officer’s inaction.\textsuperscript{471} In a more recent case, a man who was barred from Brunei bribed a superintendent to help him enter and exit the country as he pleased.\textsuperscript{472} These abuses of power for personal gain are unfortunately quite common, as stated by His


Majesty the Sultan himself. However the situation may not be as dire as in many other nations, considering the fact that Transparency International earlier this year ranked Brunei the second least corrupt nation in ASEAN; but with a score of 58 (compared to Singapore’s 84) there is much room for improvement. This achievement is in part due to the country’s anti-corruption legislation which stipulates relatively serious penalties for corruption offences. According to Section 5 of the Prevention of Corruption Act (Cap. 131), convicted offenders are ‘liable…to a fine of $30,000 and imprisonment for 7 years.’ Nonetheless, the possibility that corruption plays a part in the mere existence of narcotics in the Sultanate should not be disregarded.

Through countless efforts from agencies such as the NCB and Anti-Corruption Bureau, including a widespread, continual and extensive awareness campaign ‘NDA!’ (an abbreviation of ‘No Drugs At All!’ based on the local word for ‘no’), the government has worked tirelessly towards ensuring Bruneians are aware of the severe health and legal consequences of illicit substances. Yet why are the prospects of long prison sentences and the death penalty not deterring drug offenders?

III. Factors

Before proposing solutions for Brunei’s drug situation, it is important to understand the roots of the problems.

Legal Factors

It is difficult to argue that the country’s narcotic legislation is too lenient and that it has become ineffective. After all, at least, where

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220
penalties are concerned, it bears a striking resemblance\textsuperscript{474} to that of Singapore which has been hailed to have one of the lowest drug abuse levels in the world.\textsuperscript{475} However, low rates of drug offences may not necessarily be attributable to strict narcotic laws. In Hong Kong, for example, reports show steady declines in drug abuse\textsuperscript{476} despite not adopting the death penalty for such offences.\textsuperscript{477} Further, Switzerland, with its very 'lenient' drug laws (which have been praised\textsuperscript{478} has made impressive strides including decreasing rates of new heroin users, shedding its infamy for having the highest HIV rates in Western Europe, and increasing the focus of its police forces on drug trafficking through cannabis decriminalisation.

Thus, the severity of narcotics legislation cannot easily be blamed for failing to eliminate drug abuse, and neither can law enforcement because, despite much room for improvement (especially in terms of criminal intelligence), it is as effective as it can be without encroaching on the citizen’s rights to privacy, etc., and seeming aggressive.


\textsuperscript{475} Michael Teo, ‘Singapore's policy keeps drugs at bay’ The Guardian (Singapore, 5 June 2010) <https://www.theguardian.com/commentisfree/2010/jun/05/singapore-policy-drugs-bay> accessed 30 May 2017


Other Factors

Spiritual deficiency: Reflecting the significance of religion to the nation, the Bruneian government repeatedly posits that it plays a vital role in an individual's compliance with the law and moral codes. The NCB acting director, for instance, stated that religious education is instrumental in combatting drug abuse and other social problems among youths. He made this remark at an event commemorating 'International Day Against Drug Abuse and Illicit Trafficking' last year, for which the government chose a religious theme. Mirroring all this, the state religious leader and president of the National Anti-Drug Association opined that Islamic values are key to preventing use of illicit substances.

Legislatively speaking however, the Sultanate has put remarkable effort in ensuring that its Muslim citizens uphold their religious values. In addition to the well-known ongoing implementation of sharia law, the Compulsory Religious Education Act (Cap. 215) is also in place since 2012, which as its name would suggest, requires


every parent...[to] ensure that his child [of compulsory religious school age] is enrolled as a pupil in a religious school... Other laws showing Brunei’s commitment to religion include the mandating of Friday prayers to Muslim adult males\textsuperscript{483}, closure of businesses during those prayers and ban of the sale and consumption of alcohol.\textsuperscript{484} These are all measures the government is taking to maintain spiritual fulfilment which, in their view, prevents problems, including drug abuse.

<table>
<thead>
<tr>
<th>No.</th>
<th>Factor</th>
<th>Agree</th>
<th>Disagree</th>
<th>Unsure</th>
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</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Amount</td>
<td>%</td>
<td>Amount</td>
</tr>
<tr>
<td>1</td>
<td>Curiosity</td>
<td>335</td>
<td>76%</td>
<td>21</td>
</tr>
<tr>
<td>2</td>
<td>Financial difficulty</td>
<td>57</td>
<td>13%</td>
<td>168</td>
</tr>
<tr>
<td>3</td>
<td>Personal/family problems</td>
<td>105</td>
<td>24%</td>
<td>143</td>
</tr>
<tr>
<td>4</td>
<td>Pleasure</td>
<td>206</td>
<td>47%</td>
<td>46</td>
</tr>
<tr>
<td>5</td>
<td>Luxury</td>
<td>78</td>
<td>18%</td>
<td>143</td>
</tr>
</tbody>
</table>

\textsuperscript{483} Skipping Friday prayers also an offence in Brunei; \textit{Malaysia Today} (2 May 2014) <http://www.malaysiatoday.net/skipping-friday-prayers-also-an-offence-in-brunei/> accessed 30 May 2017

Curiosity: As shown in Fig. 3, three quarters of the respondents surveyed said that they tried drugs out of curiosity, the highest of all the factors. This finding should not surprise anyone. Along

Fig. 3: 2012 Survey on Factors of Drug Use, UNISSA-BKN Study

<table>
<thead>
<tr>
<th></th>
<th>Rebellion</th>
<th>7.5%</th>
<th>193</th>
<th>44%</th>
<th>38</th>
<th>9%</th>
</tr>
</thead>
<tbody>
<tr>
<td>7</td>
<td>Syndicate victim</td>
<td>6%</td>
<td>199</td>
<td>45%</td>
<td>33</td>
<td>7.5%</td>
</tr>
<tr>
<td>8</td>
<td>Family influence</td>
<td>2.5%</td>
<td>208</td>
<td>47%</td>
<td>28</td>
<td>6%</td>
</tr>
<tr>
<td>9</td>
<td>Stamina increase (for physical activity/work)</td>
<td>33%</td>
<td>104</td>
<td>23.5%</td>
<td>37</td>
<td>8%</td>
</tr>
<tr>
<td>10</td>
<td>Pain tolerance</td>
<td>16.5%</td>
<td>150</td>
<td>34%</td>
<td>36</td>
<td>8%</td>
</tr>
<tr>
<td>11</td>
<td>Depression</td>
<td>9%</td>
<td>180</td>
<td>41%</td>
<td>40</td>
<td>9%</td>
</tr>
<tr>
<td>12</td>
<td>Unintentional</td>
<td>13%</td>
<td>151</td>
<td>34%</td>
<td>53</td>
<td>12%</td>
</tr>
</tbody>
</table>

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485 Serbini et al., Penyalahgunaan Dadah Dalam Kalangan Rakyat Tempatan di Negara Brunei Darussalam: Punca dan Penyelesaian (BKN 2012)
with countless other studies, it only confirms the well-established fact that curiosity is the most common reason for first-time drug consumption. A British drugs survey from 2014 reached the same finding with 69% citing curiosity as their main reason for starting.\textsuperscript{486} It is a staggering 55% higher than the second factor - to fit in - which comes in at merely 14%. Similarly, a global drug survey this year found that over 91% claim to have consumed psychedelic drugs because they were curious.\textsuperscript{487}

Only few governments have recognised this fact that some individuals will do anything to try and sate their curiosity. Rather than criminalising personal drug consumption and risk having these curious individuals take drastic measures such as being involved with syndicates, the governments have established relatively safer outlets through which people can relieve their curiosity. An example of such outlets are Amsterdam’s cannabis ‘coffee shops’ where customers can buy and smoke the substance legally.\textsuperscript{488} Consequently, Dutch citizens are found to use the drug more modestly than other Europeans and also, contrary to the idea that cannabis is a gateway drug, the Netherlands’ “continuation”


rate for using marijuana from a causal experimentation in youth to regular usage in adulthood (ages 15-34) is fairly modest by international standards.  

Therefore, other governments should perhaps consider following suit as, among other reasons, it is arguable that incarceration for something as trivial as personal consumption of ‘soft’ drugs is not only ineffective (evidently in many cases, including Brunei, with its consistently high drug crime level) and counter-productive, but also a dispensable use of national resources and prison space.

**Financial difficulty:** Despite what can be understood from Fig. 3, financial difficulty may be one of the most common factors for, if not narcotic consumption, trafficking. Based on 2013’s statistics, an NCB assistant director said that nearly 60% of individuals arrested for drug charges that year were jobless.  

There is undoubtedly a link between unemployment and drug abuse. One study finds that ‘unemployment is a significant risk factor for substance use and the

489  Kathleen Maclay, ‘New research points to lessons from Dutch cannabis system’ *Berkeley News* (13 September)


subsequent development of substance use disorders and increases the risk of relapse after alcohol and drug addiction treatment.\textsuperscript{492}

In light of this, not only would it be quite unjust to imprison a financially struggling drug offender and exacerbate their situation as well as their family’s, but it would also be against the true objectives of the law. Additionally, as stated earlier, it will be counterproductive in that, as the study also finds, ‘problematic substance use increases the likelihood of unemployment and decreases the chance of finding and holding down a job.’ This may lead a drug offender to relapse to find temporary solace, or worse, be involved in narcotic trade for income. In fact, risking arrest for drug dealing may be a win-win situation for the ‘legally unemployed’ as imprisonment would grant them some benefits like free food, shelter, clothing, healthcare, drug treatment, possibly even an education and work, and more importantly, it would lift some financial burden off their family.

Therefore, because the notion of prison might actually incentivise the financially troubled to undertake illegal means for income among many other reasons, incarceration may not be the best way to address drug problems. So other measures should perhaps be examined and taken into consideration.

IV. Measures

Are heavy punishments, i.e. the death penalty and lengthy imprisonment, really effective in deterring drug offenders? They certainly are not in Brunei where drug consumption and arrests are still on the rise despite the existence of supposed deterrents. On the other hand, Japan has some the world's toughest drug laws where its Pharmaceutical Affairs Law bans the production and sale of 68 types of drugs and is based on a zerotolerance policy. This has resulted in low illicit substance use, but it is difficult to determine whether this can be attributed to the harsh penalties or a traditional cultural opposition to drugs and the fact that in Japanese society, conformity is valued.\textsuperscript{493} Writing about theories of criminal punishment, Minnesota Law professor Michael Tonry expressed that a legal system should be effective in deterring wrongdoers, while upholding their rights of life, essential freedom and hearing. An achievement in 20\textsuperscript{th} century criminal legislation was a kind of devaluation of this aggravation which was accomplished by replacing old casuistic rules with more flexible models of regulation\textsuperscript{494}. This will be elaborated below.

Is Harm Reduction Better Than Complete Prohibition?


\textsuperscript{494} Michael Tonry, \textit{Why Punish? How Much?}: \textit{A Reader on Punishment} (OUP 2011)
Harm reduction is a policy aimed to reduce the negative (legal) outcomes of drug use. It is an alternative to heavy penalties like fines, prison sentences and the death penalty which are ineffective and do not necessarily uphold the rights of individuals who use narcotics. A prime example of a government with this approach would be Portugal, where personal drug consumptions would warrant treatment instead of imprisonment. This is highly unconventional compared to the zero-tolerance policies popularized by campaigns such as Nixon’s ‘war on drugs’ which involve heavy, violent measures to curb drug trafficking and other drug-related offences. As a result, this led to mass incarcerations and systemic human rights abuses in the US during the 20th century.

Some have described complete drug prohibition (such as that practiced by the Nixon administration) as an ‘irrational type of policy doomed for failure’; however, bureaucrats see legalisation (to any extent) as an ‘utter disaster’. Support for the zero-tolerance policy stems from ideas like the gateway drug theory which was popularised by Harry Anslinger who, during hearings for his Marihuana Tax Act of 1937, testified to Congress that marijuana would make people ‘insane and die’. To this, a doctor from the American Medical Association rebutted by saying that the

497 A major player in the US war on drugs who drafted the Marihuana Tax Act of 1937
statement was invalid as the association had been using the product in medication for decades and no psychological harm had affected patients. Anslinger counter-argued that while this may be true, people might become curious about more potent drugs such as opium or cocaine. Hence, the idea that cannabis is a ‘gateway drug’ to more serious narcotics was created. This gateway theory resulted in the opposition of harm reduction policies, fearing that users might develop addiction and thus worsen the country’s drug problems. These prohibitionists also contended that drug prohibition would make supplying more difficult, as quantities will fall and prices will rise. However, this belief is far from reality.

American economist Mark Thornton,498 who has written about drug prohibition, argued that transportation costs actually increases revenues for drug trade. It is generally expensive (and risky due to trade regulations) to ship commodities from one place to another, especially across borders and overseas; thus, to sellers, as they are going to incur transportation charges anyway, they will be incentivized to make it worthwhile, by sending their most valuable products. This very idea applies to illegal drugs as well. In South America, the price of highly potent cannabis would actually only be 10 dollars per pound. However, thousands of dollars are added to the price due to the aforementioned risks and transportation costs. In the early 1970s, cannabis in the US only had a maximum average potency of 0.4%. However in recent years, the average potency has risen to 10%. Moreover, the market has moved on to stronger drugs like heroin and meth which, unlike cannabis, can be chemically manufactured and not grown; accordingly, not

498 Mark Thornton, ‘How We Won the Drug War’ (Mises Institute, Alabama, 23 July 2015) <https://www.youtube.com/watch?v=eUArFo5MSlQ> accessed 30 April 2017
requiring transportation. The iron law of prohibition, as coined by Richard Cowan⁴⁹⁹ in 1986, states that as law enforcement becomes more intense, the potency of prohibited substances increases.

With that said, the ‘war on drugs’ as founded by the 37th US President, Richard Nixon, in 1971 has no benefits and has only increased costs. Worse, it has led to the creation of even more harmful substances. Policy shift towards harm reduction, through ending drugs use criminalization; and implementing proportional sentences and alternatives to incarceration, have been advocated for over the past few decades by a growing number of countries on the basis of the legal latitude allowed under UN treaties. Further exploration of flexible interpretations of drug treaties is an important objective; but ultimately, the global drug control regime must be reformed to permit responsible legal regulation.⁵⁰⁰

Drug Decriminalisation

Decriminalisation involves the removal of criminal penalties for drug law violations which would result in no prosecution, fine, imprisonment or execution. In some parts of South America, possessions of small amounts of cannabis for personal consumption are treated like minor traffic violations. However,

⁴⁹⁹ Former director of the National Organization for the Reform of Marijuana Laws (NORML)
⁵⁰⁰ Fernando Henrique Cardoso, ‘Five Ways to End the Drug War; Start By Decriminalizing Drug use’ (Huffington Post) <http://www.huffingtonpost.com/fernando-henrique-cardoso/end-global-drugwar_b_5799150.html> accessed 30 April 2017
possessing larger quantities and, of course, drug trade still lead to severe penalties.\textsuperscript{501}

After the Carnation Revolution of Portugal on 25 April 1974, the newfound freedom, after a shift from an authoritarian regime to a democratic one, also engendered an attitude shift regarding hard drug use. Subsequently, by 1999, nearly 1\% of the population had drug addiction and the country’s drug-induced death rate was the highest in the European Union (EU). After multiple failed attempts to manage this serious problem, the republic decided to experiment with the unconventional approach of decriminalisation or descriminalização, a legal framework implemented in 2001, whereby a user, instead of incarceration, would be sent to the Commission for the Dissuasion of Drug Addiction for treatment if found to be in the possession of less than a 10-day supply of illicit substances. The Commission would sometimes recommend a fine or more often, release patients without a single penalty. The results of this approach have shown it to be remarkable.

\textsuperscript{501} Marijuana Decriminalization Overview (\textit{FindLaw})

Long before drug decriminalisation was implemented in Portugal, one in every 100 citizen abused heroin. As a result, the nation's drug-induced death rates were surging in the 1990s. However, with the new policy, this figure declined significantly to only three per million dying from overdose. This is exemplary compared to other European countries, for example, the Netherlands, with 10.3 deaths per million and Estonia with 126.8 deaths per million.  

Furthermore, a 2015 report from the Transform Drug Policy Foundation confirms that overdose remains at a rate that keeps Portugal well below the European average of 17.3 deaths per million.\(^{503}\) As a result, Portugal has the second lowest drug overdose rate in the European region as shown above.

Furthermore, the use of cannabis between 2001 and 2012 plummeted by 5\% and by 2012, the use of cocaine and heroin among adults had become nearly non-existent. Additionally, the

\(^{503}\) Zeeshan Aleem, ‘14 Years After Decriminalizing Drugs, This Chart Shows Why Portugal’s Bold Risk Paid Off’ *The Mic* (USA, 10 June 2015) <https://mic.com/articles/120403/14-years-after-decriminalizing-drugs-onechart-shows-why-portugal-s-experiment-has-worked#a59B5j1wu> accessed 30 April 2017
second chart above\textsuperscript{504} shows an obvious decrease in drug-related convictions before and after the decriminalisation. Portugal's current drug-induced death rate is three per million residents, more than five times lower than the EU's average of 17.3.\textsuperscript{505} The drug-related crimes have significantly declined, owing much to the new policy which, for some, has become an ideal remedy.

The movement towards decriminalisation is already gaining momentum in US states such as Colorado, Oregon, Alaska and Washington, which have legalised the recreational use of marijuana. A city in Washington, Seattle, is leading the change towards a more compassionate and rational approach of enforcement for more potent drugs by introducing the Law Enforcement Assisted Diversion (LEAD) programme wherein users are assigned a case manager who helps provide them with treatment, counselling, mental health services and even housing, instead of being sentenced to jail.\textsuperscript{506}

These harm reduction methods stand in stark contrast to Brunei's current policy. They are clearly effective in addressing the major


\textsuperscript{506} 10 Countries That Ended Their War On Drugs Inspire Malibu <https://www.inspiremalibu.com/blog/drugaddiction/10-countries-that-ended-their-war-on-drugs> accessed 30 April 2017
factors of drug abuse and the results have been consistently positive. For instance, the rise of substance use and subsequent addiction that resulted from Portugal's Carnation Revolution declined significantly upon narcotics decriminalization, removing the nation's infamy for having the highest death rate resulting from drug overdose in the EU. However, given the Bruneian government's devotion to the regional vision of a 'drugs-free ASEAN', with a zero-tolerance approach to narcotics, it cannot be expected that they will even consider such measures. Nonetheless, the administration still needs to at least acknowledge that its current severe approach to illicit substances is not making any positive changes. Perhaps drug abuse should no longer be seen as a crime and instead be treated as a health issue in order to genuinely improve societal welfare and address the real issues pertaining to drug abuse without diminishing the nation's workforce and unnecessarily spending budgets on incarceration and executions.

V. Conclusion

To answer the question posed by the title, Brunei is not even close to the conclusion of its relatively small battle against illicit substances that has been waged since before 1988, the year the NCB was established to address the nation's increasingly worrying drug problems. This conclusion is drawn from the simple fact that the country's yearly number of drug-related cases is still among the highest it has seen. Keeping in mind that a majority of these cases are related to personal consumption (as opposed to more serious, corrupting problems such as trafficking and production), we are perhaps taking a faulty approach to the situation. Rather than
investing the nation's workforce and resources (which could instead go into job creation, improving infrastructure, etc.) on penalising these individuals whose personal narcotic use is, on the grand scheme of things, rather trivial, legislators should maybe start considering other alternatives to tackling the drug situation (as the current penalties are also rarely effective). The alternative of decriminalising drugs has certainly proved useful in Portugal where, against all odds, it overcame its overdose crisis and much more. Additionally, by treating narcotics addiction as a health issue (instead of demonising and worsening the users' life conditions), the nation deals with drug problems in a genuinely helpful and substantial way. Although decriminalization shall be exemplified, for a country devoted to the more conventional zero-tolerance policy like Brunei, it could take decades, if ever, to adopt a similar approach.
Defeating Inverted Pentagrams: Criminal Liabilities of the Chief of State and His Minions in Errant War on Drugs

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ABSTRACT

In light of the Philippines President Rodrigo Duterte’s War on Drugs, this article discusses several key issues which relate to its implementation. It discusses Operation Tokhang and notes that the extrajudicial killings (EJK) accompanying it show the failure of the Executives to uphold Republic Act No. 9165, or the Comprehensive Dangerous Drugs Act of 2002. It analyzes legislations and cases which could give rise to criminal liabilities of the Commander-in-Chief and errant law enforcers under domestic and international criminal law, despite the cloak of Presidential Immunity and the ability of the Chief Executive to

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grant absolute pardon. It also discusses various legal remedies for citizens directly and indirectly affected by Duterte's administration of the War on Drugs, and posits that the Courts retain the power to prevent these abuses from further happening, as well as penalize those who have exceeded the scope of their authorities and exercised abuse of power.

**INTRODUCTION**

The Inverted Pentagram is associated with black magic lore as a circle of protection. Once inside it, the user seems invincible against the maleficent effects of the dark magic he practices. The same can be said to hold true for an errant Chief-of-State; by virtue of the concept of Presidential Immunity from Suit, he may cast far-reaching damages from the safety of his demonic circle.

But as it is in popular lore, the hands of justice grant legal mechanisms to hinder this grave and deadly abuse of power.

The prevailing law on the matter of drug abuse in the Philippines is Republic Act No. 9165, or the Dangerous Drugs Act of 2002. It is mala prohibita in nature; certain acts relating to the use, possession, transport and trade of illegal substances, controlled precursors and essential chemicals are punishable by the law, regardless of motive or intent. Fines range from PHP10,000 to PHP15,000,000; the minimum term of imprisonment is six (6)
months; and the death penalty is the maximum imposable punishment. As the death penalty is suspended, this sentence is normally commuted to life imprisonment; but with recent developments, in the Philippines legislature, pushing for the re-imposition of the death penalty, this can spell death by lethal injection, hanging or firing squad.508

Under the strict letter of the law, possession of as little as 10 grams of an illegal drug can be punishable by death. However, this harsh penalty is tempered by the law itself; under its implementing rules and regulations, the meticulous manner by which a person can be convicted of the crime, particularly of possession, is provided.509 In fact, it even provides the sanction of death for people who are found to have planted evidence on unsuspecting persons. Furthermore, in People v. Gutierrez,510 the Court stated that the corpus delicti to be presented as evidence must follow the chain of custody rule, as defined by Section 1(b) of the Dangerous Drugs Regulation No. 1, Series of 2002:

Chain of Custody means the duly recorded authorized movements and custody of seized drugs or controlled chemicals or plants source of dangerous drugs or laboratory equipment at each stage, from the time of seizure/confiscation to receipt in the forensic laboratory


510 People v. Gutierrez, G.R. No. 179213 (2009)
to safekeeping to presentation in court and destruction. Such record of movements and custody of the seized item shall include the identity and signature of the person who held temporary custody of the seized item, the dates and times when such transfers of custody were made in the course of safekeeping and use in court as evidence, and the final disposition.

This process, which involves the transfer and documentation of the evidence from the arresting officer to the investigating officer, and then to the forensic chemist, and finally the court trying the case, is required to be strictly followed. Non-compliance therewith will result in a denial of due process for the accused, constituting grounds for the dismissal of the criminal case.

Unfortunately, in the implementation of Republic Act 9165, police officers are taking shortcuts. By killing those who are guilty of possession in alleged buy-bust operations, they do not have to comply with these lengthy reportorial requirements. All they have to allege in the police reports would be that there was an altercation and the suspect fought back, popularly known in the Philippines as ‘nanlaban’, and cases like these are closed without
further investigation.\textsuperscript{511}\textsuperscript{512} Other cases of extrajudicial killings involve masked men, also reportedly police officers,\textsuperscript{513} killing those who are suspected drug addicts and small-time pushers, some of whom have previously surrendered to the police and are alleged to be on their way to reform, off the streets.

Alarmingly, these practices are now very widespread. As of December 2016, a mere six (6) months after President Duterte has assumed the Presidency, nearly 6,000 cases have been reported by the Philippine National Police (PNP).\textsuperscript{514} While, of course, these

\textsuperscript{511} There are many various instances where the ‘nanlaban’ excuse has been used, including incredulous ones such as when the accused had his hands cuffed behind his back, when the accused is under the custody of the government with no reasonable access to guns, or even when ballistics report reveal that the victim was lying down and most likely asleep. These news reports are but a few. Bea Cupin ‘Nanlaban sila: Duterte’s war on drugs’ (Rappler, September 1 2016) <www.rappler.com/newsbreak/in-depth/143905-war-on-drugs-pnp-duterte> accessed 20 February 2017; ABS-CBN News. Nanlaban umano Hinilibang tulad ng droga, patay sa Maynila’ (ABS CBN News, January 5 2017) <http://news.abs-cbn.com/video/news/01/05/17/nanlaban-umanohinibalang-tulad-ng-droga-patay-sa-maynila> accessed 20 February 2017; Lottie Salarda ‘Nanlaban? | With video. Albuera Mayor Espinosa killed in Leyte jail’ (Interaksyon News, November 5 2016) <http://interaksyon.com/article/133992/nanlaban-albuera-mayor-espinosa-killed-in-leyte-jail-cell> accessed 20 February 2017; Christina Mendez ‘Suspect unarmed? Give him a gun’ (The Philippine Star, December 20, <http://www.philstar.com/headlines/2016/12/20/1655205/suspect-unarmed-give-him-gun> accessed 20 February 2017


\textsuperscript{513} Kimberly Tan ‘More than 5,800 killed amid drug war on drugs. PNP’ (ABS CBN News, December 6 2016) < http://news.abs-cbn.com/news/12/06/16/more-than-5800-killed-amid-war-on-drugs-pnp> accessed 20 February 2017; Jaime Laude ‘PNP: 4,605

242
are not all attributable to errant police officers, the culture of impunity can be reasonably attributable to the Chief Executive, who has repeatedly promised the police his support and protection,\textsuperscript{515} despite official and verified reports of police abuse of power.\textsuperscript{516}

The drug problem does exist. It is undeniable that with the increase in the ease of use of technology and transportation, the illegal drug trade problem has grown in the past decade,\textsuperscript{517} and this problem concerns the smallest of Filipino communities\textsuperscript{518} to international entities such as the Association of Southeast Asian

\textsuperscript{515} Christina Mendez 'Duterte to PNP: Kill 1,000, I'll protect you' \textit{The Philippine Star}, July 2, 2016 <http://www.philstar.com/headlines/2016/07/02/1598740/duterte-pnp-kill-1000-ill-protect-you> accessed 20 February 2017


Nations (ASEAN). However, Philippines President Duterte’s War on Drugs is ill-informed at best.

In his rants during live media coverage, he has promised to kill more than 3 million Filipinos who are involved in the drug trade, making no differentiation between multinational drug cartels, small-time dealers, or victims of substance use disorder. The targets of his campaign of blood and gore remain the poor and the helpless, as no crackdown has yet been made on international organizations; and from the looks of it, none will be. This War on Drugs, nicknamed ‘Oplan Tokhang’, has turned into a War against the Poor.

This is alarming because not only does it have short-term repercussions, translating into a mass murder of those suffering from substance use disorder, it has long-term and wideranging repercussions as well, from personal to cultural and even economic and political. Not only are the families of the victims affected, it also affords a culture of impunity for both errant police officers and criminals seeking to commit felonies under the guise of vigilante

killings. These, in turn, create political and economic tensions, particularly in the international community, whose members' aid and support in the Philippines are slowly being withdrawn in light of Duterte's unreasonable stance on the War on Drugs.\textsuperscript{522} The damages that these may cause extend beyond his six-year term.

This review posits that the method by which Duterte addresses this growing problem is not only grossly unconstitutional, it also goes against international human rights law, and can make the President liable under the Rome Statute and the International Criminal Court, regardless of whether he chooses to withdraw from it or not.

ISSUES

There are three key issues to be discussed this article:

1. What are the remedies against the continued implementation of \textit{Oplan Tokhang}?

2. Can the members of the Philippine National Police, as law enforcers, be liable when it comes to the community implementation of a flawed order from the Chief Executive?

\textsuperscript{522} Phelim Kine 'Duterte's abusive 'war on drugs' risks foreign aid' \textit{(Asia Times}, December 19 2016) <https://www.hrw.org/news/2016/12/19/dutertes-abusive-war-drugs-risks-foreign-aid> accessed 20 February 2017
3. Can the President be liable as Commander-in-Chief for his misguided and malinformed War on Drugs?

REGULATIONS

For the first question, we turn to the legal basis of Oplan Tokhang, which is Republic Act No. 9165, otherwise known as the Comprehensive Dangerous Drugs Act of 2002. Further guidance is provided in its Implementing Rules and Regulations, promulgated by the Executive. We will analyze the actions under Oplan Tokhang and see whether they follow the guidelines set by both RA 9165 and the 1987 Constitution. If the answer is negative, we will seek remedies in the Supreme Court under the Revised Rules of Court to halt these actions.

The second question calls into fore the criminal provisions of the Revised Penal Code which, despite being promulgated in 1930, remains good law. Together, we will tackle their applications with the administrative penalties proposed under Republic Act No. 6713, which contains the Code of Conduct and ethical standards for government officials and employees, including the Dangerous Drugs Board, the Philippine Drug Enforcement Agency, and the Philippine National Police, the main implementation arm of the Executive when it comes to preventing and suppressing illegal drug trade. The author posits that they can also be held liable for damages under the Civil Code of 1950, but this is beyond the ambit of this paper.
The third question relates to the liability of the President. While the Chief Executive enjoys immunity from suit during his term, a principle upheld both in domestic jurisprudence and under international law, the conclusion of his Presidential tenure opens the gates for him to answer to the call of justice, not only as a driving force for murders under national laws, but also under Article VII of the Rome Statute. This can be hastened by a potential call for impeachment under the 1987 Constitution.

ANALYSES

**EJKs as Failure to Uphold RA 9165**

Republic Act No. 9165 provides guidance on how the anti-drug campaigns of the government should be implemented. *Oplan Tokhang* is the Philippine National Police’s massive national campaign against drugs, under the initiative of President Duterte. The name ‘tokhang’ is derived from the Visayan term ‘toktok hangyo’, meaning to knock and to plead. This program was originally spearheaded in Davao City back when President Duterte was still

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Mayor. In its nationwide implementation, officials of the barangay, the smallest local government unit in the country, are asked to produce a list of suspected drug personalities in the community. Police officers were to knock in the homes of suspected drug addicts and pushers, and plead with them to discontinue their illegal ways, hence ‘tokhang’. These persons are then asked to go to the police station to ‘surrender’, or otherwise face dire consequences.

This practice goes beyond the ambit of RA 9165. Under Article VII, the participation of local government units mandate that they allot a percentage of their respective annual budgets to assist in the enforcement of the law, either for educational or rehabilitation purposes, or abate drug-related public nuisances. Local government officials are not qualified by law to identify drug abusers and pushers; the most they can base their lists on are rumors and pure village hearsay. Based on this alone, they cannot even be called to court to testify.

There is indeed a provision for voluntary submission, of a drug dependent, to confinement, under Article VIII of RA 9165. However, such submission is not through forceful compulsion, nor for fear for one’s life. It does not involve any list which discriminates and seeks to sow fear in the community.

The implementation of Oplan Tokhang is clearly unconstitutional, going against the very essence of the Bill of Rights as enshrined in the 1987 Constitution. It removes the presumption of innocence from the accused, by virtue of only
hearsay evidence. It further subjects the right against self-incrimination invalid, as the suspects who are invited to the police station are made to sign documents that they promise to refrain from continuing their illegal drug-related activities,\textsuperscript{526} documents which, even to the eyes of the legally untrained, automatically makes them admit guilt of previous illicit actions. Due process is forgotten.

Vaguer, but similarly unconstitutional, are the extrajudicial killings related to \textit{Oplan Tokhang}. The term ‘extrajudicial killings’ refers to executions conducted by the police organ of the state without giving its victims their necessary day in court. In contrast, a judicial execution may refer to the imposition of the death penalty. Accidental deaths in cases of legitimate police operations may also be included under the second category. Extrajudicial killings remove the right to life of the accused without regard for due process and celebrate the culture of impunity. These killings can take varied forms, from vigilante killings by alleged police officers and their agents to legitimate buy-bust operations alleging that the suspects tried to fight their way out of the situation. Massive evidence, however, points to the police abuse of this aspect of \textit{Oplan Tokhang}, where officers liberally take the lives of suspects even when there exists no danger to justify such actions.

\textsuperscript{526} Cardinoza, Gabriel and Agoncillo, Jodee. 'Pushers give up en masse' \textit{(Philippine Daily Inquirer, June 29 2016)}

\url{http://newsinfo.inquirer.net/792984/pushers-give-up-en-masse} accessed 20 February 2017
The conclusion remains that *Oplan Tokhang* and its evil twin, EJK, are against the law which created it; additionally, it is grossly unconstitutional and immensely immoral. It is a grotesque failure in the implementation of the law, and tramples the most basic human rights.

Fortunately, the separation of power provides the concept of judicial review. When there exists grave abuse of discretion, or the lack or excess of jurisdiction in the exercise of powers granted by the State, the Judiciary can put its foot down and order such acts to cease.

Such power has been granted by the 1987 Constitution and made operational under Rule 65 of the Rules of Court. In the case of Operation *Tokhang*, a petition for certiorari, prohibition and mandamus can be made against it, to enjoin the Executive Arm from further implementing this bloody War on Drugs. Grounds for such action can be based on both the Constitution and international human rights laws, particularly those related to the protection of life and liberty without due process of law.

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38 PHIL CONST, art VIII, § 1.
Presently, *Oplan Tokhang* is geared towards stronger implementation, and it is up to lawyers to mount this powerful remedy from the courts to prevent more deaths of the citizens.

**Liability of Police Officers**

Another equally noteworthy aspect of this War on Drugs is the promise of President Duterte to pardon police officers who have killed in the line of duty, even commending them in doing so. Clearly, he does not intend to exercise the innate disciplinary powers that he has as the Chief Executive over the members of the PNP, despite recorded cases of grave errors on the part of the latter. Because of this, we turn again to the courts to implement the law.

Section 28 of RA 9165 governs the criminal liabilities of government officials and employees. It provides for the imposition of the maximum allowable penalty, including absolute perpetual disqualification from office. A common suspected crime committed by these police officers, that of planting of evidence, falls under Section 29, which is punishable by death.

Furthermore, under the Revised Penal Code and (support from) jurisprudence, a police officer going beyond the allowed

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mandate of duty and killing an accused, where such action is hardly necessary, is considered murder.  

Families of victims of EJKs, can file a suit against the erring police, it may be an administrative or a criminal case. Republic Act No. 6975, as amended by Republic Act No. 8551, provides for a section on Citizen’s Complaints, where an administrative complaint by any person, whether natural or juristic, against any member of the PNP, can be brought to Chiefs of Police, the Mayors of cities and municipalities and the People’s Law Enforcement Board, depending on the period of suspension to be imposed. However, in instances where criminal cases are filed, for planting of evidence, committing perjury and murder, etc., regular courts maintain exclusive jurisdiction.

Despite the promise of the sitting President to pardon the wrongdoings of policemen, it is also noteworthy that he may not even have the chance to do so. Before executive clemency can be granted, the Constitution requires that the accused first be convicted by final judgment. Under the Revised Penal Code, crimes which are punishable by death, reclusion perpetua or reclusion temporal have a prescription period of 20 years. Families of victims may then choose to file the appropriate criminal case once Duterte’s term is over; his term is limited to only six years.

This, however, is a lot easier said than done. While these are all valid and strategic legal remedies, they prove to be impractical for

43 Act No. 3815 (1930), art 90.
a good number of people who have been victimized by the police abuse of power. These victims are characterized as poor, and in many cases, uneducated.\textsuperscript{533} They do not have ready access to the criminal justice mechanism, and even if they do, it may prove to be too resource-draining in the long run, especially in a country where justice is very rarely served on time. Their voices are heard only when they cry out for justice in the media, but are still completely forgotten by the annals of the legal system. This is also precisely why these systematic abuses have to be stopped before more people are killed by the War on Drugs.

\textit{Liability of the President}

It is admittedly difficult to pinpoint individual members of the police who engage in vigilante killings, or who make \textit{Oplan Tokhang} a poor excuse to kill without reservations, much more to hold them accountable. After all, even if the justice system convicts these erring officials as criminals and dismisses them from service, the President can exercise his power of pardon and restore them to their positions \textit{tabula rasa}, ready to abuse again. In this case, we posit that the President himself can be liable.

Even without taking into account his numerous inflammatory statements, including his positive regard for the Holocaust and his promise to kill 3 million of his own people, Duterte stands as a leader whose words and actions enable his police forces to act with

\textsuperscript{533} Joseph Franco "The Philippines: War on Drugs is really a war on the poor" (The Global Observatory, August 10, 2016) <https://theglobalobservatory.org/2016/08/philippines-duterte-drugs-extrajudicial-killing-tokhang/> accessed 20 February 2017
impunity in dealing with civilians, particularly when it comes to the War on Drugs and EJKs.

Under ordinary circumstances, Duterte would be liable under the Revised Penal Code, not only for Crimes against Persons, embodying murder and physical injuries suffered by the people caught in the meshes of his War on Drugs, but also for Crimes against the Fundamental Laws of the State, which are committed upon his orders, including arbitrary detention and violation of domicile. However, due to the all-powerful concept of Presidential Immunity, President Duterte cannot be impleaded in the courts today. It is interesting to note that the 1973 Constitution has a provision to this effect, while the 1987 Constitution does not.534 This doctrine is also preserved in Philippine jurisprudence, particularly in Soliven v. Judge Makasiar, where it was held that ‘[t]he rationale for the grant to the President of the privilege of immunity from suit is to assure the exercise of Presidential duties and functions free from any hindrance or distraction, considering that being the Chief Executive of the Government is a job that, aside from requiring all of the office-holder’s time, also demands undivided attention.’535 This immunity, however, does not subsist beyond the term of office. In Estrada v. Desierto, the Court ruled that ‘unlawful acts of public officials are not acts of the State and the officer who acts illegally is not acting as such but stands in the same footing as any other trespasser.’536 This means that the moment that Duterte steps out, resigns, is impeached or is

46 535 G.R. No. 82585 (1988)
otherwise ousted from office, he can be liable for criminal acts that he has engendered. This concept can be likened to command responsibility, wherein given the knowledge that such crimes are being committed, he had grossly failed to prevent and punish such illegal acts of his subordinates.\footnote{Guenael Mettraux 'The Doctrine of Superior/Command Responsibility, Peace and Justice Initiative' (2016) <http://www.peaceandjusticeinitiative.org/implementation-resources/command-responsibility> accessed 20 February 2017}

But apart from national law, where arguably everything is a function of politics, Duterte is also liable under international criminal law. In fact, a number of legal commentators from the Philippines and the UN has noted that Duterte can be held liable under Article 5(b) of the Rome Statute, as defined under Article 7.\footnote{UN warns Duterte: Watch your mouth or be liable for crimes against humanity (Politics.com, January 10 2017) <http://politics.com.ph/un-warns-duterte-watch-mouth liable-crimes-humanity/> accessed 20 February 2017; Balagtas, Camille Balagtas, 'CHR Duterte can be held liable under ICC' (Sunstar Manila, August 23, 2016) <http://www.sunstar.com.ph/manila/local-news/20160824/chr-duterte-can-be-held LIABLE-UNDERICC-493199> accessed 20 February 2017} Crimes against humanity refer to 'the widespread or systematic attack directed against any civilian population, with knowledge of the attack, and include murder, extermination, persecution and other inhumane acts of similar character, intentionally causing great suffering or serious injury to body or to mental or physical health.'\footnote{Rome Statute (2002) art 7 (a)(b)(h)(k)} To commence investigations, a State Party may refer a situation to the Court, or the Prosecutor may motu proprio conduct it on the basis of available information.\footnote{Rome Statute (2002) arts 14, 15} In this particular case, presidential immunity does not apply, as official capacity is rendered irrelevant by the Rome Statute.\footnote{ibid art 27} In fact, heads of states...
of Sudan and Kenya have been charged before the ICC even during their incumbency. Applicable penalties may include imprisonment of up to 30 years, or in extreme cases, a life sentence, in addition to fines and forfeitures of proceeds, property and assets derived from the commission. More importantly, reparation can be ordered to be made to the victims, which may be in the form of restitution, compensation or rehabilitation, to name a few.

CONCLUSION

From this brief review we’ve established several important ideas:

Firstly, that Operation Tokhang is illegal, and intrudes upon the key rights of citizens envisioned not only by the Constitution but also by international human rights law.

Secondly, police officers can be held personally liable, both administratively and criminally, for such acts beyond the scope of their powers.

Thirdly, the President is also liable. Under national laws, he faces charges once he is stripped of the inverted pentagram masquerading as presidential immunity, but international law does not make any particular distinction.

Lastly, the answer could lie in the courts, whether it be the Philippine Courts or the International Criminal Court. Although once considered the little brother of Executive and the Legislative, the Judiciary now enjoys more freedom in the exercise of its supreme powers.

542 Joel Butuyan, 'Extrajudicial killings as crime against humanity' (Philippine Daily Inquirer, August 15 2016) <http://opinion.inquirer.net/96518/extrajudicial-killings-crime-humanity> accessed 20 February 2017
543 Rome Statute (n 32) arts 75, 79
While it is not, and cannot be, totally free from ravaging politics, it may hold the key to this dire situation that Filipinos currently face.
When Returning Back to The Society from Rehabilitation Centers – Suggestions for the Future

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Introduction

In most countries, drug abuse is a crime in the lens of the law. People label addicts as villains or trouble makers and want to put them in jail and/or punish them. However, many forget an important issue, eventually they will return to the society and participate as one of us again. Therefore, the outcome we should focus on is whether the addicts have rehabilitated when they are released from correctional facilities, instead of putting them in prisons.

According to yearly statistics, provided by Taiwan’s police administration, there were 53,622 offenders of the Narcotics Hazard Prevention Act in 2015. This is the second largest group of the eighteen criminal cases classification, which totals 269,296 offenders. In 2015, the number of prisoners who violated the Narcotics Hazard Prevention Act was 27,007, which equals to 47.7% of all prisoners in 2015. Most of them were convicted for

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using or possessing narcotics under Articles 10 and 11, causing overcrowded prisons.

Taiwan has invested a lot of police and legal resources in investigating, holding trials, and punishing drug offenders; yet, for the last 10 years, the number of drug offenders still remain very high. Also, repeat offenders\textsuperscript{546} account for no less than 90\% of drug offenders each year, from 2007 to 2011.\textsuperscript{547} This indicates that the way the Taiwanese government is fighting drugs is not effective, and that those who return to the society from correctional facilities have not been effectively rehabilitated.

In order to provide some suggestions on this issue, there is a need to first look at the current system to identify the problems. Secondly, there is a need to briefly go through the legislative history to determine the possibility of decriminalization. Through understanding these issues, it would be possible to propose some solutions to help drug addicts reintegrate.

**Discussion 1: New Direction to Help Drug Addicts**

I. The Current Rehabilitation System

Presently, drugs are divided into 4 categories based on their abilities to form negative habits, cause abusive usage, and threaten the society.\textsuperscript{548} Category 1 is the highest ranking, and consists of drugs such as heroin, morphine, opium and cocaine. People taking drugs under different categories will be subjected to different punishments. For example, under Article 10 of the Narcotics Hazard Prevention Act,

\textsuperscript{546} Refers to offenders with previous drug records (found guilty)
\textsuperscript{547} Taiwan Investigation Bureau, Ministry of Justice, *Drug crime prevention work year book 2011* (1\textsuperscript{st} edn, Investigation Bureau, Ministry of Justice 2012) p 67
\textsuperscript{548} Taiwan Narcotics Hazard Prevention Act art 2
Persons convicted of using Category one narcotics shall be punished with a minimum six-month to a maximum five-year fixed-term imprisonment. (Category two: maximum three-year fixed-term)

However, legislators now think that offenders should also be seen as patients; thus, first-time violators of Article 10, will have to go through a series of observations or rehabilitation, rather be directly jailed. This means they will face rehabilitation measures. According to Article 20 of the Narcotics Hazard Prevention Act,

‘...for persons convicted of the offenses described in Article 10 ...the accused... (should) be ordered to go into a rehabilitation center for observation or rehabilitation for a period of no longer than two months. After the observation and rehabilitation, the prosecutor should release the offender immediately ..., if...the rehabilitation center confirms that the person... exhibits no sign of continuing using narcotics. If the person ...exhibits the tendencies of continuing to use narcotics, the prosecutor should petition the court to order... for the offender to receive a compulsory rehabilitation program at a rehabilitation center for more than six months until there is no need for a compulsory rehabilitation. However, the longest duration shall not exceed one year.’

II. Problems with the Current Rehabilitation Centers
In one report, made by the Ministry of Justice, it is written that, in the localized rehabilitation model, rehabilitation centers have four characteristics:  

1) using professional medical treatment,  
2) rehabilitating by faith,  
3) emphasizing occupational education for addicts, and  
4) providing after-care for addicts.

The model did work; but the budget is inadequate, and the time spent in the rehabilitation centers are short (no more than a year). Consequently, the occupational education can only provide some basics and easy skills in gardening, cooking, and computer fixing.

Likewise, there are not enough social workers to keep track of the addicts and support them in reconnecting with their


550 The methods and frequencies which each rehabilitation center conducts this is slightly different. In general, it is done with the help of volunteers from local Buddhist or Christian associations or foundations. They enlighten the addicts by teaching scriptures, emotion control, carrying out group consultations, etc.

551 Since we have only 4 independent rehabilitation centers, the rest are attached to detention centers or prisons. It is not easy to compare the budgets for use in rehabilitation centers and those to be used in prisons. However, according to Bohong-Zhang, a former Superintendent of Siandian drug abuser treatment center, problems like overcrowding and lack of trained prison guards and officials are still unsolved. See Bohong-Zhang. (2014). Drug Rehabilitation Institution's research enterprise management (Chapter 5 : A review for current drug rehabilitation management). Chinese Correctional Association. Retrieved from http://www.corrections-cca.org.tw/index.php?do-publications_detail&id=14739 (accessed 29 May 2017)

552 Lack of budget is a problem for the whole criminal prison system. According to Yang Shilong, director of National Chung Cheng University’s crime research center, the government should raise the budget for all correctional cost. He said, “compared to police system which have 120 billion dollars, correction system should have 90 billion dollars rather than 10 billion dollars”.

families and the society. Therefore, many fall victims to drugs again even though they have behaved quite well in these rehabilitation centers. These reasons cause the recidivism rate to remain high, as mentioned in the foregoing paragraphs.

III. Suggestions for the Reformation of Rehabilitation Centers

Hsu, Heng-da, a criminal law professor at NCCU once said in a private discussion that, 'The problem is, when they leave rehabilitation center or even prison, the environment they live with remain the same as before.' Li, Mao-Sheng, a criminal law professor at NTU also expressed his opinion to the media,\(^553\) he said: 'Family, education, [and] environment issues always stay behind drugs problem.' He suggests that the government should establish an intermediary organization to act as the bridge between the closed rehabilitation centers and the ‘cruel society’.

Moreover, from the author’s point of view, the government should build a more comprehensive process to rehabilitate and recruit more social workers to enhance tracking, helping, and the accompaniment of drug addicts.

In addition, having a stable job means having financial independence. The government should figure out a better way to subsidize companies\(^554\) and help the rehabilitated offenders

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\(^{554}\) Employment insurance to promote the implementation of employment regulations was enacted in 2010, making employers hire workers who are unemployed for at least 30 days or those having the status recognized as underprivileged like being physically challenged, aboriginals, or discharged prisoners, etc. However, it does not seem to be working so well. This issue is worthy of further research and analyses.
reintegrate and be accepted by the public. With government subsidies and incentive schemes, companies will be incentivize to hire them. This consequently creates a strong social security network. The author believes that by doing so, we can help them reconnect and strengthen bonds with their families and the society.

Discussion 2: The Possibility of Decriminalizing Drug Abuse

I. Why we see drug abuse as a crime

If we look back on Taiwan's legislative history, we can see the strict attitude towards drug abusers since 1955, when the 'Drug Control Act during the Period for Suppression of the Communist Rebellion' was enacted. Drug users would be sentenced to no less than three years and no more than seven years, and if the offender violates the crime for the third time, the death penalty will be imposed. Although in 1998, the Narcotics Hazard Prevention Act replaced the former law and claims the offenders to be both criminal and patient, the law still punishes the drug taker.

The decision as to whether a regulation is constitutional or not is made by the Taiwan Constitutional Court. In its interpretation, No.544, the court gave legitimacy to sentencing illegal drug takers to imprisonment under the Narcotics Hazard Prevention Act, ‘...The use of narcotics damages the physical and mental well-being of narcotic users and leads to the perpetration of crimes causing

49 According to a research done by Wen-Ju Li, employers are not only concerned about the salary, but also the risks to their reputation. Besides, the interests of the discharged prisoners also matter.
50 See Li min Ru, Wen-Ju Li, 'An Economic Analysis the linkage of rehabilitation to Social Bonding' (2010) pp
51 <http://handle.ncl.edu.tw/11296/ndltd/24567579124187042222>
serious harm to society. Therefore, the legislature must take necessary measures to regulate narcotics use and imprison narcotic users to prevent the widespread use of narcotics.

Based on the interpretation, we know that in the opinion of court, imprisoning a drug user is not unconstitutional. However, are such behaviors necessary to be punished by the criminal law? Why don’t we treat these drug addicts the same as those who drink alcohol or smoke cigarettes? If we take a closer look at the opinions of criminal law scholars and psychologists, we could understand why we should decriminalize drug abuse.

II. Legal reasons for decriminalization

In the lens of criminal law, the legitimacy of a crime is based on whether such behavior harms and violates others’ legally recognized interests, or briefly legal interests. For example, when a person is harmed or killed, his/her legal interest in his/her body or life is violated. However, if one commits suicide, one will not be sued for murder, because such person himself/herself is not an object of penal harm. That is, if the action of taking drugs only hurts no one but themselves, we shouldn’t see it as a crime. Therefore, as the action of taking drugs does not hurt others, physically and

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558 Taiwan accepted the principles of criminal law from Germany. Thus, 他傷不法 and 自傷不罰 are applied to review whether a behavior should be regarded as a crime.
legally, there’s no reason to deprive drugs users from their liberty.559

A similar issue could be seen in the United States’s case of *Robinson v. California*.560 The police arrested Robinson under Californian law, which makes it a misdemeanor to ‘be addicted to the use of narcotics’, based on the marks on his right arm which resulted from injection needles. Robinson was convicted by the jury and sentenced to 90 days imprisonment. In the end, this case went to the supreme court.

The opinion of the Court delivered by Justice Stewart was:

‘This statute,561 therefore, is not one which punishes a person for the use of narcotics, for their purchase, sale or possession, or for antisocial or disorderly behavior resulting from their administration. It is not a law which even purports to provide or require medical treatment. Rather, we deal with a statute which makes the "status" of narcotic addiction a criminal offense, for which the offender may be prosecuted "at any time before he reforms." California has said that a person can be continuously guilty of this offense, whether or not he has ever used or possessed any narcotics within the State, and whether or not he has been

559 In the U.S. legal system, liberty is more emphasized than the principles of law, “The established right to bodily integrity encompasses the right to harm oneself, since such behavior involves no one but the person taking part in it, and also causes direct physical harm to no one but that person. Therefore, the right to engage in self-injury without fear of involuntary psychiatric commitment is a constitutionally protected right, since it is directly related to a right already established as a protected liberty interest under the Due Process Clause.” See Kristin Carr (2004). The Right to Self-Harm 42
560 370 U.S. 660 (1962)
561 California Health and Safety Code art 11721
guilty of any antisocial behavior there....We hold that a state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment. To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. *Even one day in prison would be a cruel and unusual punishment for the "crime" of having a common cold.* We can see that the justice thinks that the law which makes narcotic addiction a criminal offense and enforces punishment to a patient is unconstitutional.

Besides, there is a social science theory known as the 'labeling theory', which explains that self-identity and behavior of individuals may be influenced by the terms used to describe them or, simply said, the stereotypes and even discriminations. Applying this theory to situations of drug abuse, when we see offenders as criminals and label them as threats or villains, they will behave worse, to fit the society's opinion of them.\(^{562}\) It is an awful vicious circle which we have constructed unconsciously, making it harder for addicts to return to the society. Therefore, to open our minds to accept the addicts and not label them as criminals, through decriminalization, it will be easier for them to escape the vicious circle and be accepted by the society.

Also, we can refer to Portugal's policy as a model in reshaping our legal system. Portugal made a unique policy that

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\(^{562}\) Liu, Yueh-Lin 'A Study of Drug Use Prevention Policy in Taiwan from the Characterization of Drugs' Masters dissertation 2015 p 76
decriminalized all drugs in 2001,⁵⁶³ from marijuana to crack, and diverted the money used for the juridical system - arresting and imprisoning addicts - to treatment.⁵⁶⁴ This meant that personal drugs possession is not treated as a criminal offense, and that health and harm reduction services have been significantly expanded.⁵⁶⁵

The results⁵⁶⁶ of the policy, in Portugal, are very inspiring; drugs use has declined amongst people between the age of 15 to 24 years old. The proportion of the population who has never used drugs continue to increase. Drugs-deduced death also decreased, from 80%, significantly, and numbers of HIV positive addicts is massively decreased. The policy’s a good example for countries, like Taiwan, which are still waging war on drugs, to reconsider whether their strict policies really are the best option.

Above are the legal reasons for decriminalization. Next, the psychological side will be explored.

III. Psychological Reasons for Decriminalization

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⁵⁶³ Portugal decriminalized the personal possession of all drugs in 2001. However, this means that, although it is no longer a criminal offence to possess drugs for personal use, it is still an administrative violation, punishable by penalties such as fines or community service.

See Transform, 'Drug decriminalisation in Portugal: setting the record straight'

Transform (United Kingdom, 11 June 2014) <www.tdpf.org.uk/blog/drug-decriminalisation-portugal-setting-record-straight> (accessed 31 March 2017)

⁵⁶⁴ Juriaan van Eerten, 'Portugal: Fifteen years of decriminalised drug policy' Al Jazeera (Portugal, 15 November 2016)


⁵⁶⁵ Transofrm,'The success of Portugal-s decriminalisation policy in seven charts'


⁵⁶⁶ ibid
Bruce Alexander is a psychologist and professor of Psychology at Simon Fraser University, Vancouver, who has taught and conducted research on the psychology of addiction since 1970. He carried out an incredible experiment to prove that our idea towards addiction is wrong.\textsuperscript{567}

Unlike previous experiments which provided normal water and drugged water for rats in empty and isolated cages to drink, he built a cage which he calls `Rat Park`, `filled with things that rats like, such as platforms for climbing, tin cans for hiding in, wood chips for strewing around, and running wheels for exercise`. Moreover, they’ve got loads of friends and even a boy/girlfriend. Surely, he still provided normal water and drugged water (morphine solution) for the rats to drink.

Professor Alexander realized that the rats do not like drugged water if they lived in a rat park. Rats in isolated cages consumed a lot more morphine solution when compared to the rats in `Rat Park`, called `Social Females and Males`, which consumed hardly any.\textsuperscript{568} This points out that the real reason for drugs taking, which leads to addiction, is the lost of bonding with the society. If so, putting drug abusers into jail is not only vain but also cruel.

\textbf{Conclusion}

The author believes the reasons that people are not addicted to drugs are having a loving home and family to connect and socialize with, having goals to chase after in life, and receiving financial and emotional support from family members. However, those who have lost all their bonds with others and become isolated, by nature, have

\textsuperscript{568} ibid
no choice but to resort to things like drugs which can give them some sense of relaxation and relief.\footnote{569}

The current system in Taiwan is not successful because of the inadequate rehabilitation process and limited financial resources. Also, strict law for drug takers, which labels them, challenge them with unfriendly situations even when they want to turn to and become a part of the society again. It seems almost hopeless for them to restart a new life.

However, through this article, we now know what the addicts need to get rid of drugs. It is not more punishment, but the emotional and financial support. Therefore, we should encourage the government and the public to change their attitude. Whether it be building an organization to promote this idea or writing a letter to the media or the government, there is a need to let the society know that there are ways to solve drug abuse problems. That is, to perfect our current rehabilitation centers by hiring more social workers and offering more vocational education. At the same time, improving the system by subsidizing enterprise to hire addicts and establish an intermediary organization to accompany them. It is important that the government lets the addicts know that they’re not alone, isolated and abandoned. Additionally, efforts should be made to decriminalize drug taking, or at least, lower the punishment so that they will no longer have to face unjust punishments and the unfriendly society. The author believes that there is always hope and that we all have the responsibility to change the world and make our society a better place.

\footnote{569 The idea was mentioned in TED talk by Johann Hari on ‘Everything you think you know about addiction is wrong’.}
Bridging law students in Asia & Europe: The importance of global legal cooperation

The long distance between Tokyo and Brussels and the time difference could not be perceived as obstacles and, in the end, they have been annihilated, when it came to identify that ALSA and ELSA have something more in common: two leading legal publications. Founded in 2007, the ALSA Law Review is a student-run journal published annually by Asian Law Students’ Association (ALSA) International. Focused on diversity in a shifting legal landscape of Asian countries, the ALSA Law Review has grown significantly over years and seeks to publish timely and important legal articles. The ELSA Law Review - founded in early 80s and re-established in 2015 - is a student-edited and peer-reviewed law journal published by the European Law Students’ Association (ELSA). The ELSA Law Review strives to create an open forum for legal analysis and discussion and it serves as an international platform through which engaged law students, graduates and young legal professionals can showcase their legal research.

As the premier regional law students’ organizations, ALSA and ELSA realize the challenges that arise from the varied legal systems and educational approaches of different countries and regions. It is beyond question that understanding social, economic, and educational factors that have shaped the legal views, principles, and systems of different jurisdictions benefits anyone who studies law. Striving for excellence, our Law Reviews provide a platform for law students with diverse backgrounds to
engage in dialogue on current legal issues of global interest, as well as motivate them to enhance their research and writing skills. Additionally, these publications aim to provide an enthusiastic international readership with access to scholarly discussion of contemporary legal issues, exposure to which they may otherwise not have. The core of importance of this project is the free provision of a comprehensible source of legal knowledge tailored to young students’ demands. ‘Bridging law students in Asia & Europe: The importance of global legal cooperation

As the world is becoming smaller by globalization, Asia and Europe foresee greater legal cooperation. The initiation of this goal is clearly based on a big vision: by publishing simultaneously our work and exchanging legal opinions by our members, we do not only expand the reach of our reading audience, but we set the basis for the establishment of a frequent communication which is aspiring to bring concrete outcomes in the future and unite the populations when it comes to resolution of legal matters - and potentially issues of other fields as well. We believe that our new initiative will be a stepping-stone to bridging law students in the world’s two most diverse regions, as the enhancement of legal capabilities of students cannot be achieved without the exchange of knowledge with one another.
THE RIGHT TO LIFE IN ARMED CONFLICT: THE RATIO OF THE NORMS OF INTERNATIONAL HUMANITARIAN LAW AND THE NORMS OF INTERNATIONAL HUMAN RIGHTS LAW.

Sergey Y. Garkusha-Bozhko

ABSTRACT

The right to life is a fundamental human right. But despite this, during armed conflicts it is broken due to the nature of the armed conflict. International humanitarian law contain provisions that protect the right to life in armed conflict. But the question arises about the correlation of these norms with the norms of human rights law. This problem devoted this article.

Chapter I discloses the lawfulness of deprivation of life in armed conflict under the norms international humanitarian law. Chapter II discloses the lawfulness of deprivation of life in armed conflict under human rights law. Finally, Chapter III reveals such term as “integrated verification of the lawfulness of the deprivation of life in the use of force in armed conflict”. This verification test was developed by the international human rights judicial bodies and actively used by them.

Finally, the author comes to the conclusion that the cases of deprivation of life during armed conflict in the first place should apply rules of international humanitarian law and human rights law applies subsidiary.

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INTRODUCTION.

The right to life is a fundamental human right. This right is the basis for all other human rights – no life – no person, no his rights. The importance of the right to life is huge. Article 3 of the universal Declaration of human rights proclaims: “Everyone has the right to life”.571 The International Covenant on civil and political rights establishes that the right to life is an inalienable right of every human being. This right is protected by law. No one may be arbitrarily deprived of life.572 The importance of this right is confirmed by his enshrinement at the national level, for example, article 20 of the Constitution of The Russian Federation enshrines the right to life573. The right to life is an absolute right, but some scientists disagree with this statement574. It is also important to international control over the observance of this right575.

But what about the right to life in armed conflict? In any war, murder is commonplace: the parties of the armed conflict are killing each other and especially the right to life is thing assault of many international crimes576. In context of military conflicts the protection of the right to life takes on special meaning577. There is a problem of the relation of international human rights law and international humanitarian law, more precisely, the law of armed conflict.

571 UNGA res 217 (III), 10 Dec 1948 ‘Universal Declaration of Human Rights’.
This is one of the most important issues of international law. In the scientific world does not cease sharp debates about the relation of these two branches of the rules regarding the protection of a fundamental human right - the right to life. There are various theories of ratio of different rules. It is the competitive theory, according to which the rules of these branches do not intersect. It is complementary theory, according to which the rules in these sectors intersect, and, finally, integration theory, according to which the rules in these branches of international law have a single nature. The diversity of approaches gives rise to controversy, so this topic is so relevant.

CHAPTER I. THE LAWFULNESS OF DEPRIVATION OF LIFE IN ARMED CONFLICT UNDER INTERNATIONAL HUMANITARIAN LAW

If we compare the regulation of the right to life under international humanitarian law and international human rights law, it can be concluded that many of the rules are the same, for example, the prohibition of arbitrary and deliberate taking of life, the prohibition of extrajudicial executions and etc. Many of the provisions are different, but compatible and complement each other, for example, rules on the investigation of violations in this area. It is no secret that these two branches of public international law are closely linked. But there are some rules that can be regarded as contradictory – in the first place is the norm on the protection of the right to life in the application of force against the enemy during the war.

The rules of international humanitarian law which regulate the lawfulness of the deprivation of life are allowing,

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578 V. N. Rusinova, ‘The contribution of the European Court of human rights in the development of the duties of States to protect the right to life in armed conflict’ (2013) 3 Pravovedenie 50 – 69, 51.
restricting and prohibiting. They provide protection for quite a wide range of individuals. Conventionally, these rules can be divided into 3 blocks. The first block includes the special principles of international humanitarian law (the principles of humanity, distinction, proportionality and precaution), the restrictions in the choice of means and methods of warfare, as well as military necessity (which is the most controversial). The second block – there are rules on the classification of participants in armed conflicts, the third block – the rules which are associated with the qualification of the behaviour of civilians as a falling or not falling under the notion of "direct participation in hostilities".

A. Special principles of international humanitarian law.

Firstly, we refer to the first block. The first and the main principle is the principle of humanity, which is enshrined in many international instruments. The essence of this principle is the requirement of humane treatment of civilians and persons hors de combat. By this principle include the rules on humane treatment of civilians, the rules that wounded or sick soldiers should be chosen and treated, regardless of their affiliation and etc. According to many scientists, other principles of international humanitarian law arising from the principle of humanity.

The principle of distinction, which consists in the need to distinguish between combatants and the civilian population: the

\[ \text{\textsuperscript{580} M. N. Shaw, International Law (Cambridge University Press, 6th edn, 2008) 1170.} \]
\[ \text{\textsuperscript{581} V. Rusinova, Human rights in armed conflict : problems of correlation of the norms of international humanitarian law and international human rights law (Statut, 2015) 152.} \]
\[ \text{\textsuperscript{582} Legality of the Threat or Use of Nuclear Weapons [1996] ICJ Advisory Opinion.} \]
\[ \text{\textsuperscript{583} F. Bugnion, The International Committee of The Red Cross and the protection of war victims (ICRC, Macmillan, 2003) 12.} \]
\[ \text{\textsuperscript{584} E. David, Principles of law of the armed conflicts (Bruylant, 2002) 12.} \]
combatants have the right to kill enemy combatants and destroy military targets, but they are forbidden to use force against the civilian population and objects\textsuperscript{585}. This principle was enshrined quite late – only in 1949. But non-combatants should not apply only to weapons as long as they use their weapons only in self-defence or defence of property\textsuperscript{586}. It should also be noted that part of the principle of distinction is also a rule on the legitimacy of the use of force only in relations between the battling.

The principle of proportionality is applicable to the assessment of the legality of the deprivation of life in the armed conflict. It is enshrined in para. 5(b) of article 51 of the First Additional Protocol: prohibits an attack which may be expected to cause incidental loss of civilian life, injury to civilians and damage to civilian objects that would be excessive in relation to the concrete and direct military advantage anticipated thus gain\textsuperscript{587}. This principle applies to armed conflicts of an international character, and not international. International tribunals have repeatedly used in his practice this principle to both types of armed conflict\textsuperscript{588}.

The precautionary principle is the responsibility of the parties to take all possible measures to avoid incidental loss of civilian life, accidental damage to civilian objects, or simply to reduce them to a minimum. This principle was enshrined in article 57 of the First Additional Protocol\textsuperscript{589}. In fact, this principle is a rule of customary international law, as confirmed in the

\textsuperscript{585} Y. Dinstein, \textit{The Conduct of Hostilities under the Law of International Armed Conflict} (Cambridge University Press, 2\textsuperscript{nd} edn, 2004) 92.
\textsuperscript{586} V. Kalugin, \textit{International humanitarian law course} (Tesey, 2006) 133.
\textsuperscript{587} ‘Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I)’, 8 June 1977.
\textsuperscript{589} ‘Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I)’, 8 June 1977.
"Prosecutor v Kupreškić" by International Criminal Tribunal for the former Yugoslavia\textsuperscript{590}.

There are also a number of principles of international law, and some scientists refer ban on the use of means and methods of warfare of a nature to cause unnecessary suffering or injury. At the same time ban on the use of means and methods of warfare of a nature to cause unnecessary suffering, is fixed at the national level - its violation entails criminal liability in many countries\textsuperscript{591}. International Criminal Tribunal for the former Yugoslavia in the case "The Prosecutor v. Dusko Tadic," pointed out that "elementary considerations of humanity and common sense to make the absurd conclusion that the use by States of weapons prohibited in armed conflicts between them may be allowed when States try to crush the rebellion its own citizens in its own territory\textsuperscript{592}. In fact, the ban is a customary rule.

You can also mention the principle of the protection of victims of war, according to which the combatants are obliged to protect the interests of victims of war humanely treat them and provide them with the necessary medical care and attention. With regard to them should not be discrimination, as well as those provisions apply to both international conflicts and non-international\textsuperscript{593}.

B. Military necessity.

\textsuperscript{590} Kupreškić \textit{et al} [2000] ICTY Trial Judgment IT-95-16.
\textsuperscript{591} V. Rusinova, \textit{Human rights in armed conflict : problems of correlation of the norms of international humanitarian law and international human rights law} (Statut, 2015) 152.
\textsuperscript{592} \textit{Prosecutor v. Duško Tadić} [1999] ICTY Trial Judgment IT-94-1-A.
\textsuperscript{593} Y. Kolosov and E. Krivichkova (eds), \textit{International Law} (International relations, Yurayt, 2nd edn, 2007) 461 – 462.
Now we turn to military necessity. Scientists do not always distinguish it as a separate principle of international humanitarian law, but it was fixed as the stop howling behaviour of the parties in the Guide to the interpretation of the concept of "direct participation in hostilities" in accordance with international humanitarian law, published in 2009 under the auspices of the ICRC.

The concept of "military necessity" humanity is clearly opposed to the achievements of the opponent to win. But at the same time, as noted above, military necessity is limiter of behaviour of the parties of the armed conflict: not all actions arising from the needs of war are necessary. In other words, it cannot be considered military necessity concept, which is opposite to humanity. An interesting fact is that often in the agreements governing the rules of warfare indicates military necessity, and therefore it is not clear why it is neglected as a principle that regulates the right to life in armed conflict.

The concept of military necessity has arisen for a long time: many of the great thinkers of the past addressed the problem of limitation of military behaviour. For example, Hugo Grotius wrote: "All the battles are not employees or to obtain adequate, nor to stop the war, are intended solely to serve the ambition of power or as the Greeks say, is" testament to the strength, and not fight against the enemies, "contrary to Christian duty and humanity itself ". But despite this the principle of military necessity for a long time is not fixed either at national or at international level. It was only in the second half of the XIX century. This principle has become fixed in the international instruments. But even now, not all

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scientists agree that the principle of military necessity is the principle of international humanitarian law.

As for the content of military necessity, firstly, use it to legitimize acts prohibited by international humanitarian law, possible only with the direct indication of rules for it. For example, representatives of the ICRC in accordance with the Third Geneva Convention can visit prisoners of war, can visit places of their detention, but those visits could be limited for the purpose of military necessity. Secondly, the military necessity has never been an excuse for any act aimed at the destruction of the enemy, and etc. It is also a constraint. Thirdly, military necessity is a concept evaluation, assessment and therefore is subject to each individual case of use of force. In conclusion, we can say that the principle of military necessity has been unfairly forgotten, although it is one of the most important stops howling behaviour of the parties and guarantee the right to life in armed conflict.

C. Classification of participants in armed conflicts.

Also, separation of combatants and non-combatants is very important for the right to life in armed conflicts. Of course, this division conditionally\(^{595}\), but it plays a huge role. Combatants, have the right to use weapons against each other, and non-combatants, which include civilians, medical personnel and chaplains, quartermaster composition, military lawyers, reporters and etc.\(^{596}\), shall be immune from the use of force to them at any circumstances cannot use force and kill non-combatants as well as have a number of specific rights\(^{597}\). During the military operations


it is necessary to distinguish combatants from non-combatants\textsuperscript{598}. If warring party violates this rule, it would be a crime. Securing the rights of these persons it has started fix in the first acts of international humanitarian law\textsuperscript{599}.

But let us turn to direct participation in hostilities. In today's conflicts are increasingly civilians are drawn into hostilities. It is the right point of view, that such persons lose their non-combatant status and become combatants, and therefore carry the same rights and duties as members of the military action. But the concept of military action rather loose, so it is necessary to consider it in detail.

The hostilities include attacks on military targets, goals, actions aimed at causing harm to the enemy, including unlawful attacks on civilian persons and objects. But this is an exception: the attack on the persons who are in the power of the civilians involved or the parties to the conflict as a "military action" is not interpreted\textsuperscript{600}. But it is also possible to note a few cases, when attacks against persons in the power of parties to the conflict, in essence it must be seen as military action. Firstly, if the situation referred to international conflict, and civilians take part in this conflict, they lose their immunity from military attack: in the event that non-combatant would be drawn into the armed struggle, it actually turns into a combatant. Secondly, the bombardment of the camp internees and prisoners of war by mistake must be considered is the military actions. Thirdly, the deliberate targeting of civilians is considered military action, as well as crime. In a situation to hold this distinction even more difficult to non-international armed conflict.

\textsuperscript{600} N. Melzer, \textit{Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law} (ICRC, 2009) 27.
In conclusion, we can say that the notion of "direct participation in hostilities" requires further detail, since without it the question of the legality of the deprivation of life, in this case will remain vague. A significant contribution is made to guide the ICRC's interpretation of this concept.

So, we can say that the constraints that guarantee the right to life in armed conflicts are present in international humanitarian law. Let not all of them are developed, but it still confirms the value of the right to life under such conditions.

CHAPTER II. THE LAWFULNESS OF DEPRIVATION OF LIFE IN ARMED CONFLICT UNDER HUMAN RIGHTS LAW

The International Covenant on Civil and Political Rights enshrines the prohibition of arbitrary deprivation of life\textsuperscript{601}. It also prohibits making exceptions to this provision, even in a "state of emergency in the state in which the life of the nation is threatened by"\textsuperscript{602}. This prohibition also clarified in the European Convention on Human Rights: “No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law”\textsuperscript{603}. Then there was the adoption of the Protocol number 6 to the ECtHR, allowing the death penalty only in time of war (in force for Russia), and later was adopted by the protocol number 13, abolishing the death penalty (not signed by Russia). But this Convention indicates the legitimacy of cases of deprivation of life - is to protect the person from unlawful violence, lawful detention, to prevent the escape of a person detained and

\textsuperscript{601} UN doc, ‘The International Covenant on civil and political rights’, 16 Dec 1966.
\textsuperscript{602} Ibid.
legitimate insurrection or riot suppression. But even in this case the European Court of Human Rights interprets the term "intentional" rather broadly.

Referring to article 15 of the ECtHR – it states that derogate from it in the event of war or other public emergency threatening the life of the nation, but in the article on the law of life states that the right to life is unacceptable, except in respect of deaths resulting from lawful hostilities. There is a question on the interpretation of the concept of "legitimate military action", the more the ECHR not yet expressed an opinion on the matter. Many scientists believe that under this concept includes all international armed conflicts. With regard to non-international conflicts, the opinion of the majority is inclined to think that they fall under the concept of "other public emergency threatening the life of the nation." But if the government will retreat from any of its obligations under the Convention in this case, the lawfulness of the deprivation of life should be assessed under Article 2 of the ECtHR.

But does the boundary can be the same between lawful and unlawful deprivation of life in peace and war time? Many of the international judicial bodies in their practice reduce everything to the absolute similarity of concepts – the border is the same in all cases. But this contradicts all the principles of international humanitarian law, including deprive combatants of their legitimate right to use weapons against the enemy and renders meaningless the position of the UN Charter the right of States to individual and collective defence. This point of view is wrong, because still retained the factors that may lead to military action, which would still entail sacrifice. The priority in the context of armed conflict

604 Ibid.
605 Ibid.
still has a notion of arbitrariness enshrined in international humanitarian law, so the bar set in the international law of human rights in the context of international conflicts should be reduced.

But still there is a tendency in the practice of international courts that prohibit international humanitarian law to protect non-combatants is generally regarded as the minimum guarantees for the protection of human rights, including the right to life. And this is the explanation – the rules of the absolute prohibition of the taking of life in human rights law are the general rule in relation to the rules of international humanitarian law. IHL can be called *lex specialis* in relation to the absolute prohibition of the taking of life – this is the most common argument. There is another explanation – the rules of international humanitarian law in the majority of customary rules, and then they become norms *jus cogens*.

Now let us turn to the combatants. Interesting cases on this subject were in the practice of the UN Human Rights Committee and the ECHR. With regard to the UN Human Rights Committee, its practice on the legality of the deprivation of life of combatants rather scarce – it is possible to note the case "Suárez de Guerrero v. Colombia" dated March 31, 1982 and concluding observations on Israel's reports 2003 and 2010. If taking the first case, it is interesting because of its factual circumstances have occurred during the armed conflict, but the Committee did not apply the rules of international humanitarian law and applied only the rules of human rights law. A more interesting case of Israel: The Committee was concerned about the use of force by Israel against the people suspected of terrorism. Israel, in turn, justified the legitimacy of their actions, referring to the rules of international

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humanitarian law, but the Committee noted that it is necessary to exhaust such methods of struggle as the arrest and etc.

The practice of the ECHR on this subject is vast. Although in these cases have not raised the question of the legality of the deprivation of life of fighting, but but the Court repeatedly made the caveat that the use by the state forces against the armed opposition groups must be proportionate in the light of article 2 of the ECtHR. This approach can be seen in a number of "Turkish" and "Chechen" solutions. For example, in "Isayeva v. Russia" the Court is not limited by the fact that "the situation in Chechnya called for exceptional measures by the Russian Federation needed to regain control of the Chechen Republic and to suppress the illegal armed insurgency", the Court also pointed out that "taking into account the circumstances Chechen conflict, such measures could include the use of military force, equipped with military weapons, including artillery and military aircraft, as well as the presence of a fairly large group of armed militants in Katyr-Yurt and their active resistance to law enforcement authorities, which was not disputed by the parties, could justify the infliction of death". It should also mention the case of "Esmukhambetov and others against Russia." Despite the fact that the ECHR recognized the existence of an armed conflict not of an international character in Chechnya, but due to the fact that the evidence that force was used against the federal forces were absent, the Court decided that the right to life has been violated.

Of course, anti-Russian rhetoric can be clearly traced in these decisions the ECHR, and there are some contradictions, but they are important to us in that they have the Court of proportionality applicable to the forces fighting parties.

608 Isayeva v. Russia App no 57950/00 (ECHR, 24 Feb 2005); Isayeva, Yusupova and Bazayeva v. Russia, App no. 57947 – 57949/00 (ECHR, 24 Feb 2005).
609 Esmukhambetov and others v. Russia App no. 23445/03 (ECHR, 29 March 2011).
In general, we can say that the ECHR’ way is characteristic as way of human rights law, which is different from the approach of international humanitarian law. You can highlight the following features of this approach: the first feature – each situation is evaluated individually, and not the overall context in which military force is used. The second – the application of the proportionality test in the deprivation of life.

Now we turn to the legality of accidental deaths of civilians in an attack on military targets. This issue affects only the ECHR. Attention is drawn to the following: the concept and limits of acceptability "collateral damage" (random victim) and the content of the precautionary measures to be taken by parties to the conflict in order to avoid such accidental loss.

These cases also apply the proportionality test, and the Court in its practice takes the position that allows recognizing the validity of such acts. Of course, there is a difference between the criteria of proportionality in the ECtHR and in international humanitarian law – IHL clearly indicates the need for a comparison with the military advantage of random victims, not taking direct part in hostilities, and the ECtHR logic implies that should be checked and the use of force against the "rebels", including persons who are directly involved in the hostilities.

Regarding civilians, the ECHR is guided by the same logic as in international humanitarian law: an attack on military targets should not lead to disproportionate civilian casualties, and fight should take precautions both in the preparation and planning, as well as during operation.

With regard to precautionary measures, they are not expressly provided for in the ECtHR. The ECHR removes them
from the obligation to ensure respect for the right to life. Also, decision of ECHR "McCann v. The United Kingdom" is significant. In this case European Court said: “to determine whether the use of force in line with article 2, the court must check carefully ... not only whether the force used by soldiers in exact proportion to the protection of individual targets from unlawful violence but also whether the anti-terrorist operation planned and whether it is controlled by the authorities to minimize as much as possible”610.

In general, the analysis of the practice of the ECHR, it can be concluded that the Court in such matters is based on the norms of international humanitarian law, without mentioning them directly. There are 3 groups of such obligations: first group – commitments made by the ECHR similarly IHL norms (for example, rules on the prohibition of certain methods and means of armed conflict); the second group – the commitments of the output by interpreting the rules of IHL (such as precautions to prevent accidental civilian deaths); third group – the obligation, which the Court deduced yourself and which not derived from the norms of international humanitarian law611.

So, it can be concluded that in international human rights law in the assessment of the legality of the deprivation of life in the armed conflict has its own method of assessment different from the techniques of international humanitarian law, but in some cases, this technique still relies on the technique of IHL.

610 McCann v. United Kingdom, App no. 18984/91 (ECHR, 13 May 2008).
611 V. Rusinova, Human rights in armed conflict : problems of correlation of the norms of international humanitarian law and international human rights law (Statut, 2015) 240 – 244.
CHAPTER III. INTEGRATED VERIFICATION
THE LAWFULNESS OF DEPRIVATION OF LIFE IN THE
USE OF FORCE IN ARMED CONFLICT

We have examined the legality of the deprivation of life assessment in the conditions of military conflict in the aspect of the two branches of international law. Now we turn to the joint management of international human rights law and international humanitarian law deprivation of life as a result of the use of force in armed conflict, which is quite problematic. According to the norms of IHL deprivation combatant life, organized armed group members and persons taking direct part in hostilities at the time of these actions is lawful, if he is not hors de combat and if the use of force will not lead or do not lead to civilian casualties and causing damage to civilian objects that would be excessive in relation to the military advantage obtainable, and if another party do not using prohibited methods and means of warfare. According to the norms of human rights law, as it was found to have changed the interpretation of international instruments on human rights, recognizing the right to life: the criteria of absolute necessity and proportionality, as well as in time of peace, are applicable to the case of military conflict, thereby tightening requirements for the legality of the deprivation of life. As a result, international judicial bodies used "integrated " verification test of the legality of the deprivation of life, which consist of IHL practices and human rights law practices – there are taken into account rules of IHL, and the criteria of absolute necessity and proportionality are applied.

This test, in fact, was born from the practice of international bodies to protect human rights, in particular from the practice of the ECHR, which can be seen in his practice. Of course, this test has been criticized for failing to IHL, but it should be noted that this assertion is incorrect – international humanitarian cannot be used in isolation, its provisions are part of the international public law, and therefore should be applied taking into account the provisions of other branches of international law. It should also be
noted that there are situations where international human rights law does not apply, therefore, in these situations it should be applied only the rules of international humanitarian law. Moreover, the criteria, which ECHR applies, have never been more challenged by the respondent states. The practice of these bodies, the opinion of the doctrine, despite the criticism of the test, still has determined that this test international law.

But it should be noted that this test is that only applies to non-international conflicts. Is it possible to use it to armed conflicts of an international character? According to scientists on the matter clearly – if it may be used "integrated" test for non-international conflicts, then to conflicts of an international character it may be applied only rules of international humanitarian law. It is argued that the international nature of the armed conflict is governed by slightly different rules than non-international conflicts. In the absence of practice on this issue, you must turn to the international instruments on human rights – only the European Convention makes a hard division between the international conflict and non-international conflict, so it is concluded that an integrated approach is only applicable to non-international conflicts, but it can be denied.

Firstly, the distinction between these types of conflicts is based on the presumption that during the armed conflict of an international character state will do no derogation from the right to life, but in practice this is what happens and does not happen.

Secondly, even if the retreat was, this derogation must comply with the criteria of proportionality and necessity, because, according to the ECtHR, it could do retreat "only to the extent required by the exigencies of circumstances."

Thirdly, the Convention there is no reference to the need to apply the *renvoi* to IHL, therefore, what is considered lawful acts of war is determined on the basis of other instruments of international law.

On this basis, it can be concluded that the dualistic approach to evaluating the legality of the deprivation of life during armed conflict is quite controversial. "Integrated" test requires States to take account of all the commitments given situation. Therefore, no ads situation "military" or "fighting" or the use of military forces to carry it out, or view applicable government forces weapons are neither together nor separately decisive factors to determine the legality of the deprivation of life, because of the situation does not depend on the type of operation, and on the qualifications of all the circumstances. This approach avoids the abuse when the cases that arise in the context of armed conflict, are treated by the state as "combat", which is considered a "total indulgence" for the use of force. This means that, even in respect of members of armed groups must respect the principles of proportionality and necessity, therefore, not in all cases be lawful deprivation of life. In fact, international human rights law has tightened the requirements: not all that is recognized as lawful under international humanitarian law will be valid in the aspect of human rights law. But there is also a positive aspect – this approach should help strengthen the protection of victims of armed conflicts. It should be remembered that human rights law and international humanitarian law have different scope. International humanitarian law applies only in case of armed conflict, and provides a number of safeguards that reflect the specific characteristics of such conflicts. A significant number of human rights are unparalleled in international humanitarian law.

CONCLUSION
To sum up, examining the theme of the relation of international human rights law and IHL, it can be concluded that, firstly, IHL has a whole set of legal rules that restrict the application of violence or are the legal minimum, which guarantees relative immunity rights a life. Despite the fact that international humanitarian law regulates the military action in which the murder – the usual case, still have rules that guarantee the inviolability of human life, and whose violation is considered serious international crime.

Secondly, international human rights law also has standards in the protection of right to life in armed conflict, but they set more stringent requirements for the legality of the deprivation of life. Maybe in some situations, in terms of the priority of human rights such stringent requirements and justified, but, in general, these requirements are deprived of power such as the right of IHL combatants use weapons against enemy combatant sides - under such stringent requirements, these rules simply do not apply.

Thirdly, there is "integrated" verification test of the legality of the deprivation of life in the conditions of armed conflict, combining the approaches of both international human rights law and IHL. This test is most applicable, because the competition theory, according to which international humanitarian law excludes the applicability of international human rights law, is contrary to international treaties and their practical application. But, on the one hand, this test ensures the rights of those who enjoy immunity during the armed conflict, but on the other hand, this test is only applicable to non-international armed conflicts, and sometimes do not take into account some unimportant rules of IHL.
Based on all this research, it can be concluded that the universally recognized human rights priority in armed conflicts to such an overriding law, the right to life, apply the rules of IHL - its rules in this case have priority. The norms of human rights law in these situations are secondary and should be applied in the second place after the application of IHL. I believe that once the rules of IHL governing relations during armed conflicts, and attitudes related to human rights, in this period should also be governed by the same rules.