



MATERIALS AND CASES

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Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, I.C.J. Advisory Opinion, 2010. The U.N. General Assembly requested an advisory opinion of the International Court of Justice on the *Unilateral Declaration of Independence* by Kosovo. The territory of Kosovo is the subject of a dispute between Serbia and the Republic of Kosovo established by the declaration. This was the first case regarding a unilateral declaration of independence to be brought before the Court.

Anglo-Iranian Oil Co. Case (United Kingdom v. Iran), 1952. The case involved a dispute between the United Kingdom (UK) and Iran. The UK alleged that the Iranian Oil Nationalization act of 1951 violated a convention agreed upon by the Anglo-Persian Oil Co. (now British Petroleum (BP)) and the Imperial Government of Persia (now Iran) in 1933 which granted the Anglo-Iranian Oil Co. a 60-year license to mine oil in 100,000 square miles (260,000 km²) of Iran's territory in return for a percentage royalty. On 26 May 1951, the UK brought a case against Iran before the International Court of Justice, demanding that the 1933 agreement be upheld and that Iran pay damages and compensation for disrupting the UK-incorporated company's profits.

Application of Convention on Prevention and Punishment for the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 1996. On March 20, 1993, the Government of Bosnia filed an Application before the International Court of Justice alleging violations of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) by the Government of the Yugoslavia. Bosnia asked the Court to order Yugoslavia to cease the acts constituting such violations and declare that Yugoslavia had incurred international responsibility for which it must make appropriate reparation. Yugoslavia sought to dismiss the case. It argued that the Application was not admissible because of the lack of an international dispute and the lack of authority of the President of Bosnia at the time the Application was filed. Yugoslavia also alleged that the Court lacked jurisdiction.

Arbitral Award (Guinea Bissau v. Senegal), 1989. On August 23, 1989, Guinea-Bissau instituted proceedings against Senegal in the International

Court of Justice seeking a declaration that the award of arbitration between the parties, rendered on July 31, 1989, was “inexistent” for lack of a real majority. Subsidiarily, Guinea-Bissau contended that the award was null and void because the Tribunal had failed to answer the second of two questions put to it, had not decided on the delimitation of the maritime area concerned as a whole by a single line on a map, and had not given the reasons for so failing to exercise its jurisdiction.

Argentina - Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items, WTO Panel Report, 1997. The great majority of Argentina’s import tariffs are fixed in ad valorem terms. Regarding textiles, clothing and footwear, Argentina maintained a regime of minimum specific import duties as from 1993. This regime was applied through resolutions and decrees having fixed terms. Argentina approved the results of the Uruguay Round through Law No. 24.425, promulgated on 23 December 1994. These results included a bound rate of duty of 35 per cent *ad valorem* with respect to textiles, apparel and footwear imported into Argentina. In parallel, Argentina continued to apply a system of minimum specific import duties in the footwear, textile and apparel sectors. Regarding footwear, the minimum specific duty was revoked in 1997. Provisional safeguard measures were applied in that sector on 25 February 1997. Concurrently, since 1989, Argentina applied a tax on imported products intended to finance statistical services to importers, exporters and the general public. The Panel procedure concerned the Argentine measures adopted in order to apply the above mentioned regime, as established and maintained *inter alia* through the laws, decrees and resolutions.

Arrest Warrant (Democratic Republic of the Congo v. Belgium), 2002. In 1993, Belgium’s Parliament voted in a “law of universal jurisdiction,” allowing it to judge people accused of war crimes, crimes against humanity or genocide. In 2001, four Rwandans were convicted and sentenced to from 12 to 20 years’ imprisonment for their involvement in 1994 Rwandan genocide. An arrest warrant was issued in 2000 under this law against Abdoulaye Yerodia Ndombasi, the then Minister of Foreign Affairs of the Democratic Republic of the Congo, whose challenge to this action was considered by the International Court of Justice.

Budayeva v. Russia, European Court of Human Rights, 2008. The applicants lived in Tyrnauz in the mountain district near Mount Elbrus in the Republic of Kabardino-Balkariya (Russia). Mudslides led to death and destruction of property. Prior slides were recorded in the area every year since 1937, especially in summer. The case concerned the applicants’ allegations that the Russian authorities violated their human rights as they failed to heed warnings

about the likelihood of a large-scale mudslide, which in fact did occur, devastating Tyрнаuz in July 2000. Authorities failed to implement evacuation and emergency relief policies or, after the disaster, to carry out a judicial enquiry.

Costa v. Enel, ECJ European Community Supremacy (Italian Company) Nationalization of Italian Company, 1964. The European Court of Justice considered the supremacy of European Union law over the laws of its member states under a proceeding concerning Mr. Costa, an Italian citizen, who had owned shares in an electricity company and opposed to the nationalization of the electricity sector in Italy. He refused to pay his electricity bill, which amounted to 1,925 lira (€0.99), in protest and was sued for nonpayment by the newly created state electricity company, ENEL. In his defense he argued that the nationalization of the electricity industry violated the Treaty of Rome and the Italian Constitution. The Italian judge, the *Giudice Conciliatore* of Milan referred the case first to the Italian Constitutional Court and then to the European Court of Justice.

Dimitry Gridin v. Russia, Human Rights Committee, 2007. The Committee found in favor of the author of the communication, Dimitry Leonodovich Gridin, a Russian student, who claimed to be a victim of Russia's violation of articles 9, 10, and 14, (due process of law and right to fair trial) under the International Covenant on Civil and Political Rights.

Felix Kulov v. Kyrgyzstan, Human Rights Committee, 2011. The Committee found in favor of the author of the communication Mr. Felix Kulov, a Kyrgyz national, who claimed while serving a prison sentence in Kyrgyzstan to be the victim of violations by Kyrgyzstan of his rights under articles 2, 7, (prohibition of torture) 9 (freedom from arbitrary arrest and detention), and 14 of the International Covenant on Civil and Political Rights.

Dubetska and others v. Ukraine, European Court of Human Rights, 2011. The applicants, 11 Ukrainian nationals, complained to the European Court of Human Rights that they suffered chronic health problems and damage to their homes and living environment from a coal mine and a factory operating nearby. A State-owned coal mine started operating in 1960 in the vicinity of the applicants' houses, and a mine spoil heap was erected around 100 metres away from the Dubetska-Nayda family house. In 1979, the State opened a coal processing factory which subsequently produced a 60-metre spoil heap about 430 metres from the Dubetska-Nayda family house and 420 metres from the Gavrylyuk-Vakiv family house. The spoil heap remained State property even after a 2007 decision to privatize the factory. A number of studies by governmental and non-governmental entities found that the operation of the mine and factory had had adverse environmental effects,

including flooding, polluted ground water and air and soil subsidence. The reports concluded that people living in the factory's and mine's surrounding area were exposed to a higher risk of cancer and respiratory and kidney diseases. The applicants challenged the government's actions to allow the facilities as violations of human rights.

East Timor (Portugal v. Australia), 1995. On 22 February 1991 Portugal instituted proceedings against Australia concerning "certain activities of Australia with respect to East Timor." Portugal acted as the administering Power over East Timor in accordance with Chapter XI of the Charter of the United Nations. It claimed that Australia, by the conclusion of a Treaty of "Cooperation in an area between the Indonesian Province of East Timor and Northern Australia," had failed to observe the obligation to respect the powers and duties of Portugal as the administering power of East Timor, as well as the right of the people of East Timor to self-determination and the related rights. Australia, according to Portugal's allegations, had thereby incurred international responsibility vis-a-vis both the people of East Timor and Portugal, which claimed to have remained the administering power according to several resolutions of the General Assembly and the Security Council, even though it had left East Timor when Indonesia invaded East Timor in 1975. Australia objected to the jurisdiction of the Court and the admissibility of the application.

Republic of Estonia v European Commission, European Court of Justice, 2009. The case involved a challenge to a European Union directive adopted to promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner. Directive 2003/87/EC established a scheme for emission allowance trading within the Community requiring each Member State to develop a national allocation plan (NAP) stating the total quantity of allowances that it intends to allocate for that period and how it proposes to allocate them. In the case of incompatibility with the criteria listed in the Directive, the Commission may reject all or part of the NAP. In 2006, Poland and Estonia notified their NAPs for the period from 2008 to 2012 to the Commission. By two decisions in 2007, the Commission found these NAPs to be incompatible with the criteria listed in the Directive. Poland and Estonia challenged the Commission's decisions before the European Court of Justice and sought annulment of these decisions.

Fisheries Jurisdiction Case (United Kingdom v. Iceland), 1974. The United Kingdom invoked the jurisdiction of the International Court of Justice regarding its reliance upon an Exchange of Notes of 11 March 1961 with Iceland and to resolve the dispute arising out of Iceland's assertion in 1958 of a 12-mile exclusive fishing zone. The application arose out of a resolution of

the Icelandic legislature of 15 February 1972 envisaging the extension of the exclusive zone to 50 miles. Iceland failed to appear in the proceedings.

Frontier Dispute, Judgment (Burkina Faso v. Republic of Mali), 1986. Pursuant to a Special Agreement, the Republic of Upper Volta (now Burkina Faso) and the Republic of Mali submitted a dispute concerning a part of their common frontier with Burkina Faso to a special Chamber of the International Court of Justice for the delimitation of the boundary in the disputed area between the former French colonies at the end of the colonial period.

Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), 1997. On 2 July 1993, Hungary and Slovakia notified the International Court of Justice that a dispute had arisen on use of territory and the Danube under the Special Agreement between Hungary and Czechoslovakia. Specifically, the dispute concerned the implementation and the termination of the Budapest Treaty of 16 September 1977 on the Construction and Operation of the Gabčíkovo-Nagymaros System of Locks on the Danube. Among other issues, Hungary asserted that it was lawful not to allow the construction of the dam until further environmental assessments were completed as needed to safeguard its natural environment and protect the well-being of its people.

Indonesia – certain measures affecting the automobile industry, WTO Panel Report, 1998. The decision concerned European Communities challenges to Indonesia's local content requirements linked to certain sales tax benefits and customs duty benefits and its violation of the provisions of Article 2 of the *Agreement on Trade-Related Investment Measures (the "TRIMs Agreement")* and violations concerning the sales tax discrimination aspects under Article III:2 of the GATT 1994. It also concerned Indonesia's 1996 National Car Programme, and its violation of Article 2 of the *TRIMs Agreement* and Articles I and III:2 of the GATT 1994. The Panel recommended "that the Dispute Settlement Body request Indonesia to bring its measures into conformity with its obligations under the WTO Agreement.

Ismayilov v. Azerbaijan, European Court of Human Rights 2008. The applicant to the European Court of Human Rights, Mr. Ismayilov, alleged that the significant delays in the state registration of the public association of which he was a founder amounted to a violation of his right to freedom of association, that the domestic courts were not independent and impartial, and that the domestic remedies were not effective in lawsuits filed by public associations against the Ministry of Justice of Azerbaijan.

Japan – Taxes on alcoholic beverages, WTO Appellate Body Report, 1996. Japan and the United States appeal from certain issues of law and legal interpretations in the Panel Report, Japan - Taxes on Alcoholic Beverages¹ (the

“Panel Report”). That Panel was established to consider complaints by the European Communities, Canada and the United States against Japan relating to the Japanese Liquor Tax Law (Shuzeiho), Law No. 6 of 1953 as amended (the “Liquor Tax Law”).

Jorgic v. Germany, European Court of Human Rights, 2007. Bosnian Serb Nikola Jorgic was the leader of a paramilitary group that took part in acts of terror against the Muslim population. The crimes were carried out with the backing of the Serb rulers and were designed to contribute to their policy of “ethnic cleansing”. Jorgic arrested Muslims and put them in prison camps where they were tortured. The Court also found that in June 1992, he took part in the execution of 22 inhabitants of Grabska (among them disabled and elderly people), who had gathered in the open in order to escape fighting. Three other Muslims had to carry the dead to a mass grave. A few days later, Jorgic ordered the expulsion of their village and the brutal ill-treatment of 40-50 inhabitants from Sevarlije; six of them were shot dead. The seventh victim, who was not fatally wounded, died later when he was burned together with the six bodies. In September 1992, Jorgic put a tin bucket on the head of a prisoner in the central prison of Doboj and hit it with such force that the victim died as a consequence of the blow. For these acts, Jorgic was convicted for genocide by the German courts.

LaGrand Case (Germany v. U.S.A), 2011. The LaGrand case was a legal action heard before the International Court of Justice concerning the Vienna Convention on Consular Relations. The I.C.J. found that its own temporary court orders were legally binding and that the rights contained in the convention could not be denied by the application of domestic legal procedures.

Land and Maritime Boundary (Cameroon v. Nigeria: Equatorial Guinea intervening), 2002. In March 1994, Cameroon brought a dispute before the International Court of Justice concerning the question of sovereignty over the Bakassi Peninsula. In June 1994, Cameroon extended the subject of the dispute to include the question of sovereignty over Cameroonian territory in the area of Lake Chad and the frontier between Cameroon and Nigeria from Lake Chad to the sea. In 1999, the Court authorized an intervention by Guinea, which sought to protect its legal rights in the light of pending maritime boundary claims between Cameroon and Nigeria.

Legality of the Threat or Use of Nuclear Weapons in Armed Conflict, I.C.J. Advisory Opinion, 1996. The International Court of Justice considered first a request by the World Health Organization (WHO) for an advisory opinion on the topic in which it found it had no jurisdiction to consider the matter. A request was then brought in 1994 by the United Nations General Assembly in which the Court did find it had jurisdiction to hear the matter. It delivered its advisory opinion on 8 July 1996 and is an authoritative opinion

concerning the legality under international law of the use or the threatened use of nuclear weapons.

The S.S. “Lotus” Case (France v. Turkey), 1927. After a collision on 2 August 1926 between the S.S. Lotus, a French steamship and the S.S. Boz-Kourt, a Turkish steamer, in a region just north of Mytilene, the government of Turkey brought criminal proceedings against a French officer, Monsieur Demons, of the S.S. Lotus for the drowning of eight Turkish nationals aboard the Boz-Kourt. On 7 September 1927, the case was presented to the Permanent Court of International Justice to decide whether Turkey had authority to try Monsieur Demons.

Maritime Delimitation in the Black Sea (Romania v. Ukraine), 2009. On 16 September 2004, Romania brought a case against Ukraine before the International Court of Justice relating to a dispute concerning the establishment of a single maritime boundary between the two states in the Black Sea, thereby delimiting the continental shelf and the exclusive economic zones (EEZ) appertaining to them. Romania requested the Court to draw the boundary in accordance with international law and, specifically, the criteria of Article 4 of the Additional Agreement between Romania and Ukraine of October 1997.

Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), 2001. On 8 July 1991, Qatar instituted proceedings before the International Court of Justice against the State of Bahrain in respect of certain disputes between the two States relating to sovereignty over the Hawar islands, sovereign rights over the shoals of Dibal and Qit’at Jaradah, and the delimitation of the maritime areas of the two States.

Mathieu-Mohin and Klerfeyt v. Belgium, Decision of the European Court of Human Rights, 1987. The applicants to the European Court of Human Rights, Ms. Lucienne Mathieu-Mohin and Mr. George Klerfeyt, lived in the communes of the Al-Vilvord administrative district, which was part of the bilingual Brussels region and the electoral district of Brussels. On direct elections in the late 1970’s they were elected to the House of Representatives (Ms. Mathieu-Mohin) and Senate (Mr. Klerfeyt). During that period of time, Belgium was divided on a linguistic basis into several regions, which was governed by regional councils, and included members of both houses of parliament, elected in their respective districts (in the bilingual region of Brussels two councils were created). In the administrative county where the applicants were elected, most of the population was Flemish, and it was governed by Flemish Council. However, the applicants could not join it since they took a parliamentary oath in French, thus belonging only to Francophone faction. The Court considered violations of the European Convention on Human Rights in this context.

Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States), 1986. The case involved a claim by Nicaragua against the United States before the International Court of Justice for its role in assisting the Contras in the rebellion against Nicaragua, including for the mining of Nicaragua's harbor. The United States refused to participate in the proceedings after the Court rejected its challenge that the I.C.J. lacked jurisdiction to hear the case. The Court decided it had jurisdiction and proceeded to decide the case on the merits. The Court found in favor of Nicaragua.

North Sea Continental Shelf Cases, (Germany v. Denmark and Netherlands), 1969. The case involved a series of disputes brought to the International Court of Justice in 1969 regarding disagreements among Denmark, Germany, and the Netherlands on the "delimitation" of areas—rich in oil and gas—of the continental shelf in the North Sea.

Nurbek Toktokunov v. Kyrgyzstan, Human Rights Committee, 2011. The author of the communication to the Human Rights Committee, Mr. Nurbek Toktokunov, a Kyrgyz national, claimed to be the victim of violations by Kyrgyzstan of his rights under article 2, read together with article 14 (right to fair trial and due process of law), and article 19 (freedom of expression) under the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for the State party on 7 January 1995.

Otabek Akhadov v. Kyrgyzstan, Human Rights Committee, 2011. The author of the communication brought to the Human Rights Committee, Mr. Otabek Akhadov, a national of Uzbekistan claimed to be a victim of violations by Kyrgyzstan of his rights under article 6, (right to life) article 7 (prohibition of torture), article 9 (freedom from arbitrary arrest and detention, article 10 (humane treatment in detention), and article 14 (right to fair trial and due process of law) the International Covenant on Civil and Political Rights.

Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, 2002. The International Criminal Court of Yugoslavia (war crimes tribunal) convicted the three defendants for their role in the mass rape of Muslim women during the conflict in Bosnia-Herzegovina. The Tribunal considered the issue of rape of Muslim women as a crime against humanity.

Prosecutor v. Drazen Erdemovich, International Criminal Tribunal for the Former Yugoslavia, 1997. As a soldier in the 10th Sabotage Detachment (during Bosnian war), Erdemović was charged with shooting, killing, and participating with other members of his unit and soldiers from another brigade in the shooting and killing, of hundreds of unarmed Bosnian Muslim men on or about 16 July 1995. Erdemović was charged on the basis of individual criminal responsibility (Article 7(1) of the Statute) of the International Criminal Tribunal

for the former Yugoslavia (ICTY) with murder (crimes against humanity, Article 5), and alternatively, murder (violations of the laws or customs of war, Article 3).

Prosecutor v. Dusko Tadić, 2005. Tadic was a Bosnian Serb war criminal, former SDS leader in Kozarac and a former member of the paramilitary forces supporting the attack on the district of Prijedor. He was convicted of crimes against humanity, grave breaches of the Geneva Conventions, and violations of the customs of war by the International Criminal Tribunal for the Former Yugoslavia (ICTY) for his actions in the Prijedor region, including the Omarska, Trnopolje and Keraterm detention camps. He was sentenced to 25 years of imprisonment.

Prosecutor v. Juvenal Kajelijeli. The case involved charges against Kajelijeli based on his responsibility for attacks against Tutsis of the Mukingo, Nkuli, and Kigombe communes during April 1994. The Trial Chamber found Kajelijeli guilty of genocide, direct and public incitement to commit genocide, and extermination as a crime against humanity. It found him not guilty of conspiracy to commit genocide and crimes against humanity (rape and “other inhumane acts”), and dismissed the charges of complicity in genocide and crimes against humanity (murder and persecution). He was sentenced to two terms of life imprisonment and one term of 15 years to be served concurrently.

Prosecutor v. Radislav Krstic, 2004. Radislav Krstić was the Deputy Commander and Chief-of -Staff of the Drina Corps within the Bosnian Serb Army (“VRS”). In 1998, Krstić was indicted by the International Criminal Tribunal for the former Yugoslavia (ICTY) in connection with the attacks led by the Serb forces on the Muslim enclave of Srebrenica and its surroundings from July 1995 onwards. On 2 August 2001, the Trial Chamber found Radislav Krstić guilty of murder, persecutions and genocide. This was the first time that the ICTY irrevocably established that genocide was committed in Srebrenica. Krstić became the first man convicted of genocide by the Tribunal and was sentenced to 46 years in prison.

Pulp Mills on the River Uruguay (Uruguay v. Argentina), 2010. On 20 April 2010 the International Court of Justice (I.C.J.) in The Hague delivered its judgment in the case of Pulp Mills on the River Uruguay (Argentina v. Uruguay). The dispute concerned the construction of a pulp mill by Uruguay on the River Uruguay. Argentina had argued the Uruguayan pulp mills were pumping dangerous waste into the mutual river on the border between the two countries.

Raihon Hudoyberganova v. Uzbekistan, Human Rights Committee, 2004. The Committee held in favor of the author of the communication is Raihon Hudoyberganova, an Uzbek national born in 1978. She claimed that her right to freedom of thought, conscience, and religion under the Interna-

tional Covenant on Civil and Political Rights was violated when her university excluded her because she refused to remove the headscarf that she wore in accordance with her religious beliefs.

Rainbow Warrior Case (New Zealand v. France), 1990. The case involved a dispute between New Zealand and France that arose in the aftermath of the sinking of the British-registered Greenpeace ship *Rainbow Warrior*. It was arbitrated by UN Secretary-General Javier Pérez de Cuéllar in 1986, who considered international law related to State responsibility.

The Government of the Republic of South Africa. v. Grootboom and others, Constitutional Court of South Africa, 2000. The residents of Wallacedene lived in severe poverty, without any basic services such as water, sewage or refuse removal. The area was partly waterlogged and dangerously close to a main thoroughfare. Many Wallacedene residents had long since placed their names on a waiting list for low-income housing. As time wore on, a group of about 900 people, including Irene Grootboom, began to move from Wallacedene onto adjacent, vacant, privately-owned land that had been ear-marked for low-cost housing. The private landowner obtained an eviction order and the sheriff was ordered to dismantle and remove any structures remaining on the land. The evicted community, with nowhere to go, moved onto the Wallacedene sports field and tried to erect temporary structures. With legal assistance, the community formally notified the municipality of the situation and demanded that the municipality meet its constitutional obligation to provide temporary accommodation. The case was eventually brought before the highest constitutional court in South Africa.

Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia), 2001. The case concerned disputed sovereignty over two small islands in the Celebes Sea off the coast of Borneo. It was initiated by a special agreement between Indonesia and Malaysia of 30 September 1998. On 23 October 2001, the I.C.J. *denied* (14 to 1) the application of the Philippines to intervene on failure of the applicant to demonstrate an interest of a legal nature specific to the case.

Trial of General Tomoyuki Yamashita, U.S. Supreme Court, 1946. From 29 October to 7 December 1945, an American military tribunal in Manila tried General Yamashita for war crimes relating to the Manila Massacre and many atrocities in the Philippines and Singapore against civilians and prisoners of war, such as the Sook Ching massacre, and sentenced him to death. This case considered command responsibility for war crimes and is known as the Yamashita Standard.

Yekaterina Pavlovna Lantsova v. Russia, Human Rights Committee, 2002. The author of the communication brought to the Human Rights Com-

mittee, Yekaterina Pavlovna Lantsova, was the mother of Vladimir Albertovich Lantsov, deceased. Mrs. Lantsova claimed that her son was a victim of violations by Russia of article 6 (right to life) article 7 (prohibition of torture) and article 10 (freedom from arbitrary arrest and humane treatment in detention, due process of law) of the International Covenant on Civil and Political Rights.

Western Sahara, I.C.J. Advisory Opinion, 1975. The International Court of Justice delivered an Advisory opinion on the legal issues related to Western Sahara which had arisen from the international controversy surrounding the proposed Spanish decolonization of the phosphate-rich territory. Both Morocco and Mauritania sought to incorporate the Western Sahara without a referendum of the territory's population. East state pressed its claim in the United Nations, and on December 13, 1974, the General Assembly requested an advisory opinion from the Court.

WTO Panel Report on United States-restrictions on imports of Tuna, GATT Panel Report, 1994. In eastern tropical areas of the Pacific Ocean, schools of yellowfin tuna often swim beneath schools of dolphins. When tuna is harvested with purse seine nets, dolphins are trapped in the nets. They often die unless they are released. The U.S. Marine Mammal Protection Act set dolphin protection standards for the domestic American fishing fleet and for countries whose fishing boats catch yellowfin tuna in that part of the Pacific Ocean. If a country exporting tuna to the United States cannot prove to U.S. authorities that it meets the U.S. dolphin protection standards the U.S. government must embargo all imports of the fish from that country. In this dispute, Mexico's exports of tuna to the U.S. were banned. The Report concerns Mexico's complaint against the U.S. in 1991 under the GATT dispute settlement procedure.

Zhakhongir Maksudov, et. al v. Kyrgyzstan Human Rights Committee, 2006. The authors of the communications brought to the Human Rights Committee, Zhakhongir Maksudov, Adil Rakhimov, Yakub Tashbaev and Rasuldzhon Pirmatov, were Uzbek nationals born in 1975, 1974, 1956 and 1959, respectively. At the time of submission of their cases, all authors were granted refugee status by the Office of the United Nations High Commissioner for Refugees (UNHCR) and were detained in a detention centre (SIZO) of Osh, Kyrgyzstan, awaiting removal to Uzbekistan and were eventually deported to Uzbekistan. They claimed violations by Kyrgyzstan of their rights under article 6 (right to life), article 7 (prohibition of torture) article 9 (freedom from arrest and arbitrary detention), and article 14 (right to fair trial and due process of law) under the International Covenant on Civil and Political Rights.

PART I

CHAPTER 1 INTRODUCTION

In so far as international law is observed, it provides us with stability and order and with a means of predicting the behavior of those with whom we have reciprocal legal obligations.

J. William Fulbright

The Evolving Nature of International Law

International law has been referred to frequently as the ‘law of nations.’ Traditionally, international legal frameworks were established to regulate and facilitate the relations among states, and more recently to promote peace and security. These foundations of international law remain a constant in today’s world, but the landscape is changing. Scholars share a common understanding that the sources, even subjects, of international law are expanding as the world becomes interlinked and ever more globalized, and as domestic relations affect international relations. The actors most influencing trends in international trade and investment priorities, economic development, and rules of equitable governance and human freedoms are more often intergovernmental bodies and non-state actors, such as businesses, trade associations, humanitarian and human rights agencies, and other civil society organizations. These groups are direct beneficiaries of the stable order provided by a world that adheres to international legal standards. The implementation of such standards at the national level contributes to strengthening the rule of law and equitable order in domestic affairs, and to facilitating the exchange of goods, services, and ideas across borders.

The Constitution of the Kyrgyz Republic is one of the most progressive in recognition and incorporation of international standards as a means of facilitating good governance, providing in Article 6(3):

International treaties to which the Kyrgyz Republic is a party that have entered into force under the established legal procedure

and also the universally recognized principles and norms of international law shall be the constituent part of the legal system of the Kyrgyz Republic.

The provisions of international treaties on human rights shall have direct action and be of priority in respect of provisions of other international treaties.

The challenges countries face in addressing domestic level issues can affect other countries of a region or the international community as a whole. The recent financial crisis that emerged in the United States, Greece, and other countries of Europe is but one example. As scholars have noted:

The changing nature of international legal rules today responds to a new generation of worldwide problems. The most striking feature of these problems is that they arise from within states rather than from state actors themselves.¹

As the issues society faces become more closely interlinked, global governance mechanisms and international law play an ever increasing role in domestic life. Those engaged in navigating this ever changing terrain or seeking to promote better international relations must continually keep current on the evolution of law created by new multilateral treaties, global regulatory bodies, and the jurisprudence of international tribunals. As experts, we never cease to be students of this evolutionary process.

This book seeks to capture both the foundational principles on which our international legal system depends, and normative frameworks representing future legal trends. The cases and materials were selected to provide a distinct focus on issues relevant to Kyrgyzstan and Central Asian countries. In this way, the book can be a useful resource to support university teachers and students in their studies related to international law, foreign affairs, business, and other fields. It may also be a helpful guide for lawyers, policy makers, or others working on global issues in Central Asia. It is anticipated that the resources and materials will continue to be updated over time and made available on CD and web formats for the benefit of all users.

¹ Anne-Marie Slaughter & William Burke-White, "The Future of International Law is Domestic (or, The European Way of Law)," 47 *Harvard Int'l L. J.* 327, (No. 2, Summer 2006).

Getting the most from this Resource Book

The book is divided into two major parts. Part I contains chapters on international legal principles related to the sources and subjects of international law. These serve as the normative architecture for the development of global rules. This part also includes chapters on territorial sovereignty, state responsibility and dispute resolution, matters which have been the focus of legal discourse among nations for the better part of the past hundred years and which have helped shape the present context.

Part II comprises chapters on key emerging areas of substantive law--those areas where governments are engaging in negotiation and where normative standards are developing fairly rapidly. These relate to international rules on the use of force, human rights and humanitarian crises, criminal responsibility, environmental protection, and international trade and investment.

The book seeks to cover a broad area of jurisprudence but is not meant to be a law *textbook* in the traditional sense. Rather, it is designed as a compilation of necessary and useful materials that can supplement existing curriculum and practice. As such, the book retains an objective viewpoint, presenting the original texts or excerpts of scholarly articles, resolutions, declarations, and treaties of the United Nations, decisions of international and regional tribunals, and intergovernmental organization standards. It can be used by students and practitioners alike in their pursuit of understanding modern international law and existing international legal frameworks.

CHAPTER 2 SOURCES OF INTERNATIONAL PUBLIC LAW

Statute of the International Court of Justice

Article 38

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
 - a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
 - b. international custom, as evidence of a general practice accepted as law;
 - c. the general principles of law recognized by civilized nations;
 - d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Treaty Law

Maritime Delimitation and Territorial Questions (Qatar v. Bahrain), 1994²

22. The Parties agree that the exchanges of letters of December 1987 constitute an international agreement with binding force in their mutual relations. Bahrain however maintains that the Minutes of 25 December 1990 were no more than a simple record of negotiations, similar in nature to the Minutes of the Tripartite Committee; that accordingly they did not rank as

² *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, Judgment, I.C.J. Reports, 1994, p. 112.

an international agreement and could not; therefore, serve as a basis for the jurisdiction of the Court.

23. The Court would observe, in the first place, that international agreements may take a number of forms and be given a diversity of names. Article 2, paragraph (1) (a) of the Vienna Convention on the Law of Treaties of 23 May 1969 provides that for the purposes of that Convention,

“ ‘treaty’ means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”

Furthermore, as the Court said, in a case concerning a joint communiqué, “it knows of no rule of international law which might preclude a joint communiqué from constituting an international agreement to submit a dispute to arbitration or judicial settlement” (Aegean Sea Continental Shelf, Judgment. I.C.J. Reports 1978, p. 39, para. 96).

In order to ascertain whether an agreement of that kind has been concluded, “the Court must have regard above all to its actual terms and to the particular circumstances in which it was drawn up.” (ibid.)

Anglo-Iranian Oil Co. Case (United Kingdom v. Iran), 1952³

[p.95] The Application referred to the Declarations by which the Government of the United Kingdom and the Government of Iran accepted the compulsory jurisdiction of the Court in accordance with Article 36, paragraph 2, of the Court’s Statute....

[p. 102] On April 29th, 1933, an agreement was concluded between the Imperial Government of Persia (now the Imperial Government of Iran, which name the Court will use hereinafter) and the Anglo-Persian Oil Company, Limited (later the Anglo-Iranian Oil Company, Limited), a Company incorporated in the United Kingdom. This agreement was ratified by the Iranian Majlis on May 28th, 1933, and came into force on the following day after having received the Imperial assent.

On March 15th and 20th, 1951, the Iranian Majlis and Senate, respectively,

³ Anglo Iranian Oil Co. Case (United Kingdom v. Iran), Preliminary Objection, Judgment, I.C.J. Reports, 1952, p. 93.

passed a law enunciating the principle of nationalization of the oil industry in Iran. On April 28th and 30th, 1951, they passed another law “concerning the procedure for enforcement of the law concerning the nationalization of the oil industry throughout the country.” These two laws received the Imperial assent on May 1st, 1951.

As a consequence of these laws, a dispute arose between the Government of Iran and the Anglo-Iranian Oil Company, Limited. The Government of the United Kingdom adopted the cause of this British Company and submitted, in virtue of the right of diplomatic protection, an Application to the Court on May 26th, 1951, instituting proceedings in the name of the Government of the United Kingdom of Great Britain and Northern Ireland against the Imperial Government of Iran...

[p. 111] The Court will now consider whether... or not the concession contract of 1933 or the settlement of the dispute in that year constituted an agreement between the Government of Iran and the Government of the United Kingdom is a question relating to jurisdiction, the solution of which does not depend upon a consideration of the merits. It can be and must be determined at this stage, quite independently of the facts surrounding the act of nationalization complained of by the United Kingdom...

The United Kingdom maintains that,... the Government of Iran undertook certain treaty obligations towards the Government of the United Kingdom. It endeavors to establish those obligations by contending that the agreement signed by the Iranian Government with the Anglo-Persian Oil Company on April 29th, 1933, has a double character, the character of being at once a concessionary contract between the Iranian Government and the Company and a treaty between the two Governments. It is further argued by the United Kingdom that even if the settlement reached in 1933 only amounted to a tacit or an implied agreement, it must be considered to be within the meaning of the term “treaties or conventions” contained in the Iranian Declaration.

The Court cannot accept the view that the contract signed between the Iranian Government and the Anglo-Persian Oil Company has a double character. It is nothing more than a concessionary contract between a government and a foreign corporation. The United Kingdom Government is not a party to the contract; there is no privity of contract between the Government of Iran and the Government of the United Kingdom. Under the contract the Iranian Government cannot claim from the United Kingdom Government any rights which it may claim from the Company, nor can it be called upon to perform towards the United Kingdom Government any obligations which it is bound to perform towards the Company. The document bearing the signatures of

the representatives of the Iranian Government and the Company has a single purpose: the purpose of regulating the relations between that Government and the Company in regard to the concession. It does not regulate in any way the relations between the two Governments.

This juridical situation is not altered by the fact that the concessionary contract was negotiated and entered into through the good offices of the Council of the League of Nations, acting through its Rapporteur. The United Kingdom, in submitting its dispute with the Iranian Government to the League Council, was only exercising its right of diplomatic protection in favour of one of its nationals. It was seeking redress for what it believed to be a wrong which Iran had committed against a juristic person of British nationality. The final report by the Rapporteur to the Council on the successful conclusion of a new concessionary contract between the Iranian Government and the Company gave satisfaction to the United Kingdom Government. The efforts of the United Kingdom Government to give diplomatic protection to a British national had thus borne fruit, and the matter came to an end with its removal from the agenda.

Throughout the proceedings before the Council, Iran did not make any engagements to the United Kingdom other than to negotiate with the Company, and that engagement was fully executed. Iran did not give any promise or make any pledge of any kind to the United Kingdom in regard to the new concession. The fact that the concessionary contract was reported to the Council and placed in its records does not convert its terms into the terms of a treaty by which the Iranian Government is bound vis-a-vis the United Kingdom Government.

International Customary Law

North Sea Continental Shelf Cases (Germany v. Denmark and Netherlands), 1969⁴

70. The Court must now proceed to the last stage in the argument put forward on behalf of Denmark and the Netherlands. This is to the effect that even if there was at the date of the Geneva Convention no rule of customary international law in favour of the equidistance principle, and no such rule was crystallized in Article 6 of the Convention, nevertheless such a rule has come into being since the Convention, partly because of its own impact, partly on the

⁴ North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports, 1969, p. 3.

basis of subsequent State practice, - and that this rule, being now a rule of customary international law binding on all States, including therefore the Federal Republic, should be declared applicable to the delimitation of the boundaries between the Parties' respective continental shelf areas in the North Sea.

71. In so far as this contention is based on the view that Article 6 of the Convention has had the influence, and has produced the effect, described, it clearly involves treating that Article as a norm-creating provision which has constituted the foundation of, or has generated a rule which, while only conventional or contractual in its origin, has since passed into the general corpus of international law, and is now accepted as such by the *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties to the Convention. There is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed. At the same time this result is not lightly to be regarded as having been attained.

72. It would in the first place be necessary that the provision concerned should, at all events potentially, be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law. Considered in abstracto the equidistance principle might be said to fulfill this requirement. Yet in the particular form in which it is embodied in Article 6 of the Geneva Convention, and having regard to the relationship of that Article to other provisions of the Convention, this must be open to some doubt. In the first place, Article 6 is so framed as to put second the obligation to make use of the equidistance method, causing it to come after a primary obligation to effect delimitation by agreement. Such a primary obligation constitutes an unusual preface to what is claimed to be a potential general rule of law. Without attempting to enter into, still less pronounce upon any question of *jus cogens*, it is well understood that, in practice, rules of international law can, by agreement, be derogated from in particular cases, or as between particular parties, - but this is not normally the subject of any express provision, as it is in Article 6 of the Geneva Convention. Secondly the part played by the notion of special circumstances relative to the principle of equidistance as embodied in Article 6, and the very considerable, still unresolved controversies as to the exact meaning and scope of this notion, must raise further doubts as to the potentially norm-creating character of the rule. Finally, the faculty of making reservations to Article 6, while it might not of itself prevent the equidistance principle being eventually received as general law, does add considerably to the difficulty of regarding this result as having been brought about (or being potentially possible) on the basis of the Convention: for so long as this faculty

continues to exist, and is not the subject of any revision brought about in consequence of a request made under Article 13 of the Convention-of which there is at present no official indication-it is the Convention itself which would, for the reasons already indicated, seem to deny to the provisions of Article 6 the same norm-creating character as, for instance, Articles 1 and 2 possess.

73. With respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it include that of States whose interests were specially affected. In the present case however, the Court notes that, even if allowance is made for the existence of a number of States to whom participation in the Geneva Convention is not open, or which, by reason for instance of being land-locked States, would have no interest in becoming parties to it, the number of ratifications and accessions so far secured is, though respectable, hardly sufficient. That non-ratification may sometimes be due to factors other than active disapproval of the convention concerned can hardly constitute basis on which positive acceptance of its principles can be implied: the reasons are speculative, but the facts remain.

74. As regards the time element, the Court notes that it is over ten years since the Convention was signed, but that it is even now less than five since it came into force in June 1964, and that when the present proceedings were brought it was less than three years, while less than one had elapsed at the time when the respective negotiations between the Federal Republic and the other two Parties for a complete delimitation broke down on the question of the application of the equidistance principle. Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked;- and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.

75. The Court must now consider whether State practice in the matter of continental shelf delimitation has, subsequent to the Geneva Convention, been of such a kind as to satisfy this requirement. Leaving aside cases which, for various reasons, the Court does not consider to be reliable guides as precedents, such as delimitations effected between the present Parties themselves,

or not relating to international boundaries, some fifteen cases have been cited in the course of the present proceedings, occurring mostly since the signature of the 1958 Geneva Convention, in which continental shelf boundaries have been delimited according to the equidistance principle-in the majority of the cases by agreement, in a few others unilaterally-or else the delimitation was foreshadowed but has not yet been carried out. Amongst these fifteen are the four North Sea delimitations United Kingdom/Norway-Denmark-Netherlands, and Norway/Denmark already mentioned in paragraph 4 of this Judgment. But even if these various cases constituted more than a very small proportion of those potentially calling for delimitation in the world as a whole, the Court would not think it necessary to enumerate or evaluate them separately, since there are, a priori, several grounds which deprive them of weight as precedents in the present context.

76. To begin with, over half the States concerned, whether acting unilaterally or conjointly, were or shortly became parties to the Geneva Convention, and were therefore presumably, so far as they were concerned, acting actually or potentially in the application of the Convention. From their action no inference could legitimately be drawn as to the existence of a rule of customary international law in favour of the equidistance principle. As regards those States, on the other hand, which were not, and have not become parties to the Convention, the basis of their action can only be problematical and must remain entirely speculative. Clearly, they were not applying the Convention. But from that no inference could justifiably be drawn that they believed themselves to be applying a mandatory rule of customary international law. There is not a shred of evidence that they did and, as has been seen (paragraphs 22 and 23), there is no lack of other reasons for using the equidistance method, so that acting, or agreeing to act in a certain way, does not of itself demonstrate anything of a juridical nature.

77. The essential point in this connection-and it seems necessary to stress it-is that even if these instances of action by non-parties to the Convention were much more numerous than they in fact are, they would not, even in the aggregate, suffice in themselves to constitute the *opinio juris*;—for, in order to achieve this result, two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of Law requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many

international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.

78. In this respect the Court follows the view adopted by the Permanent Court of International Justice in the *Lotus* case, as stated in the following passage, the principle of which is, by analogy, applicable almost word for word, *mutatis mutandis*, to the present case (P.C.I.J., Series A, No. 10, 1927, at p. 28):

“Even if the rarity of the judicial decisions to be found . . . were sufficient to prove . . . the circumstance alleged . . ., it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom. The alleged fact does not allow one to infer that States have been conscious of having such a duty on the other hand, . . .there are other circumstances calculated to show that the contrary is true.”

Applying this dictum to the present case, the position is simply that in certain cases-not a great number-the States concerned agreed to draw or did draw the boundaries concerned according to the principle of equidistance. There is no evidence that they so acted because they felt legally compelled to draw them in this way by reason of a rule of customary law obliging them to do so-especially considering that they might have been motivated by other obvious factors.

Right of Passage over Indian Territory (Portugal v. India), 1960⁵

[p. 39] For the purpose of determining whether Portugal has established the right of passage claimed by it, the Court must have regard to what happened during the British and post-British periods. During these periods, there had developed between the Portuguese and the territorial sovereign with regard to passage to the enclaves a practice upon which Portugal relies for the purpose of establishing the right of passage claimed by it....

⁵ Case Concerning Right of Passage over Indian Territory (*Portugal v. India*), Merits, Judgment, I.C.J. Reports 1960, p. 6.

[p. 40] The Court, therefore, concludes that, with regard to private persons, civil officials and goods in general there existed during the British and post-British periods a constant and uniform practice allowing free passage between Daman and the enclaves. This practice having continued over a period extending beyond a century and a quarter unaffected by the change of regime in respect of the intervening territory which occurred when India became independent, the Court is, in view of all the circumstances of the case, satisfied that that practice was accepted as law by the Parties and has given rise to a right and a correlative obligation.

The Court therefore holds that Portugal had in 1954 a right of passage over intervening Indian territory between coastal Daman and the enclaves and between the enclaves, in respect of private persons, civil officials and goods in general, to the extent necessary, as claimed by Portugal, for the exercise of its sovereignty over the enclaves, and subject to the regulation and control of India.

As regards armed forces, armed police and arms and ammunition, the position is different.

It appears that during the British period up to 1878 passage of armed forces and armed police between British and Portuguese possessions was regulated on a basis of reciprocity. No distinction appears to have been made in this respect with regard to passage between Daman and the enclaves. There is nothing to show that passage of armed forces and armed police between Daman and the enclaves or between the enclaves was permitted or exercised as of right....

[p. 42] It would thus appear that, during the British and post-British periods, Portuguese armed forces and armed police did not pass between Daman and the enclaves as of right and that, after 1878, such passage could only take place with previous authorization by the British and later by India, accorded either under a reciprocal arrangement already agreed to, or in individual cases. Having regard to the special circumstances of the case, this necessity for authorization before passage could take place constitutes, in the view of the Court, a negation of passage as of right. The practice predicates that the territorial sovereign had the discretionary power to withdraw or to refuse permission. It is argued that permission was always granted, but this does not, in the opinion of the Court, affect the legal position. There is nothing in the record to show that grant of permission was incumbent on the British or on India as an obligation....

[p.43] There was thus established a clear distinction between the practice permitting free passage of private persons, civil officials and goods in general, and the practice requiring previous authorization, as in the case of armed forces, armed police, and arms and ammunition.

The Court is, therefore, of the view that no right of passage in favour of Portugal involving a correlative obligation on India has been established in respect of armed forces, armed police, and arms and ammunition. The course of dealings established between the Portuguese and the British authorities with respect to the passage of these categories excludes the existence of any such right. The practice that was established shows that, with regard to these categories, it was well understood that passage could take place only by permission of the British authorities. This situation continued during the post-British period.

Portugal also invokes general international custom, as well as the general principles of law recognized by civilized nations, in support of its claim of a right of passage as formulated by it. Having arrived at the conclusion that the course of dealings between the British and Indian authorities on the one hand and the Portuguese on the other established a practice, well understood between the Parties, by virtue of which Portugal had acquired a right of passage in respect of private persons, civil officials and goods in general, the Court does not consider it necessary to examine whether general international custom or the general principles of law recognized by civilized nations may lead to the same result.

As regards armed forces, armed police and arms and ammunition, the finding of the Court that the practice established between the Parties required for passage in respect of these categories the permission of the British or Indian authorities, renders it unnecessary for the Court to determine whether or not, in the absence of the practice that actually prevailed, general international custom or the general principles of law recognized by civilized nations could have been relied upon by Portugal in support of its claim to a right of passage in respect of these categories.

Legality of the Threat or Use of Nuclear Weapons in Armed Conflict, I.C.J. Advisory Opinion, 1996⁶

21. The use of the word “permitted” in the question put by the General Assembly was criticized before the Court by certain States on the ground that this implied that the threat or the use of nuclear weapons would only be permissible if authorization could be found in a treaty provision or in customary international law. Such a starting point, those States submitted, was incompatible with the very basis of international law, which rests upon the principles of sovereignty and consent; accordingly, and contrary to what was implied by

⁶ Legality of the Threat or Use of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996, p. 66.

use of the word “permitted,” States are free to threaten or use nuclear weapons unless it can be shown that they are bound not to do so by reference to a prohibition in either treaty law or customary international law. Support for this contention was found in dicta of the Permanent Court of International Justice in the “*Lotus*” case that “restrictions upon the independence of States cannot . . . be presumed” and that international law leaves to States “a wide measure of discretion which is only limited in certain cases by prohibitive rules” (*P.C.I.J., Series A, No. 10*, pp. 18 and 19). Reliance was also placed on the dictum of the present Court in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*) that:

“in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited” (*I.C.J. Reports 1986, p. 135, para. 269*).

For other States, the invocation of these dicta in the “*Lotus*” case was inapposite; their status in contemporary international law and applicability in the very different circumstances of the present case were challenged.

It was also contended that the above-mentioned dictum of the present Court was directed to the *possession* of armaments and was irrelevant to the threat or use of nuclear weapons. Finally, it was suggested that, were the Court to answer the question put by the Assembly, the word “permitted” should be replaced by “prohibited.”

22. The Court notes that the nuclear-weapon States appearing before it either accepted, or did not dispute, that their independence to act was indeed restricted by the principles and rules of international law, more particularly humanitarian law (see below, paragraph 86), as did the other States which took part in the proceedings. Hence, the argument concerning the legal conclusions to be drawn from the use of the word “permitted,” and the questions of burden of proof to which it was said to give rise, are without particular significance for the disposition of the issues before the Court....

52. The Court notes by way of introduction that international customary and treaty law does not contain any specific prescription authorizing the threat or use of nuclear weapons or any other weapon in general or in certain circumstances, in particular those of the exercise of legitimate self-defense. Nor, however, is there any principle or rule of international law which would make the legality of the threat or use of nuclear weapons or of any other weapons dependent on a specific authorization. State practice shows that the illegality of the use of certain weapons as such does not result from an absence of authorization but, on the contrary, is formulated in terms of prohibition....

60. Those States that believe that recourse to nuclear weapons is illegal stress that the conventions that include various rules providing for the limitation or elimination of nuclear weapons in certain areas (such as the Antarctic Treaty of 1959 which prohibits the deployment of nuclear weapons in the Antarctic, or the Treaty of Tlatelolco of 1967 which creates a nuclear-weapon-free zone in Latin America) or the conventions that apply certain measures of control and limitation to the existence of nuclear weapons (such as the 1963 Partial Test-Ban Treaty or the Treaty on the Non-Proliferation of Nuclear Weapons) all set limits to the use of nuclear weapons. In their view, these treaties bear witness, in their own way, to the emergence of a rule of complete legal prohibition of all uses of nuclear weapons.

61. Those States who defend the position that recourse to nuclear weapons is legal in certain circumstances see a logical contradiction in reaching such a conclusion. According to them, those Treaties, such as the Treaty on the Non-Proliferation of Nuclear Weapons, as well as Security Council resolutions 255 (1968) and 984 (1995) which take note of the security assurances given by the nuclear-weapon States to the non nuclear-weapon States in relation to any nuclear aggression against the latter, cannot be understood as prohibiting the use of nuclear weapons, and such a claim is contrary to the very text of those instruments. For those who support the legality in certain circumstances of recourse to nuclear weapons, there is no absolute prohibition against the use of such weapons. The very logic and construction of the Treaty on the Non-Proliferation of Nuclear Weapons, they assert, confirm this. This Treaty, whereby, they contend, the possession of nuclear weapons by the five nuclear-weapon States has been accepted, cannot be seen as a treaty banning their use by those States; to accept the fact that those States possess nuclear weapons is tantamount to recognizing that such weapons may be used in certain circumstances. Nor, they contend, could the security assurances given by the nuclear-weapon States in 1968, and more recently in connection with the Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons in 1995, have been conceived without its being supposed that there were circumstances in which nuclear weapons could be used in a lawful manner. For those who defend the legality of the use, in certain circumstances, of nuclear weapons, the acceptance of those instruments by the different non-nuclear-weapon States confirms and reinforces the evident logic upon which those instruments are based.

62. The Court notes that the treaties dealing exclusively with acquisition, manufacture, possession, deployment and testing of nuclear weapons, without specifically addressing their threat or use, certainly point to an increasing concern in the international community with these weapons; the Court concludes

from this that these treaties could therefore be seen as foreshadowing a future general prohibition of the use of such weapons, but they do not constitute such a prohibition by themselves. As to the treaties of Tlatelolco and Rarotonga and their Protocols, and also the declarations made in connection with the indefinite extension of the Treaty on the Non-Proliferation of Nuclear Weapons, it emerges from these instruments that :

- (a) a number of States have undertaken not to use nuclear weapons in specific zones (Latin America; the South Pacific) or against certain other States (non-nuclear-weapon States which are parties to the Treaty on the Non-Proliferation of Nuclear Weapons) ;
- (b) nevertheless, even within this framework, the nuclear-weapon States have reserved the right to use nuclear weapons in certain circumstances; and
- (c) these reservations met with no objection from the parties to the Tlatelolco or Rarotonga Treaties or from the Security Council.

63. These two treaties, the security assurances given in 1995 by the nuclear-weapon States and the fact that the Security Council took note of them with satisfaction, testify to a growing awareness of the need to liberate the community of States and the international public from the dangers resulting from the existence of nuclear weapons. The Court more over notes the signing, even more recently, on 15 December 1995, at Bangkok, of a Treaty on the Southeast Asia Nuclear-Weapon-Free Zone, and on 11 April 1996, at Cairo, of a treaty on the creation of a nuclear weapons-free zone in Africa. It does not, however, view these elements as amounting to a comprehensive and universal conventional prohibition on the use, or the threat of use, of those weapons as such.

64. The Court will now turn to an examination of customary international law to determine whether a prohibition of the threat or use of nuclear weapons as such flows from that source of law. As the Court has stated, the substance of that law must be “looked for primarily in the actual practice and *opinio juris* of States” (*Continental Shelf (Libyan Arab Jarnabiriya/Malta)*, *Judgment*, I. C. J. *Reports* 1985, p. 29, para. 27).

65. States which hold the view that the use of nuclear weapons is illegal have endeavored to demonstrate the existence of a customary rule prohibiting this use. They refer to a consistent practice of non-utilization of nuclear weapons by States since 1945 and they would see in that practice the expression of an *opinio juris* on the part of those who possess such weapons.

66. Some other States, which assert the legality of the threat and use of nuclear weapons in certain circumstances, invoked the doctrine and practice of deterrence in support of their argument. They recall that they have always, in concert with certain other States, reserved the right to use those weapons in the exercise of the right to self-defence against an armed attack threatening their vital security interests. In their view, if nuclear weapons have not been used since 1945, it is not on account of an existing or nascent custom but merely because circumstances that might justify their use have fortunately not arisen.

67. The Court does not intend to pronounce here upon the practice known as the “policy of deterrence.” It notes that it is a fact that a number of States adhered to that practice during the greater part of the Cold War and continue to adhere to it. Furthermore, the members of the international community are profoundly divided on the matter of whether non-recourse to nuclear weapons over the past 50 years constitutes the expression of an *opinio juris*. Under these circumstances the Court does not consider itself able to find that there is such an *opinio juris*.

68. According to certain States, the important series of General Assembly resolutions, beginning with resolution 1653 (XVI) of 24 November 1961, that deal with nuclear weapons and that affirm, with consistent regularity, the illegality of nuclear weapons, signify the existence of a rule of international customary law which prohibits recourse to those weapons. According to other States, however, the resolutions in question have no binding character on their own account and are not declaratory of any customary rule of prohibition of nuclear weapons; some of these States have also pointed out that this series of resolutions not only did not meet with the approval of all of the nuclear-weapon States but of many other States as well.

69. States which consider that the use of nuclear weapons is illegal indicated that those resolutions did not claim to create any new rules, but were confined to a confirmation of customary law relating to the prohibition of means or methods of warfare which, by their use, overstepped the bounds of what is permissible in the conduct of hostilities. In their view, the resolutions in question did no more than apply to nuclear weapons the existing rules of international law applicable in armed conflict; they were no more than the “envelope” or *instrumentum* containing certain pre-existing customary rules of international law. For those States it is accordingly of little importance that the *instrumentum* should have occasioned negative votes, which cannot have the effect of obliterating those customary rules which have been confirmed by treaty law.

70. The Court notes that General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule.

71. Examined in their totality, the General Assembly resolutions put before the Court declare that the use of nuclear weapons would be “a direct violation of the Charter of the United Nations”; and in certain formulations that such use “should be prohibited.” The focus of these resolutions has sometimes shifted to diverse related matters; however, several of the resolutions under consideration in the present case have been adopted with substantial numbers of negative votes and abstentions; thus, although those resolutions are a clear sign of deep concern regarding the problem of nuclear weapons, they still fall short of establishing the existence of an *opinio juris* on the illegality of the use of such weapons.

72. The Court further notes that the first of the resolutions of the General Assembly expressly proclaiming the illegality of the use of nuclear weapons, resolution 1653 (XVI) of 24 November 1961 (mentioned in subsequent resolutions), after referring to certain international declarations and binding agreements, from the Declaration of St. Petersburg of 1868 to the Geneva Protocol of 1925, proceeded to qualify the legal nature of nuclear weapons, determine their effects, and apply general rules of customary international law to nuclear weapons in particular. That application by the General Assembly of general rules of customary law to the particular case of nuclear weapons indicates that, in its view, there was no specific rule of customary law which prohibited the use of nuclear weapons; if such a rule had existed, the General Assembly could simply have referred to it and would not have needed to undertake such an exercise of legal qualification.

73. Having said this, the Court points out that the adoption each year by the General Assembly, by a large majority, of resolutions recalling the content of resolution 1653 (XVI), and requesting the member States to conclude a convention prohibiting the use of nuclear weapons in any circumstance, reveals the desire of a very large section of the international community to take, by a specific and express prohibition of the use of nuclear weapons, a significant step forward along the road to complete nuclear disarmament. The emergence, as *lex lata*, of a customary rule specifically prohibiting the use of nuclear weapons

as such is hampered by the continuing tensions between the nascent *opinio juris* on the one hand, and the still strong adherence to the practice of deterrence on the other.

74. The Court not having found a conventional rule of general scope, nor a customary rule specifically proscribing the threat or use of nuclear weapons *per se*, it will now deal with the question whether recourse to nuclear weapons must be considered as illegal in the light of the principles and rules of international humanitarian law applicable in armed conflict and of the law of neutrality....

95. Nor can the Court make a determination on the validity of the view that the recourse to nuclear weapons would be illegal in any circumstance owing to their inherent and total incompatibility with the law applicable in armed conflict. Certainly, as the Court has already indicated, the principles and rules of law applicable in armed conflict – at the heart of which is the overriding consideration of humanity – make the conduct of armed hostilities subject to a number of strict requirements. Thus, methods and means of warfare, which would preclude any distinction between civilian and military targets, or which would result in unnecessary suffering to combatants, are prohibited. In view of the unique characteristics of nuclear weapons, to which the Court has referred above, the use of such weapons in fact seems scarcely reconcilable with respect for such requirements. Nevertheless, the Court considers that it does not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance.

96. Furthermore, the Court cannot lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defence, in accordance with Article 51 of the Charter when its survival is at stake. Nor can it ignore the practice referred to as “policy of deterrence,” to which an appreciable section of the international community adhered for many years. The Court also notes the reservations which certain nuclear weapon States have appended to the undertakings they have given, notably under the Protocols to the Treaties of Tlatelolco and Rarotonga, and also under the declarations made by them in connection with the extension of the Treaty on the Non-Proliferation of Nuclear Weapons, not to resort to such weapons.

97. Accordingly, in view of the present state of international law viewed as a whole, as examined above by the Court, and of the elements of fact at its disposal, the Court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake.

General Principles of Law

Prosecutor v. Drazen Erdemovic, International Criminal Tribunal for the Former Yugoslavia, 1997

8. Between 13 July 1995 and approximately 22 July 1995, thousands of Bosnian Muslim men were summarily executed by members of the Bosnian Serb army and Bosnian Serb police...

12. On or about 16 July 1995, Drazen Erdemovic did shoot and kill and did participate with other members of his unit and soldiers from another brigade in the shooting and killing of unarmed Bosnian Muslim men at the Pilica collective farm. These summary executions resulted in the deaths of hundreds of Bosnian Muslim male civilians... Drazen Erdemovic claims that he received the order from Brano Gojkovic, commander of the operations at the Branjevo farm at Pilica, to prepare himself along with seven members of his unit for a mission the purpose of which they had absolutely no knowledge. He claimed it was only when they arrived on-site that the members of the unit were informed that they were to massacre hundreds of Muslims... He declared that had he not carried out the order, he is sure he would have been killed or that his wife or child would have been directly threatened...

16. The Appeals Chamber has raised... preliminary questions to the parties in a Scheduling Order dated 5 May 1997:

(1) In law, may duress afford a complete defence to a charge of crimes against humanity and/or war crimes such that, if the defence is proved at trial, the accused is entitled to an acquittal?...

19. For the reasons set out in the Joint Separate Opinion of Judge McDonald and Judge Vohrah and in the Separate and Dissenting Opinion of Judge Li, the majority of the Appeals Chamber finds that duress does not afford a complete defence to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings...

32. As to the first preliminary question addressed to the parties in this appeal, “[i]n law, may duress afford a complete defence to a charge of crimes against humanity and/or war crimes such that, if the defence is proved at trial,

⁷ International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 former Yugoslavia, October 7, 1997, (citations omitted).

the accused in entitled to an acquittal?,” three factors bear upon this general statement of the issue. Firstly, the particular war crime or crime against humanity committed by the Appellant involved the killing of innocent human beings. Secondly, as will be shown in the ensuing discussion, there is a clear dichotomy in the practice of the main legal systems of the world between those systems which would allow duress to operate as a complete defence to crimes involving the taking of innocent life, and those systems which would not. Thirdly, the Appellant in this case was a soldier of the Bosnian Serb army conducting combat operations in the Republic of Bosnia and Herzegovina at the material time. As such, the issue may be stated more specifically as follows: In law, may duress afford a complete defence to a soldier charged with crimes against humanity or war crimes where the soldier has killed innocent persons?...

56. It is appropriate now to inquire whether the “general principles of law recognised by civilised nations,” established as a source of international law in Article 38(1)(c) of the I.C.J. Statute, may shed some light upon this intricate issue of duress. Paragraph 58 of the Report of the Secretary-General of the United Nations presented on 3 May 1993 expressly directs the International Tribunal to this source of law:

The International Tribunal itself will have to decide on various personal defences which may relieve a person of individual criminal responsibility, such as minimum age or mental incapacity, drawing upon general principles of law recognised by all nations.

Further, Article 14 of the International Law Commission’s Draft Code of Crimes Against the Peace and Security of Mankind provides:

The competent court shall determine the admissibility of defences in accordance with the general principles of law, in the light of the character of each crime.

57. A number of considerations bear upon our analysis of the application of “general principles of law recognised by civilised nations” as a source of international law. First, although general principles of law are to be derived from existing legal systems, in particular, national systems of law, it is generally accepted that the distillation of a “general principle of law recognised by civilised nations” does not require the comprehensive survey of all legal systems of the world as this would involve a practical impossibility and has never been the practice of the International Court of Justice or other international tribunals which have had recourse to Article 38(1)(c) of the I.C.J. Statute. Second, it is the view of eminent jurists, including Baron Descamps, the President of the Advisory Committee of Jurists on Article 38(1)(c), that one purpose of this article is to avoid a situation of *non-liquet*, that is, where an international

tribunal is stranded by an absence of applicable legal rules. Third, a “general principle” must not be confused with concrete manifestations of that principle in specific rules. As stated by the Italian-Venezuelan Mixed Claims Commission in the *Gentini* case:

A rule...is essentially practical and, moreover, binding; there are rules of art as there are rules of government, while a principle expresses a general truth, which guides our action, serves as a theoretical basis for the various acts of our life, and the application of which to reality produces a given consequence.

In light of these considerations, our approach will necessarily not involve a direct comparison of the specific rules of each of the world’s legal systems, but will instead involve a survey of those jurisdictions whose jurisprudence is, as a practical matter, accessible to us in an effort to discern a general trend, policy or principle underlying the concrete rules of that jurisdiction which comports with the object and purpose of the establishment of the International Tribunal.

As Lord McNair pointed out in his Separate Opinion in the *South-West Africa Case*,

[i]t is never a question of importing into international law private law institutions “lock, stock and barrel,” ready made and fully equipped with a set of rules. It is rather a question of finding in the private law institutions indications of legal policy and principles appropriate to the solution of the international problem at hand. It is not the concrete manifestation of a principle in different national systems - which are anyhow likely to vary - but the general concept of law underlying them that the international judge is entitled to apply under paragraph (c). (Emphasis added.)

It is thus generally the practice of international tribunals to employ the general principle in its formulation of a legal rule applicable to the facts of the particular case before it. This practice is most evident in the treatment of the general principle of “good faith and equity” in cases before the International Court of Justice and the Permanent Court of International Justice. For example in the North Sea Continental Shelf Cases before the International Court of Justice, the Court had regard to “equitable principles” in its formulation of the rule delimiting the boundaries of continental shelves. In the Diversion of Water from the Meuse Case (Netherlands v. Belgium) before the Permanent Court of International Justice, Judge Hudson in his Individual Opinion, after accepting that equity is a “general principle of law recognised by civilised nations,” stated:

It would seem to be an important principle of equity that where two parties have assumed an identical or a reciprocal obligation, one party which is engaged in a continuing non-performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party.

In the *Chorzow Factory Case (Merits)*, the Permanent Court observed that “it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation.”

58. In order to arrive at a general principle relating to duress, we have undertaken a limited survey of the treatment of duress in the world’s legal systems. This survey is necessarily modest in its undertaking and is not a thorough comparative analysis. Its purpose is to derive, to the extent possible, a “general principle of law” as a source of international law....

It is clear from the differing positions of the principal legal systems of the world that there is no consistent concrete rule which answers the question whether or not duress is a defence to the killing of innocent persons. It is not possible to reconcile the opposing positions and, indeed, we do not believe that the issue should be reduced to a contest between common law and civil law.

59. The penal codes of civil law systems, with some exceptions, consistently recognise duress as a complete defence to all crimes. The criminal codes of civil law nations provide that an accused acting under duress “commits no crime” or “is not criminally responsible” or “shall not be punished.” We would note that some civil law systems distinguish between the notion of necessity and that of duress. Necessity is taken to refer to situations of emergency arising from natural forces. Duress, however, is taken to refer to compulsion by threats of another human being. Where a civil law system makes this distinction, only the provision relating to duress will be referred to.

(The Court considered both states of Civil and Common Law systems such as:

(a) Civil Law systems: France, Belgium, The Netherlands, Spain, Germany, Italy, Norway, Sweden, Finland, Venezuela, Nicaragua, Chile, Panama, Mexico, Former Yugoslavia,)

(For instance,)...

Spain

In the Spanish Penal Code of 1995, Article 20 provides that the criminal responsibility of an accused is removed where he is compelled to perform a certain act by an overwhelming fear.

Germany

Section 35(1) of the German Penal Code of 1975 (amended as at 15 May 1987) provides:

If someone commits a wrongful act in order to avoid an imminent, otherwise unavoidable danger to life, limb, or liberty, whether to himself or to a dependant or someone closely connected with him, the actor commits the act without culpability. This is not the case if under the circumstances it can be fairly expected of the actor that he suffer the risk; this might be fairly expected of him if he caused the danger, or if he stands in a special legal relationship to the danger. In the latter case, his punishment may be mitigated in conformity with section 49(1).

(b) Common law systems: England, United States and Australia, Canada, South Africa, India, Malaysia, Nigeria, Japan, China, Morocco, Somalia, Ethiopia.

(For instance),...

England

60. In England, duress is a complete defence to all crimes except murder, attempted murder and, it would appear, treason. Although there is no direct authority on whether duress is available in respect of attempted murder, the prevailing view is that there is no reason in logic, morality or law in granting the defence to a charge of attempted murder whilst withholding it in respect of a charge of murder.

United States and Australia

The English position that duress operates as a complete defence in respect of crimes generally is followed in the United States and Australia with variations in the federal state jurisdictions as to the precise definition of the defence and the range of offences for which the defence is not available....

63. In numerous national jurisdictions, certain offences are excepted from the application of the defence of duress. Traditional common law rejects the defence of duress in respect of murder and treason. Legislatures in many common law jurisdictions, however, often prescribe a longer list of excepted offences.

64. Despite these offences being excluded from the operation of duress as a defence, the practice of courts in these jurisdictions is nevertheless to mitigate the punishment of persons committing excepted offences unless there is a mandatory penalty of death or life imprisonment prescribed for the offence. In the United Kingdom, section 3(3)(a) of the Criminal Justice Act 1991

provides that a court “shall take into account all such information about the circumstances of the offence (including any aggravating or mitigating factors) as is available to it.”

Mitigating factors may relate to the seriousness of the offence, and in particular, may reflect the culpability of the offender. It is clearly established in principle and practice that where an offender is close to having a defence to criminal liability, this will tend to reduce the seriousness of the offence.

In *R. v. Beaumont*, the Court of Appeal reduced the offender's sentence because he had been entrapped into committing the offence even though entrapment is no defence in English law.

Similarly, in Australian sentencing jurisprudence and practice, the culpability of the offender is taken into account in sentencing. Section 9(2)(d) of the Penalties and Sentences Act 1992 (Qld) requires a court to take into account “the extent to which the offender is to blame for the offence.” Section 5(2)(d) of the Sentencing Act 1991 (Vic) refers to “the offender's culpability and degree of responsibility for the offence.” In *R. v. Okutgen*, the Victorian Court of Criminal Appeal held that provocation is a factor mitigating crimes of violence. In *R. v. Evans*, credence was given to the principle that a sentence should reflect the degree of participation of an offender in an offence. The degree of participation is taken to reflect the degree of the offender's culpability...

65. Courts in civil law jurisdictions may also mitigate an offender's punishment on the ground of duress where the defence fails. In some systems, the power to mitigate punishment on the ground of duress is expressly stated in the provisions addressing duress. In other jurisdictions in which the criminal law is embodied in a penal code, the power to mitigate may be found in general provisions regarding mitigation of sentence.

66. Having regard to the above survey relating to the treatment of duress in the various legal systems, it is, in our view, a general principle of law recognized by civilized nations that an accused person is less blameworthy and less deserving of the full punishment when he performs a certain prohibited act under duress. We would use the term “duress” in this context to mean “imminent threats to the life of an accused if he refuses to commit a crime” and do not refer to the legal terms of art which have the equivalent meaning of the English word “duress” in the languages of most civil law systems. This alleviation of blameworthiness is manifest in the different rules with differing content in the principal legal systems of the world as the above survey reveals. On the one hand, a large number of jurisdictions recognize duress as a complete defence absolving the accused from all criminal responsibility. On the other hand, in other jurisdictions, duress does not afford a complete defense to offences

generally but serves merely as a factor which would mitigate the punishment to be imposed on a convicted person. Mitigation is also relevant in two other respects. Firstly, punishment may be mitigated in respect of offences which have been specifically excepted from the operation of the defence of duress by the legislatures of some jurisdictions. Secondly, courts have the power to mitigate sentences where the strict elements of a defence of duress are not made out on the facts.

It is only when national legislatures have prescribed a mandatory life sentence or death penalty for particular offences that no consideration is given in national legal systems to the general principle that a person who commits a crime under duress is less blameworthy and less deserving of the full punishment in respect of that particular offence.

67. The rules of the various legal systems of the world are, however, largely inconsistent regarding the specific question whether duress affords a complete defence to a combatant charged with a war crime or a crime against humanity involving the killing of innocent persons. As the general provisions of the numerous penal codes set out above show, the civil law systems in general would theoretically allow duress as a complete defence to all crimes including murder and unlawful killing. On the other hand, there are laws of other legal systems which categorically reject duress as a defence to murder. Firstly, specific laws relating to war crimes in Norway and Poland do not allow duress to operate as a complete defence but permit it to be taken into account only in mitigation of punishment. Secondly, the Ethiopian Penal Code of 1957 provides in Article 67 that only “absolute physical coercion” may constitute a complete defence to crimes in general. Where the coercion is “moral,” which we would interpret as referring to duress by threats, the accused is only entitled to a reduction of penalty. This reduction of penalty may extend, where appropriate, even to a complete discharge of the offender from punishment. Thirdly, the common law systems throughout the world, with the exception of a small minority of jurisdictions of the United States which have adopted without reservation Section 2.09 of the United States Model Penal Code, reject duress as a defence to the killing of innocent persons.

(a) The case-law of certain civil law jurisdictions

68. We would add that although the penal codes of most civil law jurisdictions do not expressly except the operation of the defence of duress in respect of offences involving the killing of innocent persons, the penal codes of Italy, Norway, Sweden, Nicaragua, Japan, and the former Yugoslavia require proportionality between the harm caused by the accused's act and the harm with which the accused was threatened. The effect of this requirement is that

it leaves for determination in the case law of these civil law jurisdictions the question whether killing an innocent person is ever proportional to a threat to the life of an accused. The determination of that question is not essential to the disposal of this case and it suffices to say that courts in certain civil law jurisdiction may well consistently reject duress as a defence to the killing of innocent persons on the ground that the proportionality requirement in the provisions governing duress is not met. For example, the case law of Norway does not allow duress as a defence to murder. During the last months of World War Two, three Norwegian policemen were forced to participate in the execution of a compatriot who was sentenced to death by a Nazi special court. After the war, they were prosecuted under the Norwegian General Civil Penal Code for treason (paragraph 86) and murder (paragraph 233) and pleaded duress (paragraph 47) as a defence. It was urged upon the court that if they had refused to follow the order, they would have been shot along with the person who had been sentenced. Whilst accepting the version of the facts given by the accused, the court nevertheless declined to call their act “lawful” and stated:

And when this is so, the Penal Code will not allow punishment to be dispensed with merely because the accused acted under duress, even where it was of such a serious nature as in the case at bar, since according to the decision of the court of assize it must be deemed clear that the force did not preclude intentional conduct on the part of the accused.

In other words, the Norwegian court found that the proportionality required by paragraph 47 between the harm caused by the accused’s act and the harm with which the accused were threatened, was not satisfied. Accordingly, despite the general applicability to all crimes of paragraph 47 as set out in the Code, it would appear that a Norwegian court when interpreting this general provision will deny the defence to an accused person charged with murder because paragraph 47 requires that the circumstances afford justification to the accused in “regarding [the] danger as particularly significant in relation to the damage that might be caused by his act.”

69. In addition, the provisions governing duress in the penal codes of Germany and the former Yugoslavia suggest the possibility that soldiers in an armed conflict may, in contrast to ordinary persons, be denied a complete defence because of the special nature of their occupation. Section 35 (1) of the German Penal Code provides that duress is no defence “if under the circumstances it can be fairly expected of the actor that he suffer the risk; this might be fairly expected of him if he stands in a special legal relationship to the danger. In the latter case, his punishment may be mitigated in conformity with section 49(1).”

Article 10(4) of the Penal Code of the Socialist Federal Republic of Yugoslavia provides that “[t]here is no extreme necessity where the perpetrator was under an obligation to expose himself to the danger.”

(b) The principle behind the rejection of duress as a defence to murder in the common law

70. Murder is invariably included in any list of offences excepted by legislation in common law systems from the operation of duress as a defence. The English common law rule is that duress is no defence to murder, either for a principal offender or a secondary party to the crime. The House of Lords in *R.v Howe and Others* overruled the earlier decision of a differently constituted House of Lords in *Lynch v. DPP for Northern Ireland* in which it was held that duress could afford a defence to murder for a principal in the second degree. Thus, *R v. Howe* restored the position of the English common law to the traditional position that duress is not available as a defence to murder generally. There are two aspects to this position. The first is a firm rejection of the view in English law that duress, generally, affects the voluntariness of the *actus reus* or the *mens rea*. In *R.v Howe*, Lord Hailsham stated at page 777:

the second unacceptable view is that, possibly owing to a misunderstanding which has been read into some judgements, duress as a defence affects only the existence or absence of *mens rea*. The true view is stated in *Lynchs case* [1975] 1 AC 653 at 703 by Lord Kilbrandon (of the minority) and by Lord Edmund-Davies (of the majority) in their analysis. Lord Kilbrandon said:

“... the decision of the threatened man whose constancy is overborne so that he yields to the threat, is a calculated decision to do what he knows to be wrong, and therefore that of a man with, perhaps to some exceptionally limited extent, a “guilty mind.” .. “

The speech of Lord Wilberforce in *Lynch v. DPP for Northern Ireland* points out that

“an analogous result is achieved in a civil law context: duress does not destroy the will, for example, to enter into a contract, but prevents the law from accepting what has happened as a contract valid in law.”

It is of interest to note that this view of duress is shared by the Italian Court of Cassation in the *Bernardi and Randazzo* case where it stated that

[duress] leaves intact all the elements of criminal imputability. The person at issue acts with a diminished freedom of determination,

but acts voluntarily in order to escape an imminent and inevitable serious danger to his body and limb.

71. Given that duress has been held at common law not to negate mens rea, the availability of the defence turns on the question whether, in spite of the elements of the offence being strictly made out, the conduct of the defendant should be justified or excused. The second aspect of the common law stance against permitting duress as a defence to murder is the assertion in law of a moral absolute. This moral point has been pressed consistently in a long line of authorities in English law and is accepted by courts in other common law jurisdictions as the basis for the rejection of duress as a defence to murder. Indeed, it is also upon this assertion which the decisions of the British military tribunals in the Stalag Luft III case and the Feurstein case based their rejection of duress as a defence to murder.

In *Hales Pleas of the Crown*, the author states:

... if a man be desperately assaulted, and in peril of death, and cannot otherwise escape, unless to satisfy his assailant's fury he will kill an innocent person then present, the fear and actual force will not acquit him of the crime and punishment of murder, if he commit the fact for he ought rather to die himself, than kill an innocent. . . .

Blackstone reasoned that a man under duress ought rather to die himself than escape by the murder of an innocent...

Lord Griffiths in *R. v. Howe*, formulates the rationale thus:

It [the denial of duress as a defence to murder] is based upon the special sanctity that the law attaches to human life and which denies to a man the right to take an innocent life even at the price of his own or another's life.

Lord Mackay of Clashfern in the same case said:

It seems to me plain that the reason that it was for so long stated by writers of authority that the defence of duress was not available in a charge of murder was because of the supreme importance that the law afforded to the protection of human life and that it seemed repugnant that the law should recognise in any individual in any circumstances, however, extreme, the right to choose that one innocent person should be killed rather than another.

Lord Jauncey of Tullichettle stated his view in *R v. Gotts*:

The reason why duress has for so long been stated not to be available as a defence to a murder charge is that the law regards the sanctity of human life and the protection thereof as of paramount importance I would agree with Lord Griffiths (*Reg. v. Howe* [1987] AC 417, 444A) that nothing should be done to undermine in any way the highest duty of the law to protect the freedom and lives of those that live under it...

(c) No consistent rule from the principal legal systems of the world

72. It is clear from the differing positions of the principal legal systems of the world that there is no consistent concrete rule which answers the question whether or not duress is a defence to the killing of innocent persons. It is not possible to reconcile the opposing positions and, indeed, we do not believe that the issue should be reduced to a contest between common law and civil law.

We would therefore approach this problem bearing in mind the specific context in which the International Tribunal was established, the types of crimes over which it has jurisdiction, and the fact that the International Tribunal's mandate is expressed in the Statute as being in relation to "serious violations of international humanitarian law."

After the above survey of authorities in the different systems of law and exploration of the various policy considerations which we must bear in mind, we take the view that duress cannot afford a complete defence to a soldier charged with crimes against humanity or war crimes in international law involving the taking of innocent lives. We do so having regard to our mandated obligation under the Statute to ensure that international humanitarian law, which is concerned with the protection of humankind, is not in any way undermined.

In the result, we do not consider the plea of the Appellant was equivocal as duress does not afford a complete defence in international law to a charge of a crime against humanity or a war crime which involves the killing of innocent human beings.

Secondary Sources of Law

Statute of the International Court of Justice, Article 38, Section 1(d)

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
[...]

- d. judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

The S.S. "Lotus" Case (France v. Turkey), 1927⁸

[p. 23] ...it is certain that the courts of many countries, even of countries which have given their criminal legislation a strictly territorial character, interpret criminal law in the sense that offences, the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offence, and more especially its effects, have taken place there. French courts have, in regard to a variety of situations, given decisions sanctioning this way of interpreting the territorial principle. Again, the Court does not know of any cases in which governments have protested against the fact that the criminal law of some country contained a rule to this effect or that the courts of a country construed their criminal law in this sense. Consequently, once it is admitted that the effects of the offence were produced on the Turkish vessel, it becomes impossible to hold that there is a rule of international law which prohibits Turkey from prosecuting Lieutenant Demons because of the fact that the author of the offence was on board the French ship...

[p. 26] In the first place, as regards teachings of publicists, and apart from the question as to what their value may be from the point of view of establishing the existence of a rule of customary law, it is no doubt true that all or nearly all writers teach that ships on the high seas are subject exclusively to the jurisdiction of the State whose flag they fly. But the important point is the significance attached by them to this principle; now it does not appear that in

⁸ The Case of the S.S. "Lotus" (France v. Turkey), Permanent Court of International Justice (P.C.I.J.), Series A No. 70, 7 September 1927.

general, writers bestow upon this principle a scope differing from or wider than that explained above and which is equivalent to saying that the jurisdiction of a State over vessels on the high seas is the same in extent as its jurisdiction in its own territory. On the other hand, there is no lack of writers who, upon a close study of the special question whether a State can prosecute for offences committed on board a foreign ship on the high seas, definitely come to the conclusion that such offences must be regarded as if they had been committed in the territory of the State whose flag the ship flies, and that consequently the general rules of each legal system in regard to offences committed abroad are applicable....

On the other hand, there is no lack of cases in which a State has claimed a right to prosecute for an offence, committed on board a foreign ship, which it regarded as punishable under its legislation. Thus Great Britain refused the request of the United States for the extradition of John Anderson, a British seaman who had committed homicide on board an American vessel, stating that she did not dispute the jurisdiction of the United States but that she was entitled to exercise hers concurrently. This case, to which others might be added, is relevant in spite of Anderson's British nationality, in order to show that the principle of the exclusive jurisdiction of the country whose flag the vessel flies is not universally accepted.

The cases in which the exclusive jurisdiction of the State whose flag was flown has been recognized would seem rather to have been cases in which the foreign State was interested only by reason of the nationality of the victim, and in which, according to the legislation of that State itself or the practice of its courts, that ground was not regarded as sufficient to authorize prosecution for an offence committed abroad by a foreigner.

***Military and Paramilitary Activities in and against
Nicaragua (Nicaragua v. United States), 1986⁹***

188. The Court thus finds that both Parties take the view that the principles as to the use of force incorporated in the United Nations Charter correspond, in essentials, to those found in customary international law. The Parties thus both take the view that the fundamental principle in this area is expressed in the terms employed in Article 2, paragraph 4, of the United Nations Charter. They therefore accept a treaty-law obligation to refrain in their international

⁹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 14.

relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. The Court has however to be satisfied that there exists in customary international law an *opinio juris* as to the binding character of such abstention. This *opinio juris* may, though with all due caution, be deduced from, inter alia, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions, and particularly resolution 2625 (XXV) entitled “Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.” The effect of consent to the text of such resolutions cannot be understood as merely that of a “reiteration or elucidation” of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves. The principle of non-use of force, for example, may thus be regarded as a principle of customary international law, not as such conditioned by provisions relating to collective security, or to the facilities or armed contingents to be provided under Article 43 of the Charter. It would therefore seem apparent that the attitude referred to expresses an *opinio juris* respecting such rule (or set of rules), to be thenceforth treated separately from the provisions, especially those of an institutional kind, to which it is subject on the treaty-law plane of the Charter.

Jus Cogens Norms

Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States), 1986¹⁰

190. A further confirmation of the validity as customary international law of the principle of the prohibition of the use of force expressed in Article 2, paragraph 4, of the Charter of the United Nations may be found in the fact that it is frequently referred to in statements by State representatives as being not only a principle of customary international law but also a fundamental or cardinal principle of such law. The International Law Commission, in the course of its work on the codification of the law of treaties, expressed the view that ‘the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of jus cogens’ (paragraph (1) of the commentary of the Commission

¹⁰ Ibid.

to Article 50 of its draft Articles on the Law of Treaties, ILC Yearbook, 1966-II, p. 247). Nicaragua in its Memorial on the Merits submitted in the present case states that the principle prohibiting the use of force embodied in Article 2, paragraph 4, of the Charter of the United Nations ‘has come to be recognized as *jus cogens*’. The United States, in its Counter-Memorial on the questions of jurisdiction and admissibility, found it material to quote the views of scholars that this principle is a ‘universal norm’, a ‘universal international law’, a ‘universally recognized principle of international law’, and a ‘principle of *jus cogens*’.

Kamrul Hossain, Jus Cogens and Obligations Under the U.N. Charter¹¹

Recognition of Jus Cogens in International Law

During the early nineteenth century, recognition of *jus cogens* was established. Professor Oppenheim stated that there existed a number of “universally recognized principles” of international law that rendered any conflicting treaty void, and therefore, the peremptory effect of such principles was itself a “unanimously recognized customary rule of International Law.” For example, he stated that a treaty supporting piracy is void for being contrary to the “universally recognized principles” of international law. Moreover, the concept of *jus cogens* twice found favor cannot contract out. See [1963] 2 Y.B. Int’l L. Comm’n 52, U.N. Doc. A/CN.4/Ser.A/1963. in a judicial context, first, in the decision of the French-Mexican Claims Commission in the 1928 Pablo Nőjera Case, and later by Judge Schőcking of the Permanent Court of International Justice in the 1934 Oscar Chinn Case [1934] PCIJ 2 (12 December 1934). Subsequent to this 1934 case, judges of the International Court of Justice made similar references to *jus cogens* in a number of separate and dissenting opinions. For example, in a 1993 Bosnian case, Judge Lauterpacht expressed his opinion on the possibility that the Security Council had violated the genocide prohibition and therewith alleged *jus cogens* when imposing an arms embargo on both Serbia and Bosnia. In 1991, Resolution 713 of the Security Council imposed arms embargo. While this resolution disregarded the state’s inherent right of self-defense, the Security Council had been unable to take measures necessary to maintain peace and security in Bosnia. The consequences led to ethnic cleansing, genocide and large-scale human sufferings. Therefore, the argument of alleged violation of *jus cogens* has some potential weight. Furthermore, the Vienna Convention on the Law of Treaties has given the recognition of the norms of *jus cogens* in Article 53, where it states:

¹¹ Santa Clara Journal of International Law 72, at 74-85 (2005). [Citations omitted] [Reprinted with permission of the Journal]

A treaty is void, if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purpose of the present convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole, as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. That means a treaty is no longer an international legal document, if, at the time of its conclusion, it conflicts with the norms of jus cogens, which are peremptory in nature. This article sets up the four criteria for a norm to be determined as jus cogens, specifically: (1) status as a norm of general international law; (2) acceptance by the international community of states as a whole; (3) immunity from derogation; and (4) modifiable only by a new norm having the same status. On the other hand, Finnish scholar Lauri Hannikainen demonstrated that if a norm of general international law protects an overriding interest or value of the international community, and if any derogation would seriously jeopardize that interest or value, then the peremptory character of the norm may be presumed if the application of the criteria of peremptory norms produces no noteworthy negative evidence. Recognition of the rules of jus cogens was again confirmed in 1986 at the Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations. The importance of the rules of jus cogens was confirmed by the trend to apply it beyond the law of the treaties, in particular, in the law of state responsibility. Specifically, the International Law Commission (ILC) proposed the notion of international crimes resulting from the breach by a state of an international obligation “essential for the protection of fundamental interests of the international community,” which is, in fact, closely linked to the doctrine of international jus cogens. In the Nicaragua Case, the International Court of Justice clearly affirmed jus cogens as an accepted doctrine in international law. The I.C.J. relied on the prohibition on the use of force as being “a conspicuous example of a rule of international law having the character of jus cogens.”

Status of the Norm in International Law

A peremptory norm may, it would appear, be derived from a custom or a treaty, but not, it is submitted, from any other source. This statement is, however, self-contradictory. Indeed, there are serious problems associated with the assertions that a norm of jus cogens could be the result of the natural law, or, one or any of the traditional primary sources of international law, namely, treaties, customs or general principles of laws. According to Professor Michael Byers of the Duke University Law School, treaties can, at best, only be contributing factors in the development of jus cogens rules for two reasons. First, a treaty cannot bind its parties' abilities to modify the treaty terms nor to relieve the

party's obligations under it, such as through a subsequent treaty to which all the same parties have consented. Second, all generally accepted jus cogens rules apply universally yet none of the treaties, which have codified these rules, have been universally ratified. No treaty, not even the Charter of the United Nations, can establish a rule of general international law. Treaties can only create obligations between their parties.

As for the assertion that jus cogens rules to be considered as customary international law, more ambiguity exists. Customs are binding only in the case of an established *opinio juris* wherein a state believes to be bound by a said practice due to its creation from customary rule.

However, persistent objection of any customary principle creates an exception to have the binding nature of such rules. There are also other ways to supersede customary rules, such as through the development of rules of special customary international law and the conclusion of treaties. On the other hand, in case of the rules of jus cogens, these rules are binding regardless of the consent of the parties concerned and regardless of the states' own individual opinion to be bound since these rules are too fundamental for states to escape responsibility. Modification of the rules of jus cogens is only possible when a new peremptory norm of equal weight emerges.

As for the binding character of jus cogens, acceptance by the large majority of states of such norm would amount to universal legal obligation for the international community as a whole. These are superior rules and bear the common values for the international community as a whole. Michael Byers, however, tends to show that jus cogens rules are derived from the "process of customary international law," which is itself a part of international constitutional order. He argues that *opinio juris* (or something resembling *opinio juris*) appears to be at the root of the non-detractable character of jus cogens rules, because states simply do not believe that it is possible to contract out of jus cogens rules or to persistently object to them. States regard these rules as being so important to the international society of states and to how that society defines itself, such that they cannot conceive of an exception. Article 53 of the Vienna Convention, however, contains no reference to any element of practice. One could then hardly conceive jus cogens as a strengthened form of custom. David Kennedy termed jus cogens as super-customary norm.

In fact, two views predominate regarding the foundation of the concept of jus cogens, the first, as directly originating from international law, or the second, as being based on the one of the existing sources of international law. However, some argue and accept that a jus cogens recognizes a wholly new source of law capable of generally binding rules.

This idea was developed during the Vienna Conference on the Law of the Treaties at which *jus cogens* was interpreted to indicate that a majority could bring into existence peremptory norms which could bind the international community of states as a whole, regardless of the individual consent of the states. Thus, the result is a new source of law founded on the basis that a community as a whole may create rules that will bind all its members, notwithstanding their possible individual dissent. Others argue that the existing sources have been modified to allow majority rulemaking in the context of higher law. However, the negotiating history of the Vienna Convention does not support the view that the notion of *jus cogens* emerges as a new source of general international law. Rather, there was a clear tendency to view *jus cogens* as the product of the existing sources. For example, France argued that if the draft article on *jus cogens* was interpreted to mean that a majority could bring into existence peremptory norms that would be valid *erga omnes*, then the result created an international source of law. France objected to such a possibility on the ground that such a new source of law would be subject to no “control and lacking all responsibility.” Moreover, complexity remains in the interpretation of Article 53, regarding the phrase: “acceptance and recognized by the international community of States as a whole.” M.K. Yasseen, the former Chairman of the Drafting Committee of the Vienna conference on the Law of Treaties, states that [T]here is no question of requiring a rule to be accepted and recognized as peremptory by all States. It would be enough if a very large majority did so; that would mean that, if one state in isolation refused to accept the peremptory character of a rule, or if that state was supported by a very small number of states, the acceptance and recognition of the peremptory character of the rule by the international community as a whole would not be affected. Yasseen further stated that no individual state should have the right of veto. Additionally, in the ILC commentary to the Article 19 of the Draft Articles on State Responsibility, it explained the meaning of “as a whole” within the context of requiring international recognition of international crimes:

[T]his certainly does not mean the requirement of unanimous recognition by all the members of the community, which would give each state an inconceivable right of veto. What it is intended to ensure is that a given international wrongful act shall be recognized as an “international crime,” not only by some particular group of states, even if it constitutes a majority, but by all the essential components of the international community. This means that “a very large majority” will not necessarily be able to impose its will on “a very small minority” if that “small minority” represents a significant element of the international community. The same view was expressed at the Vienna Conference by the representative of the United States, namely, that the recognition of the peremptory character of a norm “would require, at a minimum, absence of dissent by any important

element of the international community.” The representative of Australia stressed that “rules could only be regarded as having the status of jus cogens if there was the substantial concurrence of states belonging to all principal legal systems.”

Debate continues, not concerning the existence of the notion of jus cogens, but on two other issues. The first one concerns the status of jus cogens either as a new source of international law or as part of other existing sources of international law. The second one concerns the process of law-making under the norm of jus cogens. While there is realistically no special source for creating constitutional or fundamental principles in the present international legal order, we all know that international law itself is under the constant process of development — “development towards greater coherence.” The existence of the concept of jus cogens was, nonetheless, not denied by the states at the Vienna Conference on the Law of Treaties. Rather, it was argued that the essence of the concept is that it must affect all states without exception. Indeed, states at the Vienna Convention reached an agreement on a constitutional principle that the peremptory norms bound all members of the international community, notwithstanding their possible dissent. It was also argued that the principal criterion of peremptory rules was considered to be the fact that they serve the interest of the international community, not the needs of individual states. However, some counter with the domestic law analogy — good customs, morals and public policies were applied in specific cases without insoluble difficulties even though these items were not necessarily defined in municipal law. Moreover, since the adoption of the Vienna Convention on Law of the Treaties, the norm of jus cogens has gained a wide support among the commentators and writers. Therefore, it could be argued that the objecting states are bound by the concept so far as Article 53 of the Vienna Convention is declaratory of an already existing international law concerning jus cogens. In fact, the principle of consent is a further structural principle of international law, distinct from jus cogens.

Uncertainty on the contents of Jus Cogens

Problems remain as to the application of the norm, in terms of which rules must necessarily be covered under the said norms. There was serious doubt concerning the fact that the norm could be misused in interpreting the rules to be covered under jus cogens. Over-inclusiveness or under-inclusiveness of the facts might come into being. For example, during the negotiating process of the United Nations Convention on the Law of the Sea (UNCLOS), the common focus of the developing countries was to ensure that they represented the interests of all mankind since they constituted the majority. However, a very small number of Western states opposed the majority’s proposals, particularly those regarding the legal status of the seabed. Consequently, developing countries turned to the notion

of jus cogens. They claimed that the principles of common heritage of mankind, as proclaimed by the 1970 United Nations General Assembly resolution on the seabed, were principles of jus cogens. This argument was clearly rejected by the minority of western states. Nonetheless, the majority, led by the Group of 77, continued to rely on the notion of jus cogens in order to impose specific normative solutions regarding the seabed. The Group of 77 asserted that since the common heritage of mankind is a customary rule which has the force of peremptory norm, then it would follow that the unilateral legislation and limited agreements were illegal and were, therefore, violations of this principle. Another example could be found concerning the legal nature of the principle of permanent sovereignty over natural resources proclaimed in a number of the U.N. General Assembly resolutions. This issue was raised at the Vienna Conference on Succession of States in Respect of State Property, Archives and Debts. The Draft Convention on Succession of States contained a rule requiring that agreements concluded between a predecessor state and a newly independent state concerning succession to state property of the predecessor state not “infringe the principle of the permanent sovereignty of every people over its wealth and natural resources.” In its commentary to a draft article containing this rule, the ILC noted that some of the members of the Commission expressed the view that agreements violating the principle of the permanent sovereignty should be void ab initio. Relying on this commentary, the developing states claimed that the principle of permanent sovereignty over wealth and natural resources was a principle of jus cogens. The conference was also used to impart the jus cogens character to other broad principles, including the right of the peoples to development, to information about their history, and to their cultural heritage. The idea of invoking some of the General Assembly Resolutions in terms of the norm of jus cogens, with a plea that resolutions achieve support from the large majority of states, was criticized by the Western states that resolutions adopted at the General Assembly are only recommendatory. These do not have any binding force. Therefore, while a very large majority of states support lawmaking under the concept of jus cogens at the session in General Assembly, it could hardly be possible, unless the other significant elements of international community, namely the western states, agreed to do so. Nonetheless, three categories of jus cogens found genuine support, as suggested by the German scholar Ulrich Scheuner:

(1) the rules protecting the foundations of international order, (i.e., the prohibition of genocide or of the use of force in international relations except in self-defence),

(2) the rule concerning peaceful cooperation in the protection of common interests (i.e., freedom of the seas) and the rules protecting the most fundamental and basic human rights, and

(3) rules for the protection of the civilians in time of war.

CHAPTER 3

SUBJECTS OF INTERNATIONAL LAW

Overview

Brownlie, "Subjects of International Law"¹²

1. INTRODUCTION.

A subject of the law is an entity capable of possessing international rights and duties and having the capacity to maintain its rights by bringing international claims.¹³ This definition, though conventional, is unfortunately circular since the indicia referred to depend on the existence of a legal person. All that can be said is that an entity of a type recognized by customary law as capable of possessing rights and duties and of bringing international claims, and having these capacities conferred upon it, is a legal person. If the first condition is not satisfied, the entity concerned may still have legal personality of a very restricted kind, dependent on the agreement or acquiescence of recognized legal persons and opposable on the international plane only to those agreeing or acquiescent. The principal formal contexts in which the question of personality has arisen have been: capacity to make claims in respect of breaches of international law, capacity to make treaties and agreements valid on the international plane, and the enjoyment of privileges and immunities from national jurisdictions. States have these capacities and immunities, and indeed the incidents of statehood as developed under the customary law have provided the indicia for, and instruments of personality in, other entities. Apart from states, organizations may have these capacities and immunities if certain conditions are satisfied. The first of the capacities set out above, for organizations of a certain type, was established by the Advisory Opinion in the *Reparation for Injuries* case. The first Waldock Report prepared for the International Law Commission on the law of treaties recognized the capacity of international organizations to become parties to international agreements, and this recognition reflected the existing practice

¹² Ian Brownlie, *Principles of Public International Law*, 7th ed. (Oxford: Oxford University Press, 2008), 57-67. [Excerpt reprinted with kind permission of Oxford University Press. Some citations omitted.]

¹³ *Reparation for Injuries* case, I.C.J. Reports (1949), 179.

between organisations and also between states and organizations. Finally, while an organization probably cannot claim privileges and immunities like those of a sovereign state as of right, it can claim to be a suitable candidate for the conferment of like privileges and immunities.

It is states and organizations (if appropriate conditions exist) which represent the normal types of legal person on the international plane. However, as will become apparent in due course, the realities of international relations are not reducible to a simple formula and the picture is somewhat complex. The 'normal types' have congeners which create problems, and various entities, including non-self-governing peoples and the individual, have a certain personality. Moreover, abstraction of types of acceptable persons at law falls short of the truth, since recognition and acquiescence may sustain an entity which is anomalous, and yet has a web of legal relations on the international plane. But in spite of the complexities, it is as well to remember the primacy of states as subjects of the law. As Professor Friedmann observes:¹⁴

“The basic reason for this position is, of course, that ‘the world is to-day organized on the basis of the co-existence of States, and that fundamental changes will take place only through State action, whether affirmative or negative. The States are the repositories of legitimated authority over peoples and territories. It is only in terms of State powers, prerogatives, jurisdictional limits and law-making capabilities that territorial limits and jurisdiction, responsibility for official actions, and a host of other questions of co-existence between nations can be determined...This basic primacy of the State as a subject of international relations and law would be substantially affected, and eventually superseded, only if national entities, as political and legal systems, were absorbed in a world state.”

2. ESTABLISHED LEGAL PERSONS

(a) States

This category, the most important, has its own problems. The existence of 'dependent' states with certain qualified and delegated legal capacities complicates the picture, but, providing the conditions for statehood exist, the 'dependent' state retains its personality. The position of members of federal unions is interesting. In the constitutions of Switzerland and the German Federal Republic component states are permitted to exercise certain of the capacities of independent states, including the power to make treaties. In the normal case, such capacities are probably exercised as agents for the union, even if the acts

¹⁴ *The Changing Structure of International Law* (1964), 213.

concerned are done in the name of the component state. However, where the union originated as a union of independent states, the internal relations retain an international element, and the union may act as agent for the states.¹⁵ The United States constitution enables the states of the Union to enter into agreements with other states of the Union or with foreign states with the consent of Congress. In Canada the federal government has the exclusive power to make treaties with foreign states.

(b) Political entities legally proximate to states

Political settlements both in multilateral and bilateral treaties have from time to time produced political entities, such as the former Free City of Danzig, which, possessing a certain autonomy, fixed territory and population, and some legal capacities on the international plane, are rather like states. Politically such entities are not sovereign states in the normal sense, yet legally the distinction is not very significant. The treaty origin of the entity and the existence of some form of protection by an international organization—the League of Nations in the case of Danzig—matter little if, in the result, the entity has autonomy and a nucleus of the more significant legal capacities, for example the power to make treaties, to maintain order and exercise jurisdiction within the territory, and to have an independent nationality law. The jurisprudence of the Permanent Court recognized that Danzig had international personality, except in so far as treaty obligations created special relations in regard to the League and to Poland.¹⁶ The special relations of Danzig were based upon Articles 100-8 of the Versailles Treaty. The League of Nations had a supervisory function and Poland was placed in control of the foreign relations of Danzig. The result was very much a protectorate, the legal status and constitution of which were externally supervised. To describe legal entities like Danzig as ‘internationalized territories’ is not very helpful since the phrase covers a number of distinct entities and situations and begs the question of legal personality. The Italian Peace Treaty of 1947 provided for the creation of a Free Territory of Trieste with features broadly similar to those of the Free City of Danzig, but placed under the direct control of the United Nations Security Council.¹⁷

¹⁵ This appears to be the position in Switzerland.

¹⁶ See “Free City of Danzig and the ILO” (1930), PCIJ, Ser. B, no. 18; and Polish Nationals in Danzig (1932), Ser. A/B, no. 44, pp. 23-4. Germany occupied the Free City in 1939 and since 1945 the area has been part of Poland.

¹⁷ The Permanent Statute of Trieste was not implemented: the administration of the territory was divided by agreement in 1954; the partition was made definitive by the Treaty of Osimo, in force 3 Apr. 1977, *Rivista di i. 60,674*. See Verzijl, *International Law in Historical Perspective*, 504-5; and, on the issue of sovereignty, *infra*, pp. 68-9. On the position of the Holy See and Taiwan see *infra*, pp. 67,68.

(c) Condominia

A condominium, as a joint exercise of state power within a particular territory by means of an autonomous local administration, may bear a resemblance to entities of the type considered latterly. However, the local administration can only act as an agency of the states participating in the condominium, and normally even its capacity as agent is limited.¹⁸

(d) Internationalized territories

The label 'internationalized territory' has been applied by writers to a variety of legal regimes. It may be applied very loosely to cases like Danzig and Trieste where a special status was created by multilateral treaty and protected by an international organization. In these instances the special status was attached to entities with sufficient independence and legal capacity to admit of legal personality. However, a special status of this kind may attach without the creation of a legal person. An area within a sovereign state may be given certain rights of autonomy under treaty without this leading to any degree of separate personality on the international plane: this was the case with the Memel Territory, which enjoyed a special status in the period 1924 to 1939, yet remained a part of Lithuania. Another type of regime, more truly international, involves exclusive administration of a territory by an international organization or an organ thereof: this was the regime proposed for the city of Jerusalem by the Trusteeship Council in 1950 but never implemented. In such a case no new legal person is established except in so far as an agency of an international organization may have a certain autonomy.

(e) UN administration of territories immediately prior to independence

In relation to territories marked out by the United Nations as under a regime of illegal occupation and qualified for an expeditious transition to independence, an interim transitional regime may be installed under UN supervision. Thus the final phase of the attainment of Namibian independence involved the Security Council, the General Assembly, and the UN Transition Assistance Group, established by Security Council resolution 435 (1978) of 29 September 1978.

In 1999 the long drawn out crisis concerning the illegal Indonesian occupation of East Timor was the subject of decisive action by the Security Council in Resolution 1272 (1999) of 25 October 1999. This established the United Nations Transitional Administration in East Timor (UNTAET) with a mandate to prepare East Timor for independence. UNTAET had full legislative and executive powers and assumed its role independently of any competing authority. After elections, East Timor became independent in 2002.

¹⁸ See 9 ICLQ (1960), 258. On the New Hebrides see O'Connell, 43 BY (1968-9), 71-145.

(f) International organizations

The conditions under which an organization acquires legal personality on the international plane and not merely as a legal person within a particular system of national law are examined in Chapter 31. The most important person of this type is of course the United Nations.

(g) Agencies of states

Entities acting as the agents of states, with delegated powers, may have the appearance of enjoying a separate personality and considerable viability on the international plane. Thus components of federal states probably have treaty-making capacity, where this is provided for internally, as agents of the federal state.¹⁹ By agreement states may create joint agencies with delegated powers of a supervisory, rule-making, and even judicial nature. Examples are the administration of a condominium,²⁰ an arbitral tribunal, the International Joint Commission set up under an agreement concerning boundary waters between Canada and the United States in 1909,²¹ and the former European Commission of the Danube.²² As the degree of independence and the legal powers of the particular agency increase it will approximate to an international organization.

3. SPECIAL TYPES OF PERSONALITY

(a) Non-self-governing peoples

Quite apart from the question of protected status, and the legal effect of particular agreements under which territories have been placed under mandate or trusteeship, it is very probable that the populations of 'non-self-governing territories' within the meaning of Chapter XI of the United Nations Charter have legal personality, albeit of a special type. This proposition depends on the examination of the principle of self-determination....

(b) National liberation movements

In the course of the anti-colonial actions conducted within the United Nations and within regional organizations, the practice of both the organs of the United Nations and the member States conferred legal status upon certain

¹⁹ See Fitzmaurice, *Yrbk. ILC* (1956), ii. 118 ff.; and Morin, 3 *Canad. Yrbk.* (1965), 127-86. See further the draft articles on the law of treaties, *ILC* (1966), Art. 5 (2). On the role of the chartered companies such as the English East India Company and the Dutch East India Company, see Schwarzenberger, *International Law*, i. (3rd ed.), 80-1; McNair, *Opinions*, i. 41, 55; and the *Palmas award*, *RIAA*, ii at p. 858.

²⁰ *Supra*, p. 59; *infra*, pp. 113-14.

²¹ See Baxter, *The Law of International Waterways* (1964), 107.

²² *Ibid.* 103-6, 126-9.

national liberation movements. Most, but by no means all, of the peoples represented by such movements have acquired statehood. In 1974 the General Assembly accorded recognition to the Angolan, Mozambican, Palestinian, and Rhodesian movements. These liberation movements were recognized as such by regional organizations. The political and legal roots of the concept of national liberation movements are to be found in the Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (Resolution 2625 (XV), adopted without vote, 24 October 1970), and the principle of self-determination, of which the beneficiary is a 'people'.

National liberation movements may, and usually do, have other roles, as de facto governments and belligerent communities.

The political entities recognized as liberation movements have a number of legal rights and duties, the more significant of which are as follows:

- (a) In practice liberation movements are accorded the capacity to conclude binding international agreements with other international legal persons.
- (b) The rights and obligations set by the generally recognized principles of humanitarian law. The provisions of the Geneva Protocol I of 1977 apply to conflicts involving national liberation movements if certain conditions are fulfilled: see Articles 1(4) and 96(3) of the Protocol.
- (c) The legal capacity of national liberation movements is reflected in the right to participate in the proceedings of the United Nations as observers, this right being conferred expressly in various General Assembly resolutions. Thus the Palestine Liberation Organisation (PLO) was granted observer status in Resolution 3237 (XXIX), adopted on 22 November 1974.

In conclusion, it is necessary to recall the impact of the designation of a non-self-governing people engaged in a process of national liberation upon the colonial (or dominant) power. The colonial authorities do not, for example, have the legal capacity to make agreements affecting the boundaries or status of the territory to which the liberation process is applicable.²³

²³ See the Award in the Delimitation of the Maritime Boundary between Guinea-Bissau and Senegal (1989): RIAA, Vol. XX, 138-9, paras. 49-52.

(c) States in statu nascendi

For certain legal purposes it is convenient to assume continuity in a political entity and thus to give effect, after statehood has been attained, to legal acts occurring before independence. Considerations relating to the principle of self-determination and the personality of non-self-governing peoples may of course reinforce a doctrine of continuity.

(d) Legal constructions

A state's legal order maybe projected on the plane of time for certain purposes although politically it has ceased to exist.

(e) Belligerent and insurgent communities

In practice, belligerent and insurgent bodies within a state may enter into legal relations and conclude agreements valid on the international plane with states and other belligerents and insurgents. Sir Gerald Fitzmaurice has attributed treaty-making capacity to 'para-Statal entities recognized as possessing a definite if limited form of international personality, for example, insurgent communities recognized as having belligerent status - de facto authorities in control of specific territory'. This statement is correct as a matter of principle, although its application to particular facts will require caution. The status of the particular belligerent community may be affected by the considerations offered elsewhere as to the principle of self-determination and the personality of non-self-governing peoples. A belligerent community often represents a political movement aiming at independence and secession.

(f) Entities sui generis

Whilst due regard must be had to legal principle, the lawyer cannot afford to ignore entities which maintain some sort of existence on the international legal plane in spite of their anomalous character. Indeed, the role played by politically active entities such as belligerent communities indicates that, in the sphere of personality, effectiveness is an influential principle. Furthermore, as elsewhere in the law, provided that no rule of *jus cogens* is broken, acquiescence, recognition, and the incidence of voluntary bilateral relations can do much to obviate the more negative consequences of anomaly. Some of the special cases may be considered very briefly. In a Treaty and Concordat in 1929, Italy recognized 'the Sovereignty of the Holy See in the international domain' and its exclusive sovereignty and jurisdiction over the City of the Vatican. A number of states recognize the Holy See, and have diplomatic relations with it and the Holy See has been a party to multilateral conventions, including those on the law of the sea concluded in 1958. Functionally, and in terms of its territorial and administrative organization, the Vatican City is proximate to a state. However, it

has certain peculiarities. It has no population, apart from the resident functionaries, and its sole purpose is to support the Holy See as a religious entity. Some jurists regard the Vatican City as a state, although its special functions make this doubtful. However, it is widely recognized as a legal person with treaty-making capacity. Its personality seems to rest partly on its approximation to a state in function, in spite of peculiarities, including the patrimonial sovereignty of the Holy See, and partly on acquiescence and recognition by existing legal persons. More difficult to solve is the question of the personality of the Holy See as a religious organ apart from its territorial base in the Vatican City. It would seem that the personality of political and religious institutions of this type can only be relative to those states prepared to enter into relationships with such institutions on the international plane. Even in the sphere of recognition and bilateral relations, the legal capacities of institutions like the Sovereign Order of Jerusalem and Malta must be limited simply because they lack the territorial and demographic characteristics of states. In the law of war the status of the Order mentioned is merely that of a 'relief society' within the meaning of the Prisoner of War Convention, 1949, Article 125.

Two other political animals require classification. 'Exile governments' may be accorded considerable powers within the territory of most states and be active in various political spheres. Apart from voluntary concessions by states and the use of 'exile governments' as agencies for illegal activities against lawfully established governments and states, the legal status of an 'exile government' is consequential on the legal condition of the community it claims to represent, which may be a state, belligerent community, or non-self-governing people. *Prima facie* its legal status will be established the more readily when its exclusion from the community of which it is an agency results from acts contrary to the *jus cogens*, for example, an unlawful resort to force. Lastly, the case of territory the title to which is undetermined, and which is inhabited and has an independent administration, creates problems. On the analogy of belligerent communities and special regimes not dependent on the existence of the sovereignty of a particular state (for example, internationalized territories and trust territories), communities existing on territory with such a status may be treated as having a modified personality, approximating to that of a state. On one view of the facts, this is the situation of Taiwan (Formosa). Since 1972 the United Kingdom has recognized the Government of the People's Republic of China as the sole Government of China and acknowledges the position of the Chinese Government that Taiwan is a province of China. The question will arise whether Taiwan is a 'country' within particular legal contexts.²⁴

²⁴ See *Rogers v. Cheng Fu Sheng*, ILR 31, 349; *Reel v. Holder* [1981] 1 WLR 1226; ILR 74,

(g) Individuals

There is no general rule that the individual cannot be a 'subject of international law', and in particular contexts he appears as a legal person on the international plane. At the same time to classify the individual as a 'subject' of the law is unhelpful, since this may seem to imply the existence of capacities which do not exist and does not avoid the task of distinguishing between the individual and other types of subject.

4. CONTROVERSIAL CANDIDATURES

Reference to states and similar political entities, to organizations, to non-self-governing peoples, and to individuals, does not exhaust the tally of agencies active on the international scene. Thus corporations of municipal law, whether private or public corporations, engage in economic activity in one or more states other than the state under the law of which they were "incorporated" or in which they have their economic seat. The resources available to the individual corporation maybe greater than those of the smaller states, and they may have powerful diplomatic backing from governments. Such corporations can and do make agreements, including concession agreements, with foreign governments, and in this connection in particular, jurists have argued that the relations of states and foreign corporations as such should be treated on the international plane and not as an aspect of the normal rules governing the position of aliens and their assets on the territory of a state. In principle, corporations of municipal law do not have international legal personality. Thus a concession or contract between a state and a foreign corporation is not governed by the law of treaties. However, in the present connection it must be pointed out that it will not always be easy to distinguish corporations which are so closely controlled by governments as to be state agencies, with or without some degree of autonomy, and private corporations not sharing the international law capacity of a state. It will be clear that the conferment of separate personality by a particular national law is not necessarily conclusive of autonomy vis-a-vis the state for purposes of international law. Thus ownership of shares may give a state a controlling interest in a private law corporation'.

Important functions are performed today by bodies which have been grouped under the labels 'intergovernmental corporations of private law' and 'établissements publics internationaux'. The point is that states may by treaty create legal persons the status of which is regulated by the national law of one or more of the parties. However, the treaty may contain obligations to create a privileged status within the national law or laws to which the corporation is

105, CA.

subjected. The parties by their agreement may accord certain immunities to the institution created and confer on it various powers. Where the independence from the national laws of the parties is marked, then the body concerned may simply be a joint agency of the states involved, with delegated powers effective on the international plane and with a privileged position vis-a-vis local law in respect of its activities. Where there is, in addition to independence from national law, a considerable quantum of delegated powers and the existence of organs with autonomy in decision and rule-making, then the body concerned has the characteristics of an international organization. It is when the institution created by treaty has a viability and special function which render the description 'joint agency' inappropriate, and yet has powers and privileges primarily within the national legal systems and jurisdictions of the various parties, that it calls for use of a special category. An example of intergovernmental enterprise of this kind is Eurofima, a company set up by a treaty involving fourteen states in 1955, with the object of improving the resources of railway rolling stock. The treaty established Eurofima as a corporation under Swiss law with modifications in that law provided for in the treaty. The parties agreed that they would recognize this (Swiss) private law status, as modified by the treaty, within their own legal systems. The corporation is international in function and the fourteen participating railway administrations provide the capital. The corporation is also given privileges on the international plane, including exemption from taxation in Switzerland, the state of domicile. However, useful as the category 'établissements publics internationaux' may be, it is not an instrument of exact analysis, and does not represent a distinct species of legal person on the international plane. This type of arrangement is the product of a careful interlocking of the national and international legal orders on a treaty basis, and the nature of the product will vary considerably from case to case.

5. SOME CONSEQUENCES

The content of the previous sections must serve as a warning against facile generalizations on the subject of legal personality. In view of the complex nature of international relations and the absence of a centralized law of corporations, it would be strange if the legal situation had an extreme simplicity. The number of entities with personality for particular purposes is considerable. Moreover, the tally of autonomous bodies increases if agencies of states and organizations, with a quantum of delegated powers, are taken into account. The listing of candidates for personality, the characters the reader will encounter, has a certain value, and yet such a procedure has some pitfalls. In the first place, a great deal depends on the relation of the particular entity to the various aspects of the substantive law. Thus the individual is in certain contexts regarded as a legal person, and yet it is obvious that he cannot make treaties. The context of

problems remains paramount. Further, subject to the operations of the jus cogens, comprising certain fundamental principles, the institutions of recognition have been active in sustaining anomalous relations. And finally, the intrusion of agency and representation has created problems, both of application and of principle. Thus it is not always easy to distinguish a dependent state with its own personality from a subordinate entity with no independence, a joint agency of states from an organization, or a private or public corporation under some degree of state control from the state itself.

Blakesley, “States and Statehood: The Aura of Sovereignty”²⁵

1. Nomenclature, Standing, and Role of States. In the international legal system the terms “nations,” “peoples,” “states,” and “nation-states” are used interchangeably and somewhat imprecisely, from a socio-anthropological standpoint, to refer to the legally-organized political power-structures that are the highest authority in a country, i.e., states. These entities have long been, and still are, the major structural units of the legal-political order of the planet... For centuries, states have been the recognized actors in the international legal system, where living persons as such theoretically have had no standing, except through their states. In classical theory, states are the “subjects” of “inter-state” law that they make for themselves, either by accepted custom or by specific agreements....

States traditionally, therefore, have had the virtually exclusive role in the evolution of the modern international legal system. Some scholars recently have seen international law as almost entirely the product of the Western World, having entered its “modern” stage at the end of the Thirty Years War, via the treaties made at Westphalia, in 1648, when sovereign equality moved from a few key monarchies, the Holy Roman Empire, and the Holy See, to a number of newly-independent states. [Citations omitted]. However, international organizations now play increasingly important roles as subjects of international law and as major contributors to it. You will see that regional economic integration organizations (REIOs) as supranational organizations have new roles in acting directly and significantly on the legal rights and duties of individuals, companies and other entities in the Member States as well as directly upon the Member States as such. Traditional international organizations which normally function as centers of cooperation among their Member States are also increasingly moving in such fields of human rights law to act directly on the rights and duties of individuals and other non-state entities. Non-Governmental organizations as well are ac-

²⁵ Christopher L. Blakesley, Edwin B. Firmage, Richard F. Scott, and Sharon A. Williams, *The International Legal System: Cases and Materials*, 5th ed. (2001), Ch. 2.

tive participants in the development and administration of international law, as seen in the valuable work of the International Committee of the Red Cross. In such major fields as international environment, human rights, world trade and investment law, and in the development of the International Criminal Court, non-governmental organizations have made signal contributions...

2. The Elements of Statehood. The definition of state in Section 201 of the 1987 Restatement may be useful: "... an entity which has a defined territory and permanent population, under the control of its own government, and which engages in, or has the capacity to engage in, formal relations with other such entities." This definition does not make reference to any central legal process by which those facts are to be determined. The lack of a central legal process for this purpose stands in contrast to domestic legal systems in which legal entities such as corporations are created by explicitly required legal processes. A corporation can be defined as an entity that has been created by compliance with that prescribed process. No such legal process exists in the case of the formation of entities called states.

States

Definition of a State

Montevideo Convention on the Rights and Duties of States²⁶

Article 1

The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.

Membership in the United Nations

The United Nations Charter, Article 3

The original Members of the United Nations shall be the states which, having participated in the United Nations Conference on International Organization at San Francisco, or having previously signed the Declaration by United Nations of 1 January 1942, sign the present Charter and ratify it in accordance with Article 110.

²⁶ Signed at Montevideo, 26 December 1933, entered into force, 26 December 1934, Article 8 reaffirmed by Protocol, 23 December 1936.

Article 4

1. Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.

2. The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.

Defined Territory and Population***Western Sabara, I.C.J. Advisory Opinion, 1975***²⁷

75. Having established that it is seized of a request for advisory opinion which it is competent to entertain and that it should comply with that request, the Court will now examine the two questions which have been referred to it by General Assembly resolution 3292 (XXIX). These questions are so formulated that an answer to the second is called for only if the answer to the first is in the negative:

“1. Was Western Sahara (Rio de Oro and Sakiet El Hamra) at the time of colonization by Spain a territory belonging to no one (terra nullius)?

If the answer to the first question is in the negative,

II. What were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity?”...

79. Turning to Question 1, the Court observes that the request specifically locates the question in the context of “the time of colonization by Spain,” and it therefore seems clear that the words “Was Western Sahara . . . a territory belonging to no one (terra nullius)?” have to be interpreted by reference to the law in force at that period. The expression “terra nullius” was a legal term of art employed in connection with “occupation” as one of the accepted legal methods of acquiring sovereignty over territory. “Occupation” being legally an original means of peaceably acquiring sovereignty over territory otherwise than by cession or succession, it was a cardinal condition of a valid “occupation” that the territory should be terra nullius - a territory belonging to no-one - at the time of the act alleged to constitute the “occupation” (cf. Legal Status of Eastern Greenland, P.C.I.J., Series A/B, No. 53, pp. 44 f. and 63 f.). In the view of

²⁷ Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 12.

the Court, therefore, a determination that Western Sahara was a “terra nullius” at the time of colonization by Spain would be possible only if it were established that at that time the territory belonged to no-one in the sense that it was then open to acquisition through the legal process of “occupation.”

80. Whatever differences of opinion there may have been among jurists, the State practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as *terrae nullius*. It shows that in the case of such territories the acquisition of sovereignty was not generally considered as effected unilaterally through “occupation” of *terra nullius* by original title but through agreements concluded with local rulers. On occasion, it is true, the word “occupation” was used in a non-technical sense denoting simply acquisition of sovereignty; but that did not signify that the acquisition of sovereignty through such agreements with authorities of the country was regarded as an “occupation” of a “*terra nullius*” in the proper sense of these terms. On the contrary, such agreements with local rulers, whether or not considered as an actual “cession” of the territory, were regarded as derivative roots of title, and not original titles obtained by occupation of *terrae nullius*.

81. In the present instance, the information furnished to the Court shows that at the time of colonization Western Sahara was inhabited by peoples which, if nomadic, were socially and politically organized in tribes and under chiefs competent to represent them. It also shows that, in colonizing Western Sahara, Spain did not proceed on the basis that it was establishing its sovereignty over *terrae nullius*. In its Royal Order of 26 December 1884, far from treating the case as one of occupation of *terra nullius*, Spain proclaimed that the King was taking the Rio de Oro under his protection on the basis of agreements which had been entered into with the chiefs of the local tribes: the Order referred expressly to “the documents which the independent tribes of this part of the coast” had “signed with the representative of the Sociedad Espafiola de Africanistas,” and announced that the King had confirmed “the deeds of adherence” to Spain. Likewise, in negotiating with France concerning the limits of Spanish territory to the north of the Rio de Oro, that is, in the Sakiet El Hamra area, Spain did not rely upon any claim to the acquisition of sovereignty over a *terra nullius*.

82. Before the Court, differing views were expressed concerning the nature and legal value of agreements between a State and local chiefs. But the Court is not asked by Question 1 to pronounce upon the legal character or the legality of the titles which led to Spain becoming the administering Power of Western Sahara. It is asked only to state whether Western Sahara (Rio de Oro and Sakiet El Hamra) at the time of colonization by Spain was “a territory belonging to no

one (*terra nullius*).” As to this question, the Court is satisfied that, for the reasons which it has given, its answer must be in the negative. Accordingly, the Court does not find it necessary first to pronounce upon the correctness or otherwise of Morocco’s view that the territory was not *terra nullius* at that time because the local tribes, so it maintains, were then subject to the sovereignty of the Sultan of Morocco; nor upon Mauritania’s corresponding proposition that the territory was not *terra nullius* because the local tribes, in its view, then formed part of the “*Bilad Shinguitti*” or Mauritanian entity. Any conclusions that the Court may reach with respect to either of these points of view cannot change the negative character of the answer which, for other reasons already set out, it has found that it must give to Question 1....

87. Western Sahara (Rio de Oro and Sakiet El Hamra) is a territory having very special characteristics which, at the time of colonization by Spain, largely determined the way of life and social and political organization of the peoples inhabiting it. In consequence, the legal régime of Western Sahara, including its legal relations with neighbouring territories, cannot properly be appreciated without reference to these special characteristics. The territory forms part of the great Sahara desert which extends from the Atlantic Coast of Africa to Egypt and the Sudan. At the time of its colonization by Spain, the area of this desert with which the Court is concerned was being exploited, because of its low and spasmodic rainfall, almost exclusively by nomads, pasturing their animals or growing crops as and where conditions were favourable. It may be said that the territory, at the time of its colonization, had a sparse population that, for the most part, consisted of nomadic tribes the members of which traversed the desert on more or less regular routes dictated by the seasons and the wells or water-holes available to them. In general, the Court was informed, the right of pasture was enjoyed in common by these tribes; some areas suitable for cultivation, on the other hand, were subject to a greater degree to separate rights. Perennial water-holes were in principle considered the property of the tribe which put them into commission, though their use also was open to all, subject to certain customs as to priorities and the amount of water taken. Similarly, many tribes were said to have their recognized burial grounds, which constituted a rallying point for themselves and for allied tribes. Another feature of life in the region, according to the information before the Court, was that inter-tribal conflict was not infrequent.

88. These various points of attraction of a tribe to particular localities were reflected in its nomadic routes. But what is important for present purposes is the fact that the scarcity of the resources and the spasmodic character of the rainfall compelled all those nomadic tribes to traverse very wide areas of the desert. In consequence, the nomadic routes of none of them were confined to Western

Sahara; some passed also through areas of southern Morocco, or of present-day Mauritania or Algeria, and some even through further countries. All the tribes were of the Islamic faith and the whole territory lay within the Dar al-Islam. In general, authority in the tribe was vested in a sheikh, subject to the assent of the “Juma’a,” that is, of an assembly of its leading members, and the tribe had its own customary law applicable in conjunction with the Koranic law. Not infrequently one tribe had ties with another, either of dependence or of alliance, which were essentially tribal rather than territorial ties of allegiance or vassalage.

89. It is in the context of such a territory and such a social and political organization of the population that the Court has to examine the question of the “legal ties” between Western Sahara and the Kingdom of Morocco and the Mauritanian entity at the time of colonization by Spain. At the conclusion of the oral proceedings, as will be seen, Morocco and Mauritania took up what was almost a common position on the answer to be given by the Court on Question II. The contentions on which they respectively base the legal ties which they claim to have had with Western Sahara at the time of its colonization by Spain are, however, different and in some degree opposed.

The Court will, therefore, examine them separately.

Principle That All States Are Equal

Declaration on Principles of International Law Operation Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations²⁸

PREAMBLE

The General Assembly,

Reaffirming in the terms of the Charter of the United Nations that the maintenance of international peace and security and the development of friendly relations and co-operation between nations are among the fundamental purposes of the United Nations,

Recalling that the peoples of the United Nations are determined to practice tolerance and live together in peace with one another as good neighbours,

²⁸ U.N. General Assembly, Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, 24 October 1970, General Assembly resolution 2625 (XXV), of 24 October 1970, GAOR (25th Sess., 1883 Plen Mtg), UN Doc A/Res/2625.

Bearing in mind the importance of maintaining and strengthening international peace founded upon freedom, equality, justice and respect for fundamental human rights and of developing friendly relations among nations irrespective of their political, economic and social systems or the levels of their development,

Bearing in mind also the paramount importance of the Charter of the United Nations in the promotion of the rule of law among nations,

Considering that the faithful observance of the principles of international law concerning friendly relations and co-operation among States and the fulfillment in good faith of the obligations assumed by States, in accordance with the Charter, is of the greatest importance for the maintenance of international peace and security and for the implementation of the other purposes of the United Nations,

Noting that the great political, economic and social changes and scientific progress which have taken place in the world since the adoption of the Charter give increased importance to these principles and to the need for their more effective application in the conduct of States wherever carried on,

Recalling the established principle that outer space, including the Moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means, and mindful of the fact that consideration is being given in the United Nations to the question of establishing other appropriate provisions similarly inspired,

Convinced that the strict observance by States of the obligation not to intervene in the affairs of any other State is an essential condition to ensure that nations live together in peace with one another, since the practice of any form of intervention not only violates the spirit and letter of the Charter, but also leads to the creation of situations which threaten international peace and security,

Recalling the duty of States to refrain in their international relations from military, political, economic or any other form of coercion aimed against the political independence or territorial integrity of any State,

Considering it essential that all States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations,

Considering it equally essential that all States shall settle their international disputes by peaceful means in accordance with the Charter,

Reaffirming, in accordance with the Charter, the basic importance of sovereign equality and stressing that the purposes of the United Nations can be implemented only if States enjoy sovereign equality and comply fully with the requirements of this principle in their international relations,

Convinced that the subjection of peoples to alien subjugation, domination and exploitation constitutes a major obstacle to the promotion of international peace and security, Convinced that the principle of equal rights and self-determination of peoples constitutes a significant contribution to contemporary international law, and that its effective application is of paramount importance for the promotion of friendly relations among States, based on respect for the principle of sovereign equality,

Convinced in consequence that any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a State or country or at its political independence is incompatible with the purposes and principles of the Charter.

Legality of the Threat or Use of Nuclear Weapons in Armed Conflict, I.C.J. Advisory Opinion, 1996²⁹

Dissenting opinions of Judge Shahabuddeen and Judge Weeramantry.

[p. 417 D.O. Shahabuddeen] There would be difficulty also in following how it is that what is inalienable for some States is alienable for others. It is an attribute of sovereignty that a State may by agreement restrain the exercise of its competence; yet how far it may do so without losing its status as a State is another question.³⁰ Since the right of self-defence is “inherent” in a State, it is not possible to conceive of statehood which lacks that characteristic. See the illustration in General Assembly resolution 49/10 of 3 November 1994,

“[r]eaffirming ... that as the Republic of Bosnia and Herzegovina is, a sovereign, independent State and a Member of the United Nations, it is entitled to all rights provided for in the Charter of the United Nations, including the right to self-defence under Article 51 thereof.”

Arrangements for the exercise of the right of self-defence are a different matter. But, so far as the right itself is concerned, if the right includes a right to use nuclear

²⁹ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, I.C.J. Reports 1996, p. 66, pp. 226-27.

³⁰ See argument of M. Yasseen in I.C.J. Pleadings, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, pp. 298-299.

weapons, the latter is not a small part of the former. It was no doubt for this reason that, in the parallel case brought by the World Health Organization, it was argued that to “deny the victim of aggression the right to use the only weapons which might save it would be to make a mockery of the inherent right of self-defence.”³¹ The argument is understandable, granted the premise that the right to use nuclear weapons is part of the inherent right of self-defence. The question is whether the premise is correct. For, if it is correct, then, by the same token, there is difficulty in seeing how the NNWS which were parties to the NPT could have wished to part with so crucially important a part of their inherent right of self-defence...

[p. 526-527 D.O. Weeramantry] As with all sections of the international legal system, the concept of equality is built into the texture of the laws of war.

Another anomaly is that if, under customary international law, the use of the weapon is legal, this is inconsistent with the denial, to 180 of the 185 Members of the United Nations, of even the right to possession of this weapon. Customary international law cannot operate so unequally, especially if, as is contended by the nuclear powers, the use of the weapon is essential to their self-defence. Self-defence is one of the most treasured rights of States and is recognized by Article 51 of the United Nations Charter as the inherent right of every Member State of the United Nations. It is a wholly unacceptable proposition that this right is granted in different degrees to different Members of the United Nations family of nations.

De facto inequalities always exist and will continue to exist so long as the world community is made up of sovereign States, which are necessarily unequal in size, strength, wealth and influence. But a great conceptual leap is involved in translating de facto inequality into inequality de jure. It is precisely such a leap that is made by those arguing, for example, that when the Protocols to the Geneva Conventions did not pronounce on the prohibition of the use of nuclear weapons, there was an implicit recognition of the legality of their use by the nuclear powers. Such silence meant an agreement not to deal with the question, not a consent to legality of use. The “understandings” stipulated by the United States and the United Kingdom that the rules established or newly introduced by the 1977 Additional Protocol to the four 1949 Geneva Conventions would not regulate or prohibit the use of nuclear weapons do not undermine the basic principles which antedated these formal agreements and received expression in them. They rest upon no conceptual or juristic reason that can make inroads upon those principles. It is conceptually impossible to treat the silence of these treaty provisions as overruling or overriding these principles.

³¹ Statement of the Government of the United Kingdom (para. 24), in the case concerning Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Request for Advisory Opinion).

Question of Statehood: International Legal Personality***Land and Maritime Boundary Between Cameroon and Nigeria, (Cameroon v. Nigeria: Equatorial Guinea intervening), 2002***³²

Dissenting Opinion of Judge Ajibola

[p. 568-569 D.O. Ajibola] The Court agrees with Cameroon in that it does not accept the submission of Nigeria that the City States of Old Calabar have international legal personality. As far as Cameroon is concerned, this is a myth or a kind of mirage. It argues that the City States of Old Calabar cannot claim any international legal entity separate from the State of Nigeria. During the oral proceedings counsel for Nigeria argued about the City States of Old Calabar thus: "These City States were the holders of an original historic title over the cities and their dependencies, and the Bakassi Peninsula was for long a dependency of Old Calabar." (Ibid., Vol. I, p. 67 para. 5.2.).

Although Cameroon accepts that "[w]ithout doubt, Efik trading took place over a vast area of what is now south-eastern Nigeria and western Cameroon" (Reply of Cameroon, Vol. I, p. 247, para. 5.24), yet it asserts that there were other ethnic groups in that area of the Bakassi Peninsula, which at that time showed a "complex pattern of human settlement" (ibid., Vol. I, p. 247, para. 5.24).

In deciding whether the City States of Old Calabar is an international legal entity, one should look to the nature of the Treaty entered into between Great Britain and the Kings and Chiefs of Old Calabar in 1884. In the first place, this is not the first treaty of this kind signed by the Kings and Chiefs. As I have already mentioned, Great Britain signed altogether 17 treaties of this kind with the Kings and Chiefs of Old Calabar. Secondly, Great Britain referred to it not as a mere agreement, a declaration or exchange of Notes, but as a treaty "Treaty with the Kings and Chiefs of Old Calabar, September 10, 1884" (Counter-Memorial of Nigeria, Vol. IV, Ann. NC-M 23, p. 109). How then could Great Britain sign a document, and call it a treaty if it were not so? It would have been described as an "ordinance" had it been a document involving a colony of Great Britain. There is therefore no doubt that the City States of Old Calabar have international legal personality.

³² Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002, p. 303.

Creation of New States

Declaration of Independence of a People—Recognition of a New State

Declaration of Independence by Kosovo, I.C.J. Advisory Opinion, 2010³³

IV. THE QUESTION WHETHER THE DECLARATION OF INDEPENDENCE IS IN ACCORDANCE WITH INTERNATIONAL LAW

78. The Court now turns to the substance of the request submitted by the General Assembly. The Court recalls that it has been asked by the General Assembly to assess the accordance of the declaration of independence of 17 February 2008 with “international law” (resolution 63/3 of the General Assembly, 8 October 2008). The Court will first turn its attention to certain questions concerning the lawfulness of declarations of independence under general international law, against the background of which the question posed falls to be considered, and Security Council resolution 1244 (1999) is to be understood and applied. Once this general framework has been determined, the Court will turn to the legal relevance of Security Council resolution 1244 (1999), and determine whether the resolution creates special rules, and ensuing obligations, under international law applicable to the issues raised by the present request and having a bearing on the lawfulness of the declaration of independence of 17 February 2008.

A. General international law

79. During the eighteenth, nineteenth and early twentieth centuries, there were numerous instances of declarations of independence, often strenuously opposed by the State from which independence was being declared. Sometimes a declaration resulted in the creation of a new State, at others it did not. In no case, however, does the practice of States as a whole suggest that the act of promulgating the declaration was regarded as contrary to international law. On the contrary, State practice during this period points clearly to the conclusion that international law contained no prohibition of declarations of independence. During the second half of the twentieth century, the international law of self-determination developed in such a way as to create a right to indepen-

³³ Accordance with International Law of The Unilateral Declaration Of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 22 July 2010, pp. 29-32.

dence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation (cf. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, pp. 31-32, paras. 52-53; *East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, p. 102, para. 29; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004 (I), pp. 171-172, para. 88). A great many new States have come into existence as a result of the exercise of this right. There were, however, also instances of declarations of independence outside this context. The practice of States in these latter cases does not point to the emergence in international law of a new rule prohibiting the making of a declaration of independence in such cases.

80. Several participants in the proceedings before the Court have contended that a prohibition of unilateral declarations of independence is implicit in the principle of territorial integrity. The Court recalls that the principle of territorial integrity is an important part of the international legal order and is enshrined in the Charter of the United Nations, in particular in Article 2, paragraph 4, which provides that:

“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.” In General Assembly resolution 2625 (XXV), entitled “Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations,” which reflects customary international law (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, pp. 101-103, paras. 191-193), the General Assembly reiterated “[t]he principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State.” This resolution then enumerated various obligations incumbent upon States to refrain from violating the territorial integrity of other sovereign States. In the same vein, the Final Act of the Helsinki Conference on Security and Co-operation in Europe of 1 August 1975 (the Helsinki Conference) stipulated that “[t]he participating States will respect the territorial integrity of each of the participating States” (Art. IV). Thus, the scope of the principle of territorial integrity is confined to the sphere of relations between States.

81. Several participants have invoked resolutions of the Security Council condemning particular declarations of independence: see, inter alia, Security

Council resolutions 216 (1965) and 217 (1965), concerning Southern Rhodesia; Security Council resolution 541 (1983), concerning northern Cyprus; and Security Council resolution 787 (1992), concerning the Republika Srpska. The Court notes, however, that in all of those instances the Security Council was making a determination as regards the concrete situation existing at the time that those declarations of independence were made; the illegality attached to the declarations of independence thus stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*). In the context of Kosovo, the Security Council has never taken this position. The exceptional character of the resolutions enumerated above appears to the Court to confirm that no general prohibition against unilateral declarations of independence may be inferred from the practice of the Security Council.

82. A number of participants in the present proceedings have claimed, although in almost every instance only as a secondary argument, that the population of Kosovo has the right to create an independent State either as a manifestation of a right to self-determination or pursuant to what they described as a right of “remedial secession” in the face of the situation in Kosovo. The Court has already noted (see paragraph 79 above) that one of the major developments of international law during the second half of the twentieth century has been the evolution of the right of self-determination. Whether, outside the context of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation, the international law of self-determination confers upon part of the population of an existing State a right to separate from that State is, however, a subject on which radically different views were expressed by those taking part in the proceedings and expressing a position on the question. Similar differences existed regarding whether international law provides for a right of “remedial secession” and, if so, in what circumstances. There was also a sharp difference of views as to whether the circumstances which some participants maintained would give rise to a right of “remedial secession” were actually present in Kosovo.

83. The Court considers that it is not necessary to resolve these questions in the present case. The General Assembly has requested the Court’s opinion only on whether or not the declaration of independence is in accordance with international law. Debates regarding the extent of the right of self-determination and the existence of any right of “remedial secession,” however, concern the right to separate from a State. As the Court has already noted (see paragraphs 49 to 56 above), and as almost all participants agreed, that issue is beyond the

scope of the question posed by the General Assembly. To answer that question, the Court need only determine whether the declaration of independence violated either general international law or the *lex specialis* created by Security Council resolution 1244 (1999).

84. For the reasons already given, the Court considers that general international law contains no applicable prohibition of declarations of independence. Accordingly, it concludes that the declaration of independence of 17 February 2008 did not violate general international law. Having arrived at that conclusion, the Court now turns to the legal relevance of Security Council resolution 1244, adopted on 10 June 1999.

European Community: Declarations on Creation of New States

Declaration on Yugoslavia and On The Guidelines On The Recognition Of New States, December 16, 1991³⁴

[Requirements for process of recognition of these new states]

The European Community and its member States discussed the situation in Yugoslavia in the light of their guidelines on the recognition of new states in Eastern Europe and in the Soviet Union. They adopted a common position with regard to the recognition of Yugoslav Republics- In this connection they concluded the following: The Community and its member States agree to recognise the independence of all the Yugoslav Republics fulfilling all the conditions set out below. The implementation of this decision will take place on January 15, 1992. They are therefore inviting all Yugoslav Republics to state by 23 December whether: they wish to be recognised as independent States; they accept the commitments contained in the above mentioned guidelines; “[Reproduced from European Political Cooperation Press Release P. 129/91. [The Introductory Note to the selection of documents regarding the situation in the former Yugoslavia appears at 31 I.L.M. 1421 (1992). The selection of documents includes U.N. Security Council Resolutions, 31 I.L.M. 1427 (1992); the Conference on Yugoslavia Arbitration Commission Opinions, with Introductory Note, 31 I.L.M. 1488 (1992); Documents adopted at the London Conference of the International Conference on the Former Yugoslavia, 31 I.L.M. 1527 (1992); and the U.N. Secretary-General Report on the International Conference on the Former Yugoslavia, 31 I.L.M. 1549 (1992).]

³⁴ 31 I.L.M. 1485 (1992) Extraordinary IPC Ministerial Meeting/ Brussels, 16 December 1991.

1486 they accept the provisions laid down in the draft Convention - especially those in Chapter II on human rights and rights of national or ethnic groups - under consideration by the Conference on Yugoslavia; they continue to support the efforts of the Secretary General and the Security Council of the United Nations, and the continuation of the Conference on Yugoslavia. The applications of those Republics which reply positively will be submitted through the Chair of the Conference to the Arbitration Commission for advice before the implementation date. In the meantime, the Community and its member States request the UN Secretary General and the UN Security Council to continue their efforts to establish an effective cease-fire and promote a peaceful and negotiated outcome to the conflict. They continue to attach the greatest importance to the early deployment of a UN peacekeeping force referred to in UN Security Council Resolution 724. The Community and its member States also require a Yugoslav Republic to commit itself, prior to recognition, to adopt constitutional and political guarantees ensuring that it has no territorial claims towards a neighbouring Community State and that it will conduct no hostile propaganda activities versus a neighbouring Community State, including the use of a denomination which implies territorial claims.

Declaration on the “Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union”³⁵

In compliance with the European Council's request, Ministers have assessed developments in Eastern Europe and in the Soviet Union with a view to elaborating an approach regarding relations with new states. In this connection they have adopted the following guidelines on the formal recognition of new states in Eastern Europe and in the Soviet Union: “The community and its Member States confirm their attachment to the principles of the Helsinki Final Act and the Charter of 1487 Paris, in particular the principle of self-determination. They affirm their readiness to recognise subject to the normal standards of international practice and the political realities in each case, those new states which, following the historic changes in the region, have constituted themselves on a democratic basis, have accepted the appropriate international obligations and have committed themselves in good faith to a peaceful process and to negotiations. Therefore, they adopt a common position on the process of recognition of these new states, which requires: respect for the provisions of the Charter of the United Nations and the commitments subscribed to in the Final Act of Helsinki and in the Charter of Paris, especially with regard to the rule of law, democracy and human rights; - guarantees for the rights of ethnic and national groups and minorities in accordance

³⁵ 31 I.L.M. 1486 (1992).

with the commitments subscribed to in the framework of the CSCE; - respect for the inviolability of all frontiers which can only be changed by peaceful means and by common agreement; - acceptance of all relevant commitments with regard to disarmament and nuclear non-proliferation as well as to security and regional stability; - commitment to settle by agreement, including where appropriate by recourse to arbitration, all questions concerning state succession and regional disputes. The Community and its Member States will not recognise entities which are the result of aggression. They would take account of the effects of recognition on neighbouring states. The commitments to these principles opens the way to recognition by the Community and its Member States and to the establishment of diplomatic relations. It could be laid down in agreements.

Brussels, The Hague, 16 December 1991.

Succession of States

Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), 1997³⁶

123. The Court does not find it necessary for the purposes of the present case to enter into a discussion of whether or not Article 34 of the 1978 Convention reflects the state of customary international law. More relevant to its present analysis is the particular nature and character of the 1977 Treaty. An examination of this Treaty confirms that, aside from its undoubted nature as a joint investment, its major elements were the proposed construction and joint operation of a large, integrated and indivisible complex of structures and installations on specific parts of the respective territories of Hungary and Czechoslovakia along the Danube. The Treaty also established the navigational regime for an important sector of an international waterway, in particular the relocation of the main international shipping lane to the bypass canal. In so doing, it inescapably created a situation in which the interests of other users of the Danube were affected. Furthermore, the interests of third States were expressly acknowledged in Article 18, whereby the parties undertook to ensure “uninterrupted and safe navigation on the international fairway” in accordance with their obligations under the Convention of 18 August 1948 concerning the Regime of Navigation on the Danube.

In its Commentary on the Draft Articles on Succession of States in respect of Treaties, adopted at its twenty-sixth session, the International Law Commis-

³⁶ Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), Judgment, I.C.J. Reports 1997, p. 7.

sion identified “treaties of a territorial character” as having been regarded both in traditional doctrine and in modern opinion as unaffected by a succession of States (Official Records of the United Nations Conference on the Succession of States in respect of Treaties, Vol. III, Doc. A/CONF 80/16/Add.2, p. 27, para. 2). The draft text of Article 12, which reflects this principle, was subsequently adopted unchanged in the 1978 Vienna Convention. The Court considers that Article 12 reflects a rule of customary international law; it notes that neither of the Parties disputed this. Moreover, the Commission indicated that “treaties concerning water rights or navigation on rivers are commonly regarded as candidates for inclusion in the category of territorial treaties” (*ibid.*, p. 33, para. 26). The Court observes that Article 12, in providing only, without reference to the treaty itself, that rights and obligations of a territorial character established by a treaty are unaffected by a succession of States, appears to lend support to the position of Hungary rather than of Slovakia.

However the Court concludes that this formulation was devised rather to take account of the fact that, in many cases, treaties which had established boundaries or territorial regimes were no longer-in force (*ibid.*, pp. 26-37). Those that remained in force would nonetheless bind a successor State.

Taking all these factors into account, the Court finds that the content of the 1977-Treaty indicates that it must be regarded as establishing a territorial regime within the meaning of Article 12 of 1978 Vienna Convention. It created rights and obligations “attaching to” the parts of the Danube to which it relates; thus the Treaty itself cannot be affected by a succession of States. The Court therefore concludes that the 1977 Treaty became binding upon Slovakia on 1 January 1993.

Representative of State Entity

Application of the Convention on Prevention and Punishment of Genocide (Bosnia — Herzegovina v. Yugoslavia), 1996³⁷

Dissenting Opinion of Judge Kreca

[p. 681 D.O. Kreca] In the light of the contents of the Dayton Agreements and in particular in the light of the current state of affairs, Bosnia and Herzegovina may be qualified in terms of international law as a State in *statu nascendi*.

³⁷ Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C.J. Reports 1996, p. 595, Dissenting Opinion Of Judge Korea p. 681, para. 23.

At the time of the entry into force of the Dayton Agreements, the Republic of Bosnia and Herzegovina, as a State within the administrative borders of the former Yugoslav federal unit of the same name, possessed literally no relevant attribute of a State in terms of international law...

[p. 684 D.O. Kreca] At present, an absence of the crucial State elements in terms of international law makes Bosnia and Herzegovina within its administrative borders a State *sui generis*: a combination of a contractual relationship of two entities with a strongly installed element of an international protectorate. This status is expressed at two levels, that is

(a) the factual level, as reflected in the position of IFOR. These forces are, by definition, a “multinational military Implementation Force”³⁸ deployed to Bosnia and Herzegovina to “help ensure compliance with the provisions of this Agreement”³⁹). IFOR is not only one armed force which shall “have complete and unimpeded freedom of movement by ground, air, and water throughout Bosnia and Herzegovina”⁴⁰ but is even authorized to “take such actions as required, including the use of necessary force, to ensure compliance with this Annex, and to ensure its own protection”⁴¹;

(b) the legal level, since particularly relevant provisions of Article VI of the Constitution of Bosnia and Herzegovina (Constitutional Court), which is an inherently adjudicative body which has “exclusive jurisdiction to decide any dispute that arises under this Constitution between the Entities or between Bosnia and Herzegovina and an Entity or Entities, or between institutions of Bosnia and Herzegovina”⁴²

³⁸ Article 1 of the Agreement on the Military Aspects of the Peace Settlement, doc. A/50/790/S/1995/999, p. 7.

³⁹ *Ibid.*

⁴⁰ *Ibid.*, p. 19.

⁴¹ *Ibid.*, p. 8.

⁴² *Ibid.*, p. 71.

Intergovernmental Organizations as Subjects of International Law (IGOs)

United Nations and International Bodies

Reparations for Injuries Suffered in the Service of the United Nations, I.C.J. Advisory Opinion, 1949⁴³

The question concerning reparation for injuries suffered in the service of the United Nations, was referred to the Court by the General Assembly of the United Nations (Resolution of the General Assembly dated December 3rd, 1948) in the following terms:

“I. In the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State, has the United Nations, as an Organization, the capacity to bring an international claim against the responsible de jure or de facto government with a view to obtaining the reparation due in respect of the damage caused (a) to the United Nations, (b) to the victim or to persons entitled through him?..

“11. In the event of an affirmative reply on point I (b), how is action by the United Nations to be reconciled with such rights as may be possessed by the State of which the victim is a national?”

With respect to questions I (a) and I (b), the Court established a distinction according to whether the responsible State is a Member or not of the United Nations. The Court unanimously answered question I (a) in the affirmative. On question I (b) the Court was of opinion by 11 votes against 4 that the Organization has the capacity to bring an international claim whether or not the responsible State is a Member of the United Nations.

Finally, on point 11, the Court was of opinion by 10 votes against 5 that when the United Nations as an organization is bringing a claim for reparation for damage caused to its agent, it can only do so by basing its claim upon a breach of obligations due to itself; respect for this rule ‘will usually prevent a conflict between the action of the United Nations and such rights as the agent’s national State may possess; moreover, this reconciliation must depend

⁴³ Summary of the Advisory Opinion, published by the Court, See, <http://www.I.C.J.-cij.org/docket/files/4/1837.pdf>.

up considerations applicable to each particular case, and upon agreements to be made between the Organization and individual States....

[In its Opinion]... the Court makes a number of preliminary observations on the question submitted to it. It proceeds to... analyses the : “capacity to bring an international claim.” This capacity certainly belongs to a State. Does it also belong to the Organization? This is tantamount to asking whether the Organization has international personality. In answering this question which is not settled by the actual terms of the Charter, the Court goes on to consider what characteristics the Charter was intended to give to the Organization. In this connection, the Court states that the Charter conferred upon the Organization rights and obligations which are different from those of its Members. The Court stresses, further, the important political tasks of the Organization: the maintenance of international peace and security. Accordingly the Court concludes that the Organization possessing as it does rights and obligations has at the same time a large measure of international personality and the capacity to operate upon an international plane, although it is certainly not a super-state.

The Court then examines the very heart of the subject, namely, whether the sum of the international rights of the Organization comprises the right to bring an international claim to obtain reparation from a State in respect of the damage caused by the injury of an agent of the Organization in the course of the performance of his duties.

On the first point, I (a), of the Request for Opinion the Court unanimously reaches the conclusion that the Organization has the capacity to bring an international claim against a State (whether a Member or non-member) for damage resulting from a breach by that State of its obligations towards the Organization. The Court points out that it is not called upon to determine the precise extent of the reparation which the Organization would be entitled to recover; the measure of the reparation should depend upon a number of factors which the Court gives as examples.

Then the Court proceeds to examine question I (b), namely, whether the United Nations, as an Organization, has the capacity to bring an international claim with a view to obtaining the reparation due in respect of the damage caused, not to the Organization itself, but to the victim or to persons entitled through him.

In dealing with this point the Court analyses the question of diplomatic protection of nationals. The Court points out in this connection that really only the Organization has the capacity to present a claim in the circumstances referred to, inasmuch as at the basis of any international claim there must be a breach by the defendant State of an obligation towards the Organization. In the present case

the State of which the victim is a national could not complain of a breach of an obligation towards itself. Here the obligation is assumed in favour of the Organization. However, the Court admits that the analogy of the traditional rule of diplomatic protection of nationals abroad does not in itself justify an affirmative reply. In fact, there exists no link of nationality between the Organization and its agents. This is a new situation and it must be analyzed. Do the provisions of the Charter relating to the functions of the Organization imply that the latter is empowered to assure its agents limited protection? These powers, which are essential to the performance of the functions of the Organization, must be regarded as a necessary implication arising from the Charter. In discharging its functions, the Organization may find it necessary to entrust its agents with important missions to be performed in disturbed parts of the world. These agents must be ensured of effective protection. It is only in this way that the agent will be able to carry out his duties satisfactorily. The Court therefore reaches the conclusion that the Organization has the capacity to exercise functional protection in respect of its agents. The situation is comparatively simple: in the case of Member States, for these have assumed various obligations towards the Organization.

But what is the situation when a claim is brought against a State which is not a Member of the Organization? The Court is of opinion that the Members of the United Nations created an entity possessing objective international personality and not merely personality recognized by them alone. As in the case of Question I (a), the Court therefore answers Question I (6) in the affirmative....

Legality of the Threat or Use of Nuclear Weapons in Armed Conflict, I.C.J. Advisory Opinion, 1996 (on the matter of the World Health Organization)⁴⁴

19. In order to delineate the field of activity or the area of competence of an international organization one must refer to the relevant rules of the organization and, in the first place, to its constitution. From a formal standpoint, the constituent instruments of international organizations are multilateral treaties, to which the well-established rules of treaty interpretation apply. As the Court has said with respect to the Charter:

“On the previous occasions when the Court has had to interpret the Charter of the United Nations, it has followed the principles and rules applicable

⁴⁴ Legality of the Use by a State of Nuclear Weapons in Armed Conflict, On the matter of the World Health Organization, Advisory Opinion, I.C.J. Reports 1996, p. 66, pp. 74-75, 82-83, and dissenting opinion of Judge Koroma p. 198.

in general to the interpretation of treaties, since it has recognized that the Charter is a multilateral treaty, albeit a treaty having certain special characteristics.” (Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962, p. 157).

But the constituent instruments of international organizations are also treaties of a particular type; their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals. Such treaties can raise specific problems of interpretation owing, *inter alia*, to their character which is conventional and at the same time institutional; the very nature of the organization created, the objectives which have been assigned to it by its founders, the imperatives associated with the effective performance of its functions, as well as its own practice, are all elements which may deserve special attention when the time comes to interpret these constituent treaties. According to the customary rule of interpretation as expressed in Article 31 of the 1969 Vienna Convention on the Law of Treaties, the terms of a treaty must be interpreted “in their context and in the light of its object and purpose” and there shall be “taken into account, together with the context...

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.”

The Court has had occasion to apply this rule of interpretation several times (see *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Judgment, I.C.J. Reports 1991, pp. 69-70, para. 48; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, Judgment, I.C.J. Reports 1992, pp. 582-583, para. 373, and p. 586, para. 380; *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* Judgment, I.C.J. Reports 1994, pp. 21-22, para. 41; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995, p. 18, para. 33); it will also apply it in this case for the purpose of determining whether, according to the WHO Constitution, the question to which it has been asked to reply arises “within the scope of [the] activities” of that Organization.

...29. Other arguments have nevertheless been put forward in the proceedings to found the jurisdiction of the Court in the present case. It has thus been argued that World Health Assembly resolution, having been adopted by the requisite majority, “must be presumed to have been validly adopted” (cf. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, p. 22, para. 20). The Court would observe in this respect that the question whether a resolution has been duly adopted from a procedural point of view and the question whether that resolution has

been adopted *intra vires* are two separate issues. The mere fact that a majority of States, in voting on a resolution, have complied with all the relevant rules of form cannot in itself suffice to remedy any fundamental defects, such as acting *ultra vires*, with which the resolution might be afflicted.

As the Court has stated, “each organ must, in the first place at least, determine its own jurisdiction” (Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962, p. 168). It was therefore certainly a matter for the World Health Assembly to decide on its competence - and, thereby, that of the WHO - to submit a request to the Court for an advisory opinion on the question under consideration, having regard to the terms of the Constitution of the Organization and those of the Agreement of 10 July 1948 bringing it into relationship with the United Nations. But likewise it is incumbent on the Court to satisfy itself that the conditions governing its own competence to give the opinion requested are met; through the reference made, respectively, by Article 96, paragraph 2, of the Charter to the “scope of [the] activities” of the Organization and by Article X, paragraph 2, of the Agreement of 10 July 1948 to its “competence,” the Court also finds itself obliged in the present case, to interpret the Constitution of the WHO.

The exercise of the functions entrusted to the Court under Article 65, paragraph 1, of its Statute requires it to furnish such an interpretation, independently of any operation of the specific recourse mechanism which Article 75 of the WHO Constitution reserves for cases in which a question or dispute arises between States concerning the interpretation or application of that instrument; and in doing so the Court arrives at different conclusions from those reached by the World Health Assembly when it adopted resolution WHA46.40.

Dissenting Opinion of Judge Koroma

[p. 203 D.O. Koroma] Although the resolution containing the request is not itself a treaty, however, like the Court in its majority opinion, its interpretation can be guided by the relevant provisions of the 1969 Vienna Convention on the Law of Treaties so as to establish that the question formulated in the resolution falls within the competence or scope of activities of the Organization, as defined in its Constitution.

[p. 219 D.O. Koroma] On the question whether an international organization is entitled to determine its own competence or jurisdiction, the Court had this to say in its Advisory Opinion in the Certain Expenses case:

“In the legal systems of States, there is often some procedure for determining the validity of even a legislative or governmental act, but no analogous procedure is to be found in the structure of the United Nations. Proposals made

during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice were not accepted; the opinion which the Court is in course of rendering is an advisory opinion. As anticipated in 1945 therefore, each organ must, in the first place at least, determine its own jurisdiction.” (Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), I.C.J. Reports 1962, p. 168; (second emphasis added.)

In that same Opinion, the Court stated that

“when the Organization takes action which warrants the assertion that it was appropriate for the fulfillment of one of the stated purposes of the United Nations, the presumption is that such action is not ultra vires the Organization” (ibid.).

What this shows, in my view, is that prior to the present case and in accordance with its jurisprudence; the Court has held that international organizations are competent to determine their competence or jurisdiction. On this occasion, the Court decided to depart from this its jurisprudence, but with hardly any explanation or reason but not only did the Court choose not to follow its jurisprudence on this occasion in the past, while not denying itself the right to examine the competence of the body making the request, it rejected certain objections to its jurisdiction based on the claims that such bodies were not competent to make the request (Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, I.C.J. Reports 1950, pp. 72 et seq., and Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports 1951, pp. 19-20).

The Force of Resolutions of United Nations Bodies

Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Bosnia/Herzegovina v. Yugoslavia) (Security Council/UN), 1993⁴⁵

Separate Opinion of Judge Lauterpacht

[pp. 439-441 S.O. Lauterpacht] On the face of it, Security Council resolution 713 (1991)⁴⁶ is a valid prohibition of the supply of arms and military equipment

⁴⁵ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia/Herzegovina v Yugoslavia (Serbia and Montenegro), Provisional Measures, Order, I.C.J. Reports 1993, p. 325.

⁴⁶ “.. that all States shall, for the purpose of establishing peace and stability in Yugo-

to those involved in the Yugoslav conflict and is binding on all Members of the United Nations. Although the resolution is open to the comments expressed above in paragraphs 91-96, it cannot be said with certainty that in themselves these comments affect the continuing validity of the resolution. The fact that some of the members of the Security Council indicated that they would not have supported the resolution in the absence of the consent of Yugoslavia, in relation to whose territory the embargo was adopted, could only be relevant in the absence of a determination by the Security Council that the situation fell within Chapter VII of the Charter. Once the Security Council indicated that it was acting "under Chapter VII," it was no longer constrained by the necessity of obtaining the consent of any State to the measures that it considered the circumstances to require.

This is not to say that the Security Council can act free of all legal controls but only that the Court's power of judicial review is limited. That the Court has some power of this kind can hardly be doubted, though there can be no less doubt that it does not embrace any right of the Court to substitute its discretion for that of the Security Council in determining the existence of a threat to the peace, a breach of the peace or an act of aggression, or the political steps to be taken following such a determination. But the Court, as the principal judicial organ of the United Nations, is entitled, indeed bound, to ensure the rule of law within the United Nations system and, in cases properly brought before it, to insist on adherence by all United Nations organs to the rules governing their operation. The Court has already, in the *Lockerbie* case, given an extensive interpretation of the powers of the Security Council when acting under Chapter VII, in holding that a decision of the Council is, by virtue of Articles 25 and 103 of the Charter, able to prevail over the obligations of the parties under any other international agreement (see *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992, p. 15 para. 39).

The present case, however, cannot fall within the scope of the doctrine just enunciated. This is because the prohibition of genocide, unlike the matters covered by the Montreal Convention in the *Lockerbie* case to which the terms of Article 103 could be directly applied, has generally been accepted as having the status not of an ordinary rule of international law but of *jus cogens*.

slavia, immediately implement a general and complete embargo on all deliveries of weapons and military equipment to Yugoslavia until the Security Council decides otherwise following consultation between the Secretary-General and the Government of Yugoslavia" (resolution 713 (1991), para. 6).

Indeed, the prohibition of genocide has long been regarded as one of the few undoubted examples of *jus cogens*. Even in 1951, in its Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, the Court affirmed that genocide was “contrary to moral law and to the spirit and aims of the United Nations” (a view repeated by the Court in paragraph 51 of today’s Order) and that “the principles underlying the Convention are provisions which are recognized by civilized nations as binding on States even without any conventional obligation” (I.C.J. Reports 1951, p. 22).

An express reference to the special quality of the prohibition of genocide may also be seen in the work of the International Law Commission in the preparation of Article 50 of the draft articles on the Law of Treaties (Yearbook of the International Law Commission, 1966, Vol. II, pp. 248-249) which eventually materialized in Article 53 of the Vienna Convention on the Law of Treaties and in the same Commission’s commentary on Article 19 (international crimes and delicts) of the draft articles on State Responsibility (Yearbook of the International Law Commission, 1976, Vol. II, Pt. 2, p. 103). The concept of *jus cogens* operates as a concept superior to both customary international law and treaty. The relief which Article 103 of the Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot - as a matter of simple hierarchy of norms - extend to a conflict between a Security Council resolution and *jus cogens*. Indeed, one only has to state the opposite proposition thus - that a Security Council resolution may even require participation in genocide - for its unacceptability to be apparent.

Nor should one overlook the significance of the provision in Article 24 (2) of the Charter that, in discharging its duties to maintain international peace and security, the Security Council shall act in accordance with the Purposes and Principles of the United Nations. Amongst the Purposes set out in Article 1(3) of the Charter is that of achieving international co-operation “in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.”

Now, it is not to be contemplated that the Security Council would ever deliberately adopt a resolution clearly and deliberately flouting a rule of *jus cogens* or requiring a violation of human rights. But the possibility that a Security Council resolution might inadvertently or in an unforeseen manner lead to such a situation cannot be excluded. And that, it appears, is what has happened here. On this basis, the inability of Bosnia-Herzegovina sufficiently strongly to fight back against the Serbs and effectively to prevent the implementation of the Serbian policy of ethnic cleansing is at least in part directly attributable to the fact that Bosnia-Herzegovina’s access to weapons and equipment has

been severely limited by the embargo. Viewed in this light, the Security Council resolution can be seen as having in effect called on Members of the United Nations, albeit unknowingly and assuredly unwillingly, to become in some degree supporters of the genocidal activity of the Serbs and in this manner and to that extent to act contrary to a rule of jus cogens.

What legal consequences may flow from this analysis? One possibility is that, in strict logic, when the operation of paragraph 6 of Security Council resolution 713 (1991) began to make Members of the United Nations accessories to genocide, it ceased to be valid and binding in its operation against Bosnia-Herzegovina; and that Members of the United Nations then became free to disregard it. Even so, it would be difficult to say that they then became positively obliged to provide the Applicant with weapons and military equipment.

There is, however, another possibility that is, perhaps, more in accord with the realities of the situation. It must be recognized that the chain of hypotheses in the analysis just made involves some debatable links - elements of fact, such as that the arms embargo has led to the imbalance in the possession of arms by the two sides and that that imbalance has contributed in greater or lesser degree to genocidal activity such as ethnic cleansing; and elements of law, such as that genocide is jus cogens and that a resolution which becomes violative of jus cogens must then become void and legally ineffective. It is not necessary for the Court to take a position in this regard at this time. Instead, it would seem sufficient that the relevance here of jus cogens should be drawn to the attention of the Security Council, as it will be by the required communication to it of the Court's Order, so that the Security Council may give due weight to it in future reconsideration of the embargo.

East Timor (Portugal v. Australia), 1995⁴⁷

30. Australia objects that the United Nations resolutions regarding East Timor do not say what Portugal claims they say; that the last resolution of the Security Council on East Timor goes back to 1976 and the last resolution of the General Assembly to 1982, and that Portugal takes no account of the passage of time and the developments that have taken place since then; and that the Security Council resolutions are not resolutions which are binding under Chapter VII of the Charter or otherwise and, moreover, that they are not framed in mandatory terms.

⁴⁷ East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995, p. 90, 103-104, and Weeramantry dissenting opinion pp. 190-91.

31. The Court notes that the argument of Portugal under consideration rests on the premise that the United Nations resolution, and in particular those of the Security Council, can be read as imposing an obligation on States not to recognize any authority on the part of Indonesia over the territory and, where the latter is concerned, to deal only with Portugal. The Court is not persuaded, however, that the relevant resolutions went so far.

For the two Parties, the Territory of East Timor remains a non-self-governing territory and its people has the right to self-determination. Moreover, the General Assembly, which reserves to itself the right to determine the territories which have to be regarded as non-self-governing for the purposes of the application of Chapter XI of the Charter, has treated East Timor as such a territory. The competent subsidiary organs of the General Assembly have continued to treat East Timor as such to this day. Furthermore, the Security Council, in its resolutions 384 (1975) and 389 (1976) has expressly called for respect for “the territorial integrity of East Timor as well as the inalienable right of its people to self-determination in accordance with General Assembly resolution 1514 (XV).”

Nor is it at issue between the Parties that the General Assembly has expressly referred to Portugal as the “administering Power” of East Timor in a number of the resolutions it adopted on the subject of East Timor between 1975 and 1982, and that the Security Council has done so in its resolution 384 (1975). The Parties do not agree, however, on the legal implications that flow from the reference to Portugal as the administering Power in those texts.

32. The Court finds that it cannot be inferred from the sole fact that the above-mentioned resolutions of the General Assembly and the Security Council refer to Portugal as the administering Power of East Timor that they intended to establish an obligation on third States to treat exclusively with Portugal as regards the continental shelf of East Timor.

Dissenting Opinion of Judge Weeramantry

[p. 190-191 D.O. Weeramantry] The proposition that lapse of time wears down the binding force of resolutions needs to be viewed with great caution. In cases where resolutions in fact impose obligations at international law, this Court would then, in effect, be nullifying obligations which the appropriate organ of the United Nations, properly seised of that matter, has chosen to impose. More especially is caution required from the Court in regard to resolutions dealing with obligations *erga omnes* and rights such as self-determination which are fundamental to the international legal system. The Court would, in the absence of compelling reasons to the contrary, show due respect for the valid resolutions duly passed by its sister organs.

It is to be noted that Australia's argument that the resolutions of the Security Council have fallen into desuetude cannot be accepted for a further reason.

The argument of desuetude breaks down before the fact that the Committee of Twenty-Four, which is the General Assembly's organ for overseeing the matter of decolonization, has kept the East Timor question alive on its agenda year after year. Moreover, the Committee has in its report to the General Assembly referred to this in successive years. The Committee would not be expected to keep this matter on their books if it is, as Australia has suggested, a dead issue.

Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, I.C.J. Advisory Opinion, 1999⁴⁸

50. In the process of determining whether a particular expert on mission is entitled, in the prevailing circumstances, to the immunity provided for in Section 22 (b), the Secretary-General of the United Nations has a pivotal role to play. The Secretary-General, as the chief administrative officer of the Organization, has the authority and the responsibility to exercise the necessary protection where required. This authority has been recognized by the Court when it stated:

“Upon examination of the character of the functions entrusted to the Organization and of the nature of the missions of its agents, it becomes clear that the capacity of the Organization to exercise a measure of functional protection of its agents arises by necessary intendment out of the Charter.” (Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949, p. 184.)

51. Article VI, Section 23, of the General Convention provides that “[p]rivileges and immunities are granted to experts in the interests of the United Nations and not for the personal benefit of the individuals themselves.” In exercising protection of United Nations experts, the Secretary-General is therefore protecting the mission with which the expert is entrusted. In that respect, the Secretary-General has the primary responsibility and authority to protect the interests of the Organization and its agents, including experts on mission. As the Court held:

“In Order that the agent may perform his duties satisfactorily, he must feel that this protection is assured to him by the Organization, and that he may

⁴⁸ Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999, p. 62.

count on it. To ensure the independence of the agent, and, consequently, the independent action of the Organization itself, it is essential that in performing his duties he need not have to rely on any other protection than that of the Organization ...” (Ibid., p. 183.)

52. The determination whether an agent of the Organization has acted in the course of the Performance of his mission depends upon the facts of a particular case. In the present case, the Secretary-General, or the Legal Counsel of the United Nations on his behalf, has on numerous occasions informed the Government of Malaysia of his finding that Mr. Cumaraswamy had spoken the words quoted in the article in *International Commercial Litigation* in his capacity as Special Rapporteur of the Commission and that he consequently was entitled to immunity from “every kind” of legal process.

53. As is clear from the written and oral pleadings of the United Nations, the Secretary-General was reinforced in this view by the fact that it has become standard practice of Special Rapporteurs of the Commission to have contact with the media. This practice was confirmed by the High Commissioner for Human Rights who, in a letter dated 2 October 1998, included in the dossier, wrote that: “it is more common than not for Special Rapporteurs to speak to the press about matters pertaining to their investigations, thereby keeping the general public informed of their work.”

54. As noted above... Mr. Cumaraswamy was explicitly referred to several times in the article “*Malaysian Justice on Trial*” in *International Commercial Litigation* in his capacity as United Nations Special Rapporteur on the Independence of Judges and Lawyers. In his reports to the Commission ... Mr. Cumaraswamy had set out his methods of work, expressed concern about the independence of the Malaysian judiciary, and referred to the civil lawsuits initiated against him. His third report noted that the Legal Counsel of the United Nations had informed the Government of Malaysia that he had spoken in the performance of his mission and was therefore entitled to immunity from legal process.

55. As noted in Paragraph 18 above, in its various resolutions the Commission took note of the Special Rapporteur’s reports and of his methods of work. In 1997, it extended his mandate for another three years (see paragraphs 18 and 45 above). The Commission presumably would not have so acted if it had been of the opinion that Mr. Cumaraswamy had gone beyond his mandate and had given the interview to *International Commercial Litigation* outside the course of his functions. Thus the Secretary-General was able to find Support for his findings in the Commission’s Position.

56. The Court is not called upon in the present case to pass upon the aptness of the terms used by the Special Rapporteur or his assessment of the situation.

In any event, in view of all the circumstances of this case, elements of which are set out in paragraphs 1 to 15 of the note by the Secretary-General, the Court is of the opinion that the Secretary-General correctly found that Mr. Cumaraswamy, in speaking the words quoted in the article in *International Commercial Litigation*, was acting in the course of the Performance of his mission as Special Rapporteur of the Commission. Consequently, Article VI, Section 22 (b), of the General Convention is applicable to him in the present case and affords Mr. Cumaraswamy immunity from legal process of every kind....

60. As the Court has observed, the Secretary-General, as the chief administrative officer of the Organization, has the primary responsibility to safeguard the interests of the Organization; to that end, it is up to him to assess whether its agents acted within the scope of their functions and, where he so concludes, to protect these agents, including experts on mission, by asserting their immunity. This means that the Secretary-General has the authority and responsibility to inform the government of a member State of his finding and, where appropriate, to request it to act accordingly and, in particular, to request it to bring his finding to the knowledge of the local Courts if acts of an agent have given or may give rise to Court proceedings.

61. When national Courts are seised of a case in which the immunity of a United Nations agent is in issue, they should immediately be notified of any finding by the Secretary-General concerning that immunity. That finding, and its documentary expression, creates a presumption which can only be set aside for the most compelling reasons and is thus to be given the greatest weight by national Courts.

The governmental authorities of a party to the General Convention are therefore under an obligation to convey such Information to the national Courts concerned, since a proper application of the Convention by them is dependent on such information.

Failure to comply with this Obligation, among others, could give rise to the Institution of proceedings under Article VIII, Section 30, of the General Convention....

Dissenting Opinion of Judge Weeramantry

[pp. 96-97 S.O. Weeramantry] Since it is essential to United Nations staff that they receive sufficient protection to be able to discharge their missions with independence, and since the duty of protecting its staff in the exercise of such duties lies so heavily on the United Nations, great importance must attach to the views of its chief functionary, the Secretary-General, regarding the question whether immunity does or does not attach in a given case.

The Secretary-General is better informed than any external authority regarding such questions as the limits of a given agent's functions, the purpose or purposes the appointment was intended to serve, and the needs of the United Nations in relation to any particular inquiry. He is better informed than any other authority of the practice relating to, and the factual background surrounding, the particular matter. With his unique overview of the entire scheme of United Nations operations, he, more than any other authority, can assess a given agent's functions within the overall context of the rationale, traditions and operational framework of United Nations activities as a whole.

Any attempt to determine the applicability of the privileges and immunities of the United Nations to a particular rapporteur in particular circumstances without reference to the opinion of the Secretary-General would fail to take into account an important part of the material essential to an informed decision.

Moreover, within the United Nations system, there is a practice of recognition of the conclusiveness of the Secretary-General's authority in this regard, and there are General Assembly resolutions, such as resolution 36/238 of 18 December 1981, which indicate the special importance accorded to the view of the Secretary-General on the entire range of matters relating to administration within the Organization. The views of the United Nations' highest administrative authority on an essentially administrative matter such as the extent of a particular official's sphere of authority - a question so eminently within his knowledge and supervisory functions - cannot be disregarded without detriment to the entire system.

The Secretary-General's determination as to whether a particular action was within an official's or rapporteur's sphere of authority should therefore be viewed as binding on the domestic tribunal, unless compelling reasons can be established for displacing that weighty presumption. I am in complete and respectful agreement with the Court in this regard. There is no element of arbitrariness here, for if a State disputes such a ruling by the Secretary-General, there is always room for the matter to be brought before this Court for an advisory opinion in terms of Section 30 of the Convention.

National Liberation Movements and Other Groups⁴⁹

General Assembly of the United Nations, 62nd Session, Question of Palestine

Background

This item, which had been on the agenda of the second and third sessions of the General Assembly, was included in the agenda of the twenty-ninth session, in 1974, at the request of 55 Member States (A/9742 and Corr.1 and Add.1, 2, 3 and 4). At that session, the Assembly invited the Palestine Liberation Organization (PLO), the representative of the Palestinian people, to participate in its deliberations on the question of Palestine in plenary meetings (resolution 3210 (XXIX)). At the same session, the Assembly reaffirmed the inalienable rights of the Palestinian people in Palestine, emphasizing that their realization was indispensable for the solution of the question of Palestine (resolution 3236 (XXIX)). The Assembly also invited the PLO to participate, in the capacity of observer, in its sessions and its work and in all international conferences convened under its auspices; and considered that the PLO was similarly entitled with regard to all international conferences convened by other organs of the United Nations (resolution 3237 (XXIX)).

At its thirtieth session, the General Assembly called for the invitation of the PLO to participate on an equal footing with other parties in all efforts, deliberations and conferences on the Middle East that were held under the auspices of the United Nations and to take part in the Geneva Peace Conference on the Middle East as well as in all other efforts for peace (resolution 3375 (XXX)). At the same session, the Assembly established the Committee on the Exercise of the Inalienable Rights of the Palestinian People; requested the Committee to consider and recommend to the Assembly a programme of implementation, designed to enable the Palestinian people to exercise the rights previously recognized; and requested the Security Council to consider the question of the exercise by the Palestinian people of their inalienable rights (resolution 3376 (XXX)).

The General Assembly considered the item on the question of Palestine at its thirty-first to sixtieth sessions (resolutions 31/20, 32/40 A and B, 33/28 A to C, 34/65 A to D, 35/169 A to E, 36/120 A to F, 37/86 A to E, 38/58 A to E, 39/49 A to D, 40/96 A to D, 41/43 A to D, 42/66 A to D, 43/175 A to C, 43/176,

⁴⁹ 1974 UN General Assembly recognized and accorded recognition to the Angolan, Mozambican, Palestinian, and Rhodesian movements. Add UN GA 3237 (XXIX) (November 22, 1974 PLO observer status to UN).

43/177, 44/2, 44/41 A to C, 44/42, 45/67 A to C, 45/68, 45/69, 46/74 A to C, 46/75, 46/76, 47/64 A to E, 48/158 A to D, 49/62 A to D, 50/84 A to D, 51/23, 51/24, 51/25, 51/26, 52/49, 52/50, 52/51, 52/52, 53/39, 53/40, 53/41, 53/42, 54/39, 54/40, 54/41, 54/42, 55/52, 55/53, 55/54, 55/55, 56/33, 56/34, 56/35, 56/36, 57/107, 57/108, 57/109, 57/110, 58/18, 58/19, 58/20, 58/21, 59/28, 59/29, 59/30, 59/31, 60/36, 60/37, 60/38 and 60/39)....

At its forty-third session, the General Assembly acknowledged the proclamation of the State of Palestine by the Palestine National Council on 15 November 1988; affirmed the need to enable the Palestinian people to exercise their sovereignty over their territory occupied since 1967; and decided that, effective as at 15 December 1988, the designation "Palestine" should be used in place of the designation "Palestine Liberation Organization" in the United Nations system, without prejudice to the observer status and functions of the PLO within the United Nations system, in conformity with relevant United Nations resolutions and practice (resolution 43/177).

At its sixty-first session, the General Assembly requested the Committee on the Exercise of the Inalienable Rights of the Palestinian People to continue to exert all efforts to promote the realization of the inalienable rights of the Palestinian people, to support the Middle East peace process and to mobilize international support for and assistance to the Palestinian people, and authorized the Committee to make such adjustments in its approved programme of work as it might consider appropriate and necessary in the light of developments and to report thereon to the Assembly at its sixty-second session and thereafter (resolution 61/22).

At the same session, the General Assembly requested the Division for Palestinian Rights of the Secretariat, as part of the observance of the International Day of Solidarity with the Palestinian People on 29 November, to continue to organize, under the guidance of the Committee on the Exercise of the Inalienable Rights of the Palestinian People, an annual exhibit on Palestinian rights or a cultural event in cooperation with the Permanent Observer Mission of Palestine to the United Nations (resolution 61/23).

The General Assembly also requested, at its sixty-first session, the Department of Public Information of the Secretariat, in full cooperation and coordination with the Committee on the Exercise of the Inalienable Rights of the Palestinian People, to continue, with the necessary flexibility as might be required by developments affecting the question of Palestine, its special information programme for the biennium 2006-2007, in particular, inter alia, to strengthen the annual training programme for Palestinian broadcasters and journalists (resolution 61/24).

Also at the same session, the General Assembly... demanded that Israel, the occupying Power, comply with its legal obligations under international law, as mentioned in the advisory opinion of the International Court of Justice and as demanded in resolutions ES-10/13 of 21 October 2003 and ES-10/15 of 20 July 2004 and, inter alia, that it immediately cease its construction of the wall in the Occupied Palestinian Territory, including East Jerusalem; reiterated its demand for the complete cessation of all Israeli settlement activities in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan, and called for the full implementation of the relevant Security Council resolutions; reaffirmed its commitment to the two-State solution of Israel and Palestine, living side by side in peace and security within recognized borders, based on the pre-1967 borders; urged Member States to expedite the provision of economic, humanitarian and technical assistance to the Palestinian people and the Palestinian Authority; and requested the Secretary-General to continue his efforts with the parties concerned, and in consultation with the Security Council, towards the attainment of a peaceful settlement of the question of Palestine and the promotion of peace in the region and to submit to the Assembly at its sixty-second session a report on those efforts and on developments on the matter (resolution 61/25).

***United Nations General Assembly Resolution 3237(XXIX),
Observer Status for the Palestine Liberation Organization,
22 November 1974***

The General Assembly,

Having considered the question of Palestine,

Taking into consideration the universality of the United Nations prescribed in the Charter,

Recalling its resolution 3102 (XXVIII) of 12 December 1973,

Taking into account Economic and Social Council resolutions 1835 (LVI) of 14 May 1974 and 1840 (LVI) of 15 May 1974,

Noting that the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, the World Population Conference and the World Food Conference have in effect invited the Palestine Liberation Organization to participate in their respective deliberations,

Noting also that the Third United Nations Conference on the Law of the Sea has invited the Palestine Liberation Organization to participate in its deliberations as an observer,

1. Invites the Palestine Liberation Organization to participate in the sessions and the work of the General Assembly in the capacity of observer;
2. Invites the Palestine Liberation Organization to participate in the sessions and the work of all international conferences convened under the auspices of the General Assembly in the capacity of observer;
3. Considers that the Palestine Liberation Organization is entitled to participate as an observer in the sessions and the work of all international conferences convened under the auspices of other organs of the United Nations;
4. Requests the Secretary-General to take the necessary steps for the implementation of the present resolution.

Individuals, NGOs and Business Enterprises as Subjects

Andrew Clapham, "The Role of the Individual in International Law"⁵⁰

Abstract...

This short piece tackles the role of the individual in international law....

[...]Ever since the 1966 edition of *Principles of International Law* Brownlie has asserted, 'There is no general rule that the individual cannot be a "subject of international law," and in particular contexts he appears as a legal person on the international plane'.⁵¹ Indeed it does make sense to shift the discussion from subjectivity to personality, and from general theory to particular contexts. But this still begs the question: what exactly does this appearance of the individual on the international scene bring with it in term of rights and obligations under general international law?⁵²

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⁵¹ (7th ed., 2008), at 65.

⁵² Shaw's discussion in the 6th edition of his *International Law* (2008), at 258, asserts that 'modern prac-tice does demonstrate that individuals have become increasingly

Let us consider first the issue of individual obligations under international criminal law. In the soliloquy which opens his book of selected papers Cassese quotes the two US members of the Commission on the Responsibility of the Authors of the War and on the Enforcement of the Penalties who stated in 1919 that ‘the laws and principles of humanity are not certain, varying with time, place and circumstances, and according, it may be, to the conscience of the individual judge. There is no fixed and universal standard of humanity’.⁵³ But he narrates that by the end of World War II the International Military Tribunal judges argued:

To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished.⁵⁴

Individual judges acting collectively felt they could determine what was obviously wrong, against humanity, and unjust, to the extent that they felt it was obvious that individuals had obligations under international law and could be punished, even with death by hanging, for violating those international obligations.

So we find the individual as the bearer of individual obligations under international criminal law in the context of international armed conflicts. Almost 50 years later, in the Tadic decision of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia, the idea is applied to individual criminal responsibility for certain violations of humanitarian law committed

recognised as participants and sub-jects of international law’, but the subsequent paras are confined to recalling those treaties which allow individuals to appeal directly to an international body, and he recalls at 259 that it is now established that international law proscribes certain heinous conduct so that it ‘imports direct individual criminal responsibility’.

⁵³ ‘Soliloquy’, in Cassese, *supra* note 5, at pp. lxii-lxiii, quoting the ‘Report Presented to the Preliminary Peace Conference by the Commission on the Responsibility of the Authors of War and on the Enforcement of penalties’, in *Violations of the Laws and Customs of War, Report of Majority and Dissenting Reports of Americans and Japanese members of the Commission of Responsibilities, Conference of Paris 1919 (1919)*, at 13.

⁵⁴ *Ibid.*, at p. lxii with a reference to *Trial of the Major War Criminals before the International Military Tribunal- Nuremberg 14 November 1945-1 October 1946 (Nuremberg International Military Tribunal, 1947)*, at 219 (emphasis added).

in non-international armed conflicts.⁵⁵ By 2002 we have a Statute in force for a permanent International Criminal Court with jurisdiction over individuals covering not only war crimes but also genocide and crimes against humanity.

Over the last 60 years we have also seen a change in the status of the individual as a holder of rights under international law. How can we deduce these international rights? For Cassese one can assume 'corresponding rights' to every individual's 'strict international obligation fully to respect some important values (maintenance of peace, protection of human dignity etc.)'.⁵⁶ He claims:

It would be not only consistent from the viewpoint of legal logic but also in keeping with new trends emerging in the world community to argue that the international right in respect of those obligations accrues to all individuals: they are entitled to respect for their life and limbs, and for their dignity; hence they have a right not to become a victim of war crimes, crimes against humanity, aggression, torture, terrorism. At least for the time being, this international right, deriving from general international rules, is not, however, attended by a specific means, or power, of enforcement that belongs to individuals.⁵⁷

In other words individuals currently have obligations and rights but no remedies under general international law. A traditional international lawyer might claim that inducing rights from obligations in this way is not appropriate, as states can impose obligations on individuals under criminal law without automatically generating the rights to a civil remedy for the victim. Similarly, the traditionalist might argue that even human rights treaties simply created rights and obligations for the states parties. Individuals were the beneficiaries of these treaties, just as animals might be the beneficiaries of an endangered species convention. Although the treaty might create rights enforceable at the national level, that might be a quirk of national law, rather than an inevitable consequence of international law (it could be argued). Originally under the regional human rights treaties the international law in question was sometimes seen as merely granting individuals procedural rights to seise, say, the European Commission of Human Rights, but the settlement of the dispute in legal terms demanded that the Commission decide whether to present a case to the Court. As is well known this changed for that Convention in 1998 with the adoption of the 11th

⁵⁵ See ICTY, Appeals Chamber, Decision on the defence motion for Interlocutory Appeal on Jurisdiction, Prosecutor v. Tadic, (IT-94-1-AR72), 2 Oct. 1995, especially at paras 128-137.

⁵⁶ International Law (2nd ed., 2005), at 145.

⁵⁷ Ibid.

Protocol allowing the individual victim to seize the Court directly. The same is now possible with regard to the African Court of Human and Peoples' Rights.

Can we reason therefore that the individual has not only criminal law obligations but also rights under international law? At this point we should recall the doctrinal debate which has raged over whether it made sense for individuals to be considered 'subjects' of international law. Gaja has recently addressed the issue in the context of the question whether non-governmental organizations should be included in the scope of the ILC's work on the responsibility of international organizations. Here the doctrine concerning the current category of subjects seems to exclude non-governmental organizations, but Gaja, having recalled the International Court of Justice's conclusions regarding the UN and its specialized agencies, exposes the indeterminate nature of the concept (or conception) of subjects of international law. Gaja recalls the implications of the same Court's LaGrand dictum:

The Court's assertion of the legal personality of international organizations needs to be viewed in the context of its more recent approach to the question of legal personality in international law. The Court stated in the LaGrand case that individuals are also subjects of international law.⁵⁸ This approach may lead the Court to assert the legal personality even of non-governmental organizations. It would be difficult to understand why individuals may acquire rights and obligations under international law while the same could not occur with any international organization, provided that it is an entity which is distinct from its members...⁵⁹

To be clear I am suggesting that individuals may have a role to play with regard to respect for international law which goes beyond their international criminal law obligations. This could involve obligations which have not been criminalized, or simply mean that an act could give rise to simultaneous criminal and civil violations of international law.

⁵⁸ Footnote 47 in the original reads: 'I.C.J. Reports 2001, para. 77. The Court referred to the Vienna Convention on Consular Relations of 24 April 1963 and concluded that "article 36, paragraph 1, creates individual rights."

⁵⁹ First report on responsibility of international organizations, UN Doc.A/CN.4/532, 26 Mar. 2003, at para.17. See also the Report of the ILC Working Group, 'The Responsibility of International Organizations: Scope and Orientation of the Study', UN Doc. A/CN.4/L.622, 6 June 2002, at para.11: '[t]he topic would be considerably widened if the study were to comprise also organizations that States establish under municipal laws, for example under the law of a particular State, and non-governmental organizations. Thus, it may seem preferable to leave questions of responsibility relating to this type of organization aside, at least provisionally.'

Article 58 of the ILC's Drafts Articles on State Responsibility reads: 'These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.' The ILC's Commentary explains that Article 58 was drafted so as not to preclude any development with regard to international civil liability for individuals.⁶⁰

To summarize the status of the individual in international law: since Nuremberg and Tadic we have known that individuals have criminal law obligations under the laws of armed conflict. Despite doctrinal reticence to accord individuals subjectivity, individuals are now seen as having not only criminal law obligations but also rights under international law. If we do not want the development of international law to stagnate we should perhaps admit the progressive idea that individuals have, in addition to these rights and criminal law obligations, certain international civil law obligations; this step could help to build an international community which properly recognizes the role of the individual in international law.

LaGrand Case (Germany v. United States), 2011⁶¹

75. Germany further contends that "the breach of Article 36 by the United States did not only infringe upon the rights of Germany as a State party to the [Vienna] Convention but also entailed a violation of the individual rights of the LaGrand brothers." Invoking its right of diplomatic protection, Germany also seeks relief against the United States on this ground.

Germany maintains that the right to be informed of the rights under Article 36, paragraph 1 (b), of the Vienna Convention, is an individual right of every national of a State party to the Convention who enters the territory of another State party. It submits that this view is supported by the ordinary meaning of the terms of Article 36, paragraph 1 (b), of the Vienna Convention, since the last sentence of that provision speaks of the "rights" under this subparagraph of "the person concerned," i.e., of the foreign national arrested or detained. Germany adds that the provision in Article 36, paragraph 1 (b), according to which it is for the arrested person to decide whether consular notification is to

⁶⁰ 'So far this principle has operated in the field of criminal responsibility, but it is not excluded that developments may occur in the field of individual civil responsibility. As a saving clause Article 58 is not intended to exclude that possibility; hence the use of the general term "individual responsibility": Draft Articles on Responsibility of States for Wrongful Acts, with commentaries, Yearbook of the International Law Commission, 2001, Vol. II, Part Two, at 142 (footnote omitted).

⁶¹ LaGrand Case (Germany v. United States), I.C.J. Reports 2001, p.466 and Oda dissent.

be provided, has the effect of conferring an individual right upon the foreign national concerned. In its view, the context of Article 36 supports this conclusion since it relates to both the concerns of the sending and receiving States and to those of individuals. According to Germany, the travaux préparatoires of the Vienna Convention lend further support to this interpretation. In addition, Germany submits that the “United Nations Declaration on the human rights of individuals who are not nationals of the country in which they live,” adopted by General Assembly resolution 40/144 on 13 December 1985, confirms the view that the right of access to the consulate of the home State, as well as the information on this right, constitute individual rights of foreign nationals and are to be regarded as human rights of aliens.

76. The United States questions what this additional claim of diplomatic protection contributes to the case and argues that there are no parallels between the present case and cases of diplomatic protection involving the espousal by a State of economic claims of its nationals. The United States maintains that the right of a State to provide consular assistance to nationals detained in another country, and the right of a State to espouse the claims of its nationals through diplomatic protection, are legally different concepts.

The United States contends, furthermore, that rights of consular notification and access under the Vienna Convention are rights of States, and not of individuals, even though these rights may benefit individuals by permitting States to offer them consular assistance. It maintains that the treatment due to individuals under the Convention is inextricably linked to and derived from the right of the State, acting through its consular officer, to communicate with its nationals, and does not constitute a fundamental right or a human right. The United States argues that the fact that Article 36 by its terms recognizes the rights of individuals does not determine the nature of those rights or the remedies required under the Vienna Convention for breaches of that Article. It points out that Article 36 begins with the words “[w]ith a view to facilitating the exercise of consular functions relating to nationals of the sending State,” and that this wording gives no support to the notion that the rights and obligations enumerated in paragraph 1 of that Article are intended to ensure that nationals of the sending State have any particular rights or treatment in the context of a criminal prosecution. The travaux préparatoires of the Vienna Convention according to the United States, do not reflect a consensus that Article 36 was addressing immutable individual rights, as opposed to individual rights derivative of the rights of States.

77. The Court notes that Article 36, paragraph 1 (b), spells out the obligations the receiving State has towards the detained person and the sending

State. It provides that, at the request of the detained person, the receiving State must inform the consular post of the sending State of the individual's detention "without delay." It provides further that any communication by the detained person addressed to the consular post of the sending State must be forwarded to it by authorities of the receiving State "without delay." Significantly, this subparagraph ends with the following language:

"The said authorities shall inform the person concerned without delay of his rights under this subparagraph" (emphasis added). Moreover, under Article 36, paragraph 1 (c), the sending State's right to provide consular assistance to the detained person may not be exercised "if he expressly opposes such action." The clarity of these provisions, viewed in their context, admits of no doubt. It follows, as has been held on a number of occasions, that the Court must apply these as they stand (see *Acquisition of Polish Nationality*, Advisory Opinion, 1923, P.C.I.J., Series B, No. 7, p. 20; *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, I.C.J. Reports 1950, p. 8; *Arbitral Award of 31 July 1989*, Judgment, I.C.J. Reports 1991, pp. 69-70, para. 48; *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, I.C.J. Reports 1994, p. 25, para. 51). Based on the text of these provisions, the Court concludes that Article 36, paragraph 1, creates individual rights, which, by virtue of Article I of the Optional Protocol, may be invoked in this Court by the national State of the detained person. These rights were violated in the present case.

78. At the hearings, Germany further contended that the right of the individual to be informed without delay under Article 36, paragraph 1, of the Vienna Convention was not only an individual right, but has today assumed the character of a human right. In consequence, Germany added, "the character of the right under Article 36 as a human right renders the effectiveness of this provision even more imperative." The Court having found that the United States violated the rights accorded by Article 36, paragraph 1, to the LaGrand brothers, it does not appear necessary to it to consider the additional argument developed by Germany in this regard.

Separate Opinion of Judge Shi

[p. S.O. Shi] ...The result of the debate was the adoption of the twenty States' amendment with the insertion of the words "if he so requests" at the beginning of the subparagraph. The last sentence of Article 36, paragraph 1 (b), i.e., the provision that the competent authorities of the receiving State "shall inform the person concerned without delay of his rights" (*United Nations Conference on Consular Relations*, 1963, Vol. 1, pp. 336-343) was inserted belatedly as a compromise between the aforesaid two opposing views. Thus, it is not possible

to conclude from the negotiating history that Article 36, paragraph 1 (b), was intended by the negotiators to create individual rights. Moreover, if one keeps in mind that the general tone and thrust of the debate of the entire Conference concentrated on the consular functions and their practicability, the better view would be that no creation of any individual rights independent of rights of States was envisaged by the Conference.

Separate Opinion of Judge Oda

[pp. 536 D.O. Oda] ...I see no convincing argument to support the determination of the Court that “Article 36, paragraph 1, creates individual rights for the detained person in addition to the rights accorded the sending State, and ... consequently the reference to ‘rights’ in paragraph 2 must be read as applying not only to the rights of the sending State, but also to the rights of the detained individual” (Judgment, para. 89).

I shall take the liberty of expressing my puzzlement at the reason for and relevance of the Court’s reference in the Judgment to Article 36, paragraph 1 (c), of the Convention in connection with the rights of a detained person. I believe that this provision was included in the Convention simply to provide for the situation in which an arrested foreign national waives consular notification in order to prevent his criminal conduct or even his presence in a foreign country from becoming known in his home country; that provision may not have any further significance.

[p. 537 D.O. Oda]...I am not convinced of the correctness of the Court’s holding that the Vienna Convention on Consular Relations grants to foreign individuals any rights beyond those which might necessarily be implied by the obligations imposed on States under that Convention. In addition, I cannot but think that the Court holds the view that the Vienna Convention on Consular Relations grants more extensive protection and greater or broader individual rights to foreign nationals (in this case, German nationals in the United States) than would be enjoyed by nationals in their home countries (in this case, Americans in the United States).

If the Vienna Convention on Consular Rights is to be interpreted as granting rights to individuals, those rights are strictly limited to those corresponding to the obligations borne by the States under the Convention and do not include substantive rights of the individual, such as the rights to life, property, etc. I find the Judgment devoid of any convincing explanation of this point.

***Alice De Jong, “Transnational Corporations and International Law: Bringing TNCs out of the Accountability Vacuum”*⁶²**

Both theory and practice have now firmly abandoned the traditional doctrine that states are the exclusive subjects of international law. By the middle of the twentieth century, both international organizations and individuals had been brought under the coverage of international law... So far as individuals are concerned, persons in States which have ratified the First Optional Protocol can now lodge individual complaints to the UN Human Rights Council in the event of State failure to protect the rights contained in the International Covenant on Civil and Political Rights. The 1998 Rome Statute of the International Criminal Court (ICC) provides an avenue for bringing individuals to account for “the most serious crimes of concern to the international community as a whole” (Rome Statute, 1998, article 5). So far as legal (corporate) persons are concerned, however, there are no equivalent duties imposed on them by international law...What TNCs do have, however, is access to a variety of protections and rights contained in bilateral and bilateral investment treaties. Chapter 11 of the North American Free Trade Agreement (NAFTA)[8-10], for example, protects TNCs from arbitrary expropriation of their assets by the host government. Article 1110 of the NAFTA allows TNC investors to bring a host government to compulsory arbitration in the event of expropriation without due compensation. America’s bilateral trade and investment treaties also provide for protection of the rights of TNCs investing outside the country of incorporation, and for compulsory arbitration in the event of a host-government-investors dispute.

International Court of Justice: Practice Directions

***Practice Direction XII, Consideration of NGO Amicus Curiae Briefs*⁶³**

The Court first adopted in October 2001 Practice Directions for use by States appearing before it. Practice Directions involve no alteration to the Rules of Court, but are additional hereto. They are the result of the Court’s ongoing review of its working methods. Any amendments to the Practice Directions, following their adoption by the Court, are now posted on the Court’s website

⁶² Excerpt from Alice de Jong, “Transnational Corporations and International Law: Bringing TNCs out of the Accountability Vacuum,” p.68 available at: www.emeraldinsight.com/1742-2043.htm.

⁶³ International Court of Justice; Practice Directions, <http://www.I.C.J.-cij.org/documents/index.php?p1=4&p2=4&p3=0>.

and published in the Court's Yearbook, with a note of any temporal reservations relating to their applicability.

Practice Direction XII

1. Where an international non governmental organization submits a written statement and/or document in an advisory opinion case on its own initiative, such statement and/or document is not to be considered as part of the case file.

2. Such statements and/or documents shall be treated as publications readily available and may accordingly be referred to by States and intergovernmental organizations presenting written and oral statements in the case in the same manner as publications in the public domain.

3. Written statements and/or documents submitted by international non governmental organizations will be placed in a designated location in the Peace Palace. All States as well as intergovernmental organizations presenting written or oral statements under Article 66 of the Statute will be informed as to the location where statements and/or documents submitted by international non governmental organizations may be consulted.

Rebasti and Vierucci, "A Legal Status for NGOs in Contemporary International law?"⁶⁴

Introduction

In recent years we have witnessed an unprecedented activity of Non-Governmental Organisations (NGOs)⁶⁵ at the international level. NGOs have played a crucial role in setting the international agenda, in influencing international rule-making and in contributing to the implementation of international norms. They have proven to be a driving force in some of the major innovations undergone in the international system (e.g. the establishment of a permanent International Criminal Court) but also vital partners in the day-to-day enforcement of international standards and programs.

⁶⁴ Emanuele Rebasti and Luisa Vierucci, at http://www.esil-sedi.eu/fichiers/en/VierucciRebasti_971.pdf.

⁶⁵ The notion of NGO is not univocal in the international practice or in academic debate. In the present study the term is used to identify organizations established by private initiative, formally free from any governmental influence and without profit-making aim. The notion is considered equivalent to the one of "Civil Society Organization" or more generally to "civil society." The latter term is thus meant to have a narrower meaning than the one retained by some IGOs (e.g. UN) where it includes also the private sector.

The new dimension of the phenomenon raises the problem of whether (and if so, how) it is necessary to redefine the traditional (non) legal status of NGOs in the international order and to provide civil society with a clear legal framework for its action. Following the outcomes of a workshop held at the European University Institute in 2002 (Florence Workshop), we have specifically focused on two privileged fields of NGOs action: the relationship with Inter-Governmental Organisations (IGOs) and the participation in international judicial proceedings. Interaction with intergovernmental organizations has always represented a central part of NGOs activity at the international level. Since the time of the League of Nations⁶⁶, forms of cooperation have developed in response to a convergence of NGOs and IGOs' interests. On the one hand, the institutional structures of international cooperation provide NGOs with the forum they necessitate to make their voice heard beyond the boundaries of the nation State and with a political target for the exercise of their non-governmental diplomacy. On the other, IGOs have increasingly looked at non-governmental organizations as strategic allies to ensure the success of their policies and programs, either by disseminating information and raising public awareness or by means of direct action on the field.

However the growth of non-governmental action both in quantitative and in qualitative terms has put under pressure the existing participatory tools and raised new problems. Nongovernmental organizations claims a broader involvement in the intergovernmental process, which they criticize for being auto-referential and undemocratic. Conversely, as civil society gains more power, it is called upon to justify its legitimacy and to meet higher demands for accountability and transparency. Moreover, an higher level of participation requires that the existing patterns of relationship are streamlined in order to avoid duplication, loss of information and waste of resources...

Access to justice is one of the major components of the relations between IOs and civil society. This component has become increasingly crucial by reason of the proliferation of international courts and tribunals that has been taking place in the last 15 years. While international justice was until recently prerogative of states, with the limited exception of some human rights and investment treaties granting legal standing to physical or legal persons, the last decade of the XX century bore witness to the creation of international jurisdictions with competence over individuals (e.g. the International Criminal Court (ICC)), the International Criminal Tribunal for the former Yugoslavia

⁶⁶ See Seary, "The Early History – From the Congress of Vienna to the San Francisco Conference" in Willets ed., *The Conscience of the World – The Influence of Non-Governmental Organisations in the UN System*, 1996.

(ICTY) and for Rwanda (ICTR)). The proliferation of judicial bodies coupled with enhanced public participation of NGOs at the international level calls for a re-assessment of the interrelationship between these two entities mostly with a view to verifying the state of the art from an international law angle. This means investigating whether NGOs are satisfied with the access to justice they are currently experiencing as well as speculating on the opportunity eventually to suggest changes de lege ferendain order to making their participation to international justice more fruitful.

CHAPTER 4 TERRITORIAL SOVEREIGNTY

The Concept of Territory in International Law

Martin Dixon, “Jurisdiction and Sovereignty”⁶⁷

The concept of ‘jurisdiction’ in international law can cover a multitude of sins. In this chapter, we shall examine the nature and extent of a state’s authority over territory, persons and aircraft...

6.1. General principles of jurisdiction

In the Lotus Case (1927) PCIJ Ser. A No. 10, the Permanent Court of International Justice stated that ‘the first and foremost restriction imposed by international law upon a state is that-failing the existence of a permissive rule to the contrary-it may not exercise its power in any form in the territory of another state’. In other words, unless it is expressly permitted, State A may not exercise jurisdiction in the territory of State B. However, the Court went on to explain that this did not mean that a state was barred from exercising jurisdiction in its own territory in respect of any acts which took place abroad. In international law, there was no general prohibition against states extending their legislative jurisdiction to persons, property and events taking place outside their territory. In fact, the reverse was true, and many international dispute it was for the state alleging lack of jurisdiction to prove the, existence of a rule of international law specifically curtailing the general power which every state possessed. This general ability to assume prescriptive jurisdiction the right to legislate for matters beyond the territorial domain- flowed from the absolute sovereignty of the state and could be curtailed only by positive limitation.

It appears from the Lotus Case, then, that we have two competing general rules of jurisdiction. On the one hand, the ‘first and foremost’ rule is that one state may not exercise jurisdiction in the territory of another state. On the other

⁶⁷ Excerpt from Martin Dixon, *Textbook on International Law*, pp. 132-34, 136-37, 5th ed. [Reprinted with permission Oxford University Press, 2005].

hand, there is an equally general principle that a state is entirely free to project its jurisdiction over any matter taking place outside its territory, so long as this is not prohibited by a contrary rule of international law in a specific case. Can both these statements of principle be correct, for they appear to be mutually exclusive? The answer lies in the fact that the concept of state jurisdiction over persons, property and territory encompasses two distinct ideas.

6.1.1 The jurisdiction to prescribe

The power of a state to bring any (matter within the cognisance of its national law is called its prescriptive jurisdiction. The second principle of the Lotus Case refers to this. It is the power of a state, to assert the applicability of its national law to any person, property, territory or event, wherever they may be situated or wherever they may occur. As we have seen from the dicta in the Lotus Case, in the exercise of its prescriptive jurisdiction a state is virtually unlimited by international law, save only that it may have accepted specific international obligations limiting its competence. Two good examples of the prescriptive jurisdiction of the UK are the Broadcasting Act 1990 which makes it an offence under UK law to broadcast from the high seas in a manner which interferes with domestic broadcasting services, and the case of *Joyce v DPP* [1946] AC 347, which illustrates that the offence of treason may be committed by any person owing allegiance to the Crown who has done a treasonable act, wherever that act took place. In essence, the jurisdiction to prescribe comprises a generally unfettered power to claim jurisdiction over any matter. However, the practical effect of this jurisdiction is curtailed by the first of the principles outlined in the Lotus Case—the jurisdiction to enforce.

6.1.2 The jurisdiction to enforce

Whereas a state may have a general power under international law to prescribe jurisdiction, the enforcement of that jurisdiction can generally take place only within its own territory. Specifically, a state cannot, as the above quotation from the Lotus Case makes clear, enforce its prescriptive jurisdiction in the territory of another state. Consequently, the actual exercise of jurisdiction—the operation of a police force, national courts etc.—is limited to the territory of the state asserting jurisdiction unless there is an agreement that the enforcement jurisdiction can take place elsewhere. So when a person over whom the state has prescribed jurisdiction enters the territory, the state may proceed to exercise its powers, as in *Joyce v DPP*. It cannot, in the absence of special permission, seek to enforce its prescriptive jurisdiction outside of its territory. A rare example of such a special permission is the UK/Netherlands Agreement 1999, permitting the trial of the Lockerbie subjects by a Scottish court, according to Scots law, in Dutch territory.

In fact, then, the two principles identified in the Lotus Case are not contradictory. They are concerned with two different species of jurisdiction. Under international law, a state may assert, by its national law, a jurisdiction that is virtually unlimited. However, any enforcement of that jurisdiction is confined to its own territory and must not, without special agreement, be exercised in any form in the territory of another state. As we shall see, the territorial exclusiveness of the jurisdiction to enforce is one of the most important principles of international law.

6.1.3 The absolute nature of territorial jurisdiction

Third, and as a corollary to the first of the Lotus principles, it is a fundamental rule of international law that the jurisdiction of a state within its own territory is complete and absolute. The state has power and authority over all persons, property and events occurring within its territory. This is a basic attribute of sovereignty and flows from the very existence of the state as an international legal person. Furthermore, no other power, including, the United Nations (Charter Art. 2(7)), may exercise an enforcement jurisdiction in state territory and matters arising within domestic jurisdiction cannot form the subject matter of international claims, save in exceptional cases (such as human rights). It is for this reason, for example, that police officers from other states have no authority within the UK and may operate there only with the consent of the relevant UK authorities.

However, it is clear that the absolute and complete nature of territorial jurisdiction can be modified either by general principles of international law or by specific obligations freely undertaken by the territorial sovereign. For example, a state is obliged under international law to refrain from exercising its territorial jurisdiction over diplomats... and public vessels of other states (e.g. *Schooner Exchange v McFaddon* (1812) 7 Cranch 116). These have immunity from jurisdiction. Similarly, a state may agree by treaty that another state can exercise some form of enforcement jurisdiction within its territory (e.g. the UK/Netherlands Agreement 1999) or the grant of jurisdiction may be an aspect of the grant of sovereignty, as with the UK sovereign military bases in Cyprus and the US military base in Cuba.

To sum up, then, the basic principles of jurisdiction are, first, that a state has authority under international law to apply its national laws to matters arising within and outside its territory, irrespective of the nationality of the object of that jurisdiction: this's its prescriptive jurisdiction. Second, this prescriptive jurisdiction is curtailed in practice by the fact that the enforcement of jurisdiction may take place only in a state's own territory unless some special permission has been granted to exercise enforcement jurisdiction in an area

under the sovereignty of another state. Third, a state has absolute and exclusive power of enforcement within its own territory over all matters arising therein, unless that: power is curtailed by some rule of international law, either general or specific. No other state or international legal person may trespass into the ‘domestic jurisdiction’ of the territorial sovereign.

6.2.1 Territorial jurisdiction

This principle is inherent in what has been discussed above. It is, simply, that a state has jurisdiction over all matters arising in its territory. This is so whether the individuals concerned are nationals, friendly aliens or enemy aliens, and, for example, was the primary ground for Scotland’s assertion of jurisdiction in the Lockerbie case. There is no doubt that this rule accords with international practice and the greater part of the criminal and civil jurisdiction exercised by states is based on this principle. Some doubts remain as to when an act can be said to have ‘taken place’ on the territory of a state, but these have been substantially reduced by the development of the ‘objective’ and ‘subjective’ approaches to territorial jurisdiction.

(a) Objective territoriality. A state will have jurisdiction over offences which are completed in its territory, even though some element constituting the offence (or civil wrong) took place abroad. In the Lotus Case, for example, a collision between *The Lotus*, a French ship, and a Turkish vessel resulted, in the death of eight persons on the Turkish vessel. France objected to the exercise of jurisdiction by Turkey over the French Officer of the Watch. However, after noting that the Turkish vessel was to be assimilated to Turkish territory, the PCIJ decided that Turkey was entitled to exercise jurisdiction by virtue of the fact that a constituent element in the offence of manslaughter—death—had occurred on Turkish territory.

(b) Subjective territoriality. This is simply the converse of the principle just discussed. Thus, a state has jurisdiction over all offences and matters commencing in its territory, even if some element—or the completion of the offence—takes place in another state.

In the United Kingdom, the territoriality of jurisdiction is regarded as of fundamental importance, as made clear in *Compania Naviera Vascortgado v Steamship ‘Cristitta’* [1938] AC 485, when the court emphasised the absolute-ness of the court’s reach within the territory. So, by way of corollary, in *R v Governor of Belmarsh Prison, ex parte Martin* (1995] 2 All ER 548, the Court of Appeal refused in the absence of clear words to construe an Act of Parliament as operating extraterritorially, that is in respect of acts occurring outside the territory, as this was contrary to the normal UK presumption about the reach of its jurisdiction. More importantly, the UK once took the general view that

as a matter of common law a crime did not 'occur' within state territory (so did not trigger an exercise of jurisdiction) unless the last event constituting the crime took place within the UK: there was a self-imposed presumption against subjective territoriality, even though international law permitted just such an approach. When transnational crime was little known this was not a serious limitation. However, in the 'global village', the fact that an individual might escape UK jurisdiction because an offence was completed abroad, even if all preliminary steps in the commission of the 'crime' were undertaken within the territory, became more difficult to justify. Consequently, the Law Commission reviewed the matter and its modified proposals resulted in the enactment of the Criminal Justice Act 1993, ss. 1-3. This preserves the principle of territoriality in criminal matters - in the sense that there is no general modification of the principle that jurisdiction does not exist for acts occurring outside the territory—but authorises courts in England and Wales to exercise jurisdiction over certain crimes. Where a constituent element of the crime occurred within UK territory, whether or not the final element was completed therein. It is a move to subjective territoriality. This is perfectly in conformity with international law and is a pattern already followed in other states. It must also be appreciated that the UK may still exercise an extraterritorial jurisdiction where such is specifically provided for by Act of Parliament (e.g. Civil Aviation (Amendment) Act 1996) or where justified by the other international principles of jurisdiction considered below.

6.2.2 Nationality jurisdiction

It is clear that international law permits (but does not require) a state to exercise jurisdiction over its nationals, wherever they may be when the offence or civil wrong is committed. A national is entitled to the diplomatic protection of his or her state at all times and, as a corollary, he or she is subject to its civil and criminal jurisdiction. Necessarily, the jurisdiction will not be exercised until the national physically comes within the territory of his or her home state and it may be that the state takes no action, because the matter has been dealt with by the state in whose territory the events did occur. However, there is a recognised legal right to exercise jurisdiction on the basis of nationality, and this is now exercised by the UK in respect of offences of a serious nature (e.g. murder, some sexual offences). Thus, in the *Trial of Earl Russel* [1901] AC 446, the defendant, a UK national, was convicted of bigamy even though the second act of marriage took place outside the United Kingdom. This case is also an early (and then rare) example of the subjective territorial principle in operation in the United Kingdom.

The S.S. "Lotus" Case (France v. Turkey), 1927⁶⁸

By a special agreement signed at Geneva on October 12, 1926, between the Governments of the French and Turkish Republics... [the parties] have submitted to the Permanent Court of International Justice the question of jurisdiction which has arisen between them following upon the collision which occurred on August 2nd, 1926, between the steamships Boz-Kourt and Lotus.

According to the special agreement, the Court has to decide the following questions:

"(1) Has Turkey, contrary to Article 15 of the Convention of Lausanne of July 24th, 1923, respecting conditions of residence and business and jurisdiction, acted in conflict with the principles of international law--and if so, what principles--by instituting, following the collision which occurred on August 2nd, 1926, on the high seas between the French steamer Lotus and the Turkish steamer Boz-Kourt and upon the arrival of the French steamer at Constantinople--as well as against the captain of the Turkish steamship--joint criminal proceedings in pursuance of Turkish law against M. Demons, officer of the watch on board the Lotus at the time of the collision, in consequence of the loss of the Boz-Kourt having involved the death of eight Turkish sailors and passengers?"

On August 2nd, 1926, just before midnight, a collision occurred between the French mail steamer Lotus, proceeding to Constantinople, and the Turkish collier Boz-Kourt, between five and six nautical miles to the north of Cape Sigrî (Mitylene). The Boz-Kourt, which was cut in two, sank, and eight Turkish nationals who were on board perished. After having done everything possible to succor the shipwrecked persons, of whom ten were able to be saved, the

Lotus continued on its course to Constantinople, where it arrived on August 3rd.

At the time of the collision, the officer of the watch on board the Lotus was Monsieur Demons, a French citizen, lieutenant in the merchant service and first officer of the ship, whilst the movements of the Boz-Kourt were directed by its captain, Hassan Bey, who was one of those saved from the wreck...

On August 5th, Lieutenant Demons was requested by the Turkish authorities to go ashore to give evidence. The examination,... led to the placing under

⁶⁸ The Case of the S.S. "Lotus" (France v Turkey), Permanent Court of International Justice (PCIJ), Series A No. 70, 7 September 1927.

arrest of Lieutenant Demons without previous notice being given to the French Consul-General -and Hassan Bey, amongst others. This arrest, which has been characterized by the Turkish Agent as arrest pending trial (arrestation preventive), was effected in order to ensure that the criminal prosecution instituted against the two officers, on a charge of manslaughter, by the Public Prosecutor of Stamboul, on the complaint of the families of the victims of the collision, should follow its normal course.

The case was first heard by the Criminal Court of Stamboul on August 28th. On that occasion, Lieutenant Demons submitted that the Turkish Courts had no jurisdiction; the Court, however, overruled his objection....

On September 15th, the Criminal Court delivered its judgment, the terms of which have not been communicated to the Court by the Parties. It is, however, common ground, that it sentenced Lieutenant Demons to eighty days' imprisonment and a fine of twenty-two pounds, Hassan Bey being sentenced to a slightly more severe penalty....

The action of the Turkish judicial authorities with regard to Lieutenant Demons at once gave rise to many diplomatic representations and other steps on the part of the French Government or its representatives in Turkey, either protesting against the arrest of Lieutenant Demons or demanding his release, or with a view to obtaining the transfer of the case from the Turkish Courts to the French Courts.

As a result of these representations, the Government of the Turkish Republic declared on September 2nd, 1926, that "it would have no objection to the reference of the conflict of jurisdiction to the Court at The Hague."

THE LAW

1.-The collision which occurred on August 2nd, 1926, between the S.S. Lotus, flying the French flag, and the S.S. Boz-Kourt flying the Turkish flag, took place on the high seas : the territorial jurisdiction of any State other than France and Turkey therefore does not enter into account.

2.-The violation, if any, of the principles of international law would have consisted in the taking of criminal proceedings against Lieutenant Demons. It is not therefore a question relating to any particular step in these proceedings- such as his being put to trial, his arrest, his detention pending trial or the judgment given by the Criminal Court of Stamboul-but of the very fact of the Turkish Courts exercising criminal jurisdiction. That is why the arguments put forward by the Parties in both phases of the proceedings relate exclusively to the question whether Turkey has or has not, according to the principles of international law, jurisdiction to prosecute in this case. ...

3.-The prosecution was instituted because the loss of the Boz-Kourt involved the death of eight Turkish sailors and passengers. It is...a case of prosecution for involuntary manslaughter....[T]here is no doubt that their death may be regarded as the direct outcome of the collision, and the French Government has not contended that this relation of cause and effect cannot exist...

II

...[T]he Court must now ascertain which were the principles of international law that the prosecution of Lieutenant Demons could conceivably be said to contravene.

It is Article 15 of the Convention of Lausanne of July 24th, 1923, respecting conditions of residence and business and jurisdiction, which refers the contracting Parties to the principles of international law as regards the delimitation of their respective jurisdiction. This clause is as follows: "Subject to the provisions of Article 16, all questions of jurisdiction shall, as between Turkey and the other contracting Powers, be decided in accordance with the principles of international law."

... Now the Court considers that the words "principles of international law," as ordinarily used, can only mean international law as it is applied between all nations belonging to the community of States...

III

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.

Now the first and foremost restriction imposed by international law upon a State is that-failing the existence of a permissive rule to the contrary-it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.

It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if inter-

national law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them...a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.

This discretion left to States by international law explains the great variety of rules which they have been able to adopt without objections or complaints on the part of other States; it is...to remedy the difficulties resulting from such variety that efforts have been made for many years past, both in Europe and America, to prepare conventions the effect of which would be precisely to limit the discretion at present left to States in this respect by international law, thus making good the existing lacunae in respect of jurisdiction or removing the conflicting jurisdictions arising from the diversity of the principles adopted by the various States.

In these circumstances, all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty...

IV

The Court will now proceed to ascertain whether general international law, to which Article 15 of the Convention of Lausanne refers, contains a rule prohibiting Turkey from prosecuting Lieutenant Demons.

For this purpose, it will in the first place examine the value of the arguments advanced by the French Government, without however omitting to take into account other possible aspects of the problem, which might show the existence of a restrictive rule applicable in this case.

The arguments advanced by the French Government, other than those considered above, are, in substance, the three following:

(1) International law does not allow a State to take proceedings with regard to offences committed by foreigners abroad, simply by reason of the nationality of the victim; and such is the situation in the present case because the offence must be regarded as having been committed on board the French vessel...

As regards the first argument...there has been a collision on the high seas be-

tween two vessels flying different flags, on one of which was one of the persons alleged to be guilty of the offence, whilst the victims were on board the other.

This being so, the Court does not think it necessary to consider the contention that a State cannot punish offences committed abroad by a foreigner simply by reason of the nationality of the victim. For this contention only relates to the case where the nationality of the victim is the only criterion on which the criminal jurisdiction of the State is based. Even if that argument were correct generally speaking-and in regard to this the Court reserves its opinion-it could only be used in the present case if international law forbade Turkey to take into consideration the fact that the offence produced its effects on the Turkish vessel and consequently in a place assimilated to Turkish territory in which the application of Turkish criminal law cannot be challenged, even in regard to offences committed there by foreigners. But no such rule of international law exists. No argument has come to the knowledge of the Court from which it could be deduced that States recognize themselves to be under an obligation towards each other only to have regard to the place where the author of the offence happens to be at the time of the offence.

On the contrary, it is certain that the courts of many countries, even of countries which have given their criminal legislation a strictly territorial character, interpret criminal law in the sense that offences, the authors of which at the moment of collision are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offence, and more especially its effects, have taken place there. French courts have, in regard to a variety of situations, given decisions sanctioning this way of interpreting the territorial principle. Again, the Court does not know of any cases in which governments have protested against the fact that the criminal law of some country contained a rule to this effect or that the courts of a country construed their criminal law in this sense. Consequently, once it is admitted that the effects of the offence were produced on the Turkish vessel, it becomes impossible to hold that there is a rule of international law which prohibits

Turkey from prosecuting Lieutenant Demons because of the fact that the author of the offence was on board the French ship. Since, as has already been observed, the special agreement does not deal with the provision of Turkish law under which the prosecution was instituted, but only with the question whether the prosecution should be regarded as contrary to the principles of international law, there is no reason preventing the Court from confining itself to observing that, in this case, a prosecution may also be justified from the point of view of the so-called territorial principle...

The offence for which Lieutenant Demons appears to have been prosecuted was an act-of-negligence or imprudence-having its origin on board the Lotus, whilst its effects made themselves felt on board the Boz-Kourt. These two elements are, legally, entirely inseparable, so much so that their separation renders the offence non-existent. Neither the exclusive jurisdiction of either State, nor the limitations of the jurisdiction of each to the occurrences which took place on the respective ships would appear calculated to satisfy the requirements of justice and effectively to protect the interests of the two States. It is only natural that each should be able to exercise jurisdiction and to do so in respect of the incident as a whole. It is therefore a case of concurrent jurisdiction.

For these reasons...the COURT [finds]...Turkey...has not acted in conflict with the principles of international law...

***Military and Paramilitary Activities in and against
Nicaragua (Nicaragua v. United States), 1986***⁶⁹

212. The Court should now mention the principle of respect for State sovereignty, which in international law is of course closely linked with the principles of the prohibition of the use of force and of non-intervention. The basic legal concept of State sovereignty in customary international law, expressed in, inter alia, Article 2, paragraph 1, of the United Nations Charter, extends to the internal waters and territorial sea of every State and to the air space above its territory. As to superjacent air space, the 1944 Chicago Convention on Civil Aviation (Art. 1) reproduces the established principle of the complete and exclusive sovereignty of a State over the air space above its territory. That convention, in conjunction with the 1958 Geneva Convention on the Territorial Sea, further specifies that the sovereignty of the coastal State extends to the territorial sea and to the air space above it, as does the United Nations Convention on the Law of the Sea adopted on 10 December 1982. The Court has no doubt that these prescriptions of treaty law merely respond to firmly established and longstanding tenets of customary international law.

213. The duty of every State to respect the territorial sovereignty of others is to be considered for the appraisal to be made of the facts relating to the mining which occurred along Nicaragua's coasts. The legal rules in the light of which these acts of mining should be judged depend upon where they took place. The laying of mines within the ports of another State is governed by

⁶⁹ Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 14.

the law relating to internal waters, which are subject to the sovereignty of the coastal State. The position is similar as regards mines placed in the territorial sea. It is therefore the sovereignty of the coastal State which is affected in such cases. It is also by virtue of its sovereignty that the coastal State may regulate access to its ports...

251. The effects of the principle of respect for territorial sovereignty inevitably overlap with those of the principles of the prohibition of the use of force and of non-intervention. Thus the assistance to the contras, as well as the direct attacks on Nicaraguan ports, oil installations, etc., referred to in paragraphs 81 to 86 above, not only amount to an unlawful use of force, but also constitute infringements of the territorial sovereignty of Nicaragua, and incursions into its territorial and internal waters. Similarly, the mining operations in the Nicaraguan ports not only constitute breaches of the principle of the non-use of force, but also affect Nicaragua's sovereignty over certain maritime expanses. The Court has in fact found that these operations were carried on in Nicaragua's territorial or internal waters or both (paragraph 80), and accordingly they constitute a violation of Nicaragua's sovereignty. The principle of respect for territorial sovereignty is also directly infringed by the unauthorized overflight of a State's territory by aircraft belonging to or under the control of the government of another State. The Court has found above that such overflights were in fact made (paragraph 91 above).

These violations cannot be justified either by collective self-defence, for which, as the Court has recognized, the necessary circumstances are lacking, nor by any right of the United States to take counter-measures involving the use of force in the event of intervention by Nicaragua in El Salvador, since no such right exists under the applicable international law. They cannot be justified by the activities in El Salvador attributed to the Government of Nicaragua. The latter activities, assuming that they did in fact occur, do not bring into effect any right belonging to the United States which would justify the actions in question. Accordingly, such actions constitute violations of Nicaragua's sovereignty under customary international law...

258. ...A State's domestic policy falls within its exclusive jurisdiction, provided of course that it does not violate any obligation of international law. Every State possesses a fundamental right to choose and implement its own political, economic and social systems. Consequently, there would normally be no need to make any enquiries, in a matter outside the Court's jurisdiction, to ascertain in what sense and along what lines Nicaragua has actually exercised its right.

259. However, the assertion of a commitment raises the question of the possibility of a State binding itself by agreement in relation to a question of

domestic policy, such as that relating to the holding of free elections on its territory. The Court cannot discover, within the range of subjects open to international agreement, any obstacle or provision to hinder a State from making a commitment of this kind. A State, which is free to decide upon the principle and methods of popular consultation within its domestic order, is sovereign for the purpose of accepting a limitation of its sovereignty in this field. This is a conceivable situation for a State which is bound by institutional links to a confederation of States, or indeed to an international organization. Both Nicaragua and the United States are members of the Organization of American States. The Charter of that Organization however goes no further in the direction of an agreed limitation on sovereignty of this kind than the provision in Article 3 (d) that:

“The solidarity of the American States and the high aims which are sought through it require the political organization of those States on the basis of the effective exercise of representative democracy”; on the other hand, it provides for the right of every State “to organize itself as it sees fit” (Art. 12), and to “develop its cultural, political and economic life freely and naturally” (Art. 16).

263. The finding of the United States Congress also expressed the view that the Nicaraguan Government had taken “significant steps towards establishing a totalitarian Communist dictatorship.” However the regime in Nicaragua be defined, adherence by a State to any particular doctrine does not constitute a violation of customary international law; to hold otherwise would make nonsense of the fundamental principle of State sovereignty, on which the whole of international law rests, and the freedom of choice of the political, social, economic and cultural system of a State. Consequently, Nicaragua’s domestic policy options, even assuming that they correspond to the description given of them by the Congress finding, cannot justify on the legal plane the various actions of the Respondent complained of. The Court cannot contemplate the creation of a new rule opening up a right of intervention by one State against another on the ground that the latter has opted for some particular ideology or political system...

269. ...in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited, and this principle is valid for all States without exception.

Territorial Sovereignty and Self-Determination

East Timor (Portugal v. Australia), 1995⁷⁰

Dissenting Opinion of Judge Skubiszewski

[pp. 270-271 D.O. Skubiszewski] Here the distinction between sovereignty and its exercise is a useful one. As already recalled, the Friendly Relations Declaration provides that “[t]he territory of a colony or other non-self-governing territory has, under the Charter, a status separate and distinct from the [metropolitan] territory of the State administering it.” The reason for that separateness and distinctness is self-determination. But the provision quoted does not aim at depriving the State of its title to sovereignty which it held prior to the Charter and the Declaration. The State has remained sovereign. The said provision imposes restrictions on the exercise of the State’s sovereignty. These restrictions are far-reaching. Portugal rightly referred to its “prerogatives [of] sovereignty” (para. 75 above), though on occasions it has avoided the word “sovereignty” in describing its position with regard to East Timor. Instead it has used the terms “jurisdiction” (CR 95/4, p. 10, para. 2, Co-Agent, counsel and advocate of Portugal, J. M. S. Correia), and “authority” (CR 95/12, p. 44, para. 3, *idem*). Nonetheless Portugal explains that the “Administering Powers are independent States which keep their attributes as such when they act on the international scene in relation to the non-self-governing territories for whose administration they are responsible.” (*Ibid.*)

It is submitted that these “attributes” are nothing more than sovereignty, the exercise of which has been restricted in favour of the self-determination of the people concerned. Portugal stresses that the people of the Territory is “the holder of the sovereignty inherent in the capacity to decide for itself its future international legal status” (CR 95/4, p. 13, para. 6, *idem*) and that “the international law of decolonization has transferred the sovereignty relating to such territories to their own peoples” (CR 95/12, p. 44, para. 3, *idem*). Under international law these contentions must be understood as referring to self-determination: it is the people which decide on its implementation; but “people” as the holder of “sovereignty” is a concept which, at least in part, lies beyond the realm of law.

⁷⁰ East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995, p. 90..

Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia), 2001⁷¹

Separate Opinion of Judge Franck

[p. 652] ...I wish to explicate a legal basis for the Court's decision which, while consistent with it, has not been advanced by the Court, perhaps because it was insufficiently advanced by the Parties, although discussed in passing by Malaysia (CR 2001/2, p. 56, para. 10 (Lauterpacht)) and the Philippines (CR 2001/3, p. 23, para. 14 (Magallona)). I shall endeavour to demonstrate why that legal basis is of some importance and why the Court need not have been deterred from making this clear. The point of law is quite simple, but ultimately basic to the international rule of law. It is this: historic title, no matter how persuasively claimed on the basis of old legal instruments and exercises of authority, cannot - except in the most extraordinary circumstances - prevail in law over the rights of non-self-governing people to claim independence and establish their sovereignty through the exercise of bona fide self-determination.

[pp. 655] Under traditional international law, the right to territory was vested exclusively in rulers of States. Lands were the property of a sovereign to be defended or conveyed in accordance with the laws relevant to the recognition, exercise and transfer of sovereign domain. In order to judicially determine a claim to territorial title erga omnes, it was necessary to engage with the forms of international conveyancing, tracing historic title through to a critical date or dates to determine which State exercised territorial sovereignty at that point in time. Under modern international law, however, the enquiry must necessarily be broader, particularly in the context of decolonization. In particular, the infusion of the concept of the rights of a "people" into this traditional legal scheme, notably the right of peoples to self-determination, fundamentally alters the significance of historic title to the determination of sovereign title.

Previous judgments of this Court (in particular, its Advisory Opinion of 26 January 1971 on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), I.C.J. Reports 1971, pp. 31-32, paras. 52-53 and its Advisory Opinion of 16 October 1975 in Western Sahara, I.C.J. Reports 1975, pp. 31-33, paras. 54-59) contribute to and recognize the development of the right of non-self-governing peoples to self-determination which "requires a free and genuine expression of the will of the peoples concerned" (Western Sahara, *ibid.*, p. 32, para. 55). The Court recognized in the Namibia case that, "the subsequent

⁷¹ Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia), Application, for Permission to Intervene, Judgment, I.C.J. Reports 2001, p. 575.

development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them” (I.C.J. Reports 1971, p. 31, para. 52). In the case concerning East Timor (Portugal v. Australia), the Court recognized the principle of self-determination to be “one of the essential principles of contemporary international law” (I.C.J. Reports 1995, p. 102, para. 29).

The decisions of this Court confirm the prime importance of this principle of self-determination of peoples. The firm basis for the principle is also anchored in universal treaty law, State practice and *opinio juris*. Article 1, paragraph 2, of the United Nations Charter indicates that one of the purposes of the United Nations is “[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.” The principle also finds express and implied reflection in other provisions of the Charter, namely Article 55, Article 73 and Article 76 (b). Common Article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights provides that “[a]ll peoples have the right of self-determination,” and emphasizes in Article 1 (3), that “States Parties to the present Covenant . . . shall respect [the] right [of self-determination], in conformity with the provisions of the Charter of the United Nations.”

This treaty law has been affirmed, developed and given more tangible form by numerous resolutions of the General Assembly, which have consistently received broad support. General Assembly resolution 637 (VII), adopted on 16 December 1952, was an early recognition that “every Member of the United Nations, in conformity with the Charter, should respect the maintenance of the right of self-determination,” a right which was stated to be a “prerequisite to the full enjoyment of all fundamental human rights.” The “Declaration on the Granting of Independence to Colonial Countries and Peoples,” General Assembly resolution 1514 (XV), adopted without dissent on 14 December 1960, is regarded as fundamental to the process of decolonization. It is applicable to all “territories which have not yet attained independence” and establishes that “[a]ll peoples have the right to self-determination” while insisting that “[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.” In General Assembly resolution 1541 (XV), adopted with only two dissents on 15 December 1960, the General Assembly contemplated more than one method of self-determination for non-self-governing territories, including “[i]ntegration with an independent State.” General Assembly resolution 2131 (XX), “Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty,” adopted by 109 countries without dissent on 21 December 1965, declared that,

“[a]ll States shall respect the right of self-determination and independence of peoples and nations, to be freely exercised without any foreign pressure, and with absolute respect for human rights and fundamental freedoms.” The principle of self-determination was further included among the “basic principles of international law” set out in the “Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,” adopted by consensus as the Annex to resolution 2625 (XXV) on 24 October 1970. According to this document, “all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter” (emphasis added).

The independence of North Borneo was brought about as the result of the expressed wish of the majority of the people of the territory in a 1963 election. The Secretary-General of the United Nations was entrusted under the Manila Accord of 31 July 1963 with the task of ascertaining the wishes of the people of North Borneo, and reported that the majority of the peoples of North Borneo had given serious and thoughtful consideration to their future and: “[had] concluded that they wish to bring their dependent status to an end and to realize their independence through freely chosen association with other peoples in their region with whom they feel ties of ethnic association, heritage, language, religion, culture, economic relationship, and ideals and objectives.” (Quoted by the Representative of Malaysia to the General Assembly, 1219th meeting, 27 September 1963, Official Records of the General Assembly, 18th Session, UN Doc. No. A/PV.1219.).

In 1963, Britain filed its last report to the United Nations on North Borneo as an Article 73 (e) Non-Self-Governing Territory (Note by the Secretary-General, Political and Constitutional Information on Asian Territories under United Kingdom Administration, UN Doc. No. A/5402/Add.4 (4 April 1963)). Thereafter, the United Nations removed North Borneo from the list of colonial territories under its decolonization jurisdiction (see *Yearbook of the United Nations*, 1964, pp. 411-435, which omits North Borneo from the Committee’s list of territories), thereby accepting that the process of decolonization had been completed by a valid exercise of self-determination.

Accordingly, in light of the clear exercise by the people of North Borneo of their right to self-determination, it cannot matter whether this Court, in any interpretation it might give to any historic instrument or efficacy, sustains or not the Philippines claim to historic title. Modern international law does not recognize the survival of a right of sovereignty based solely on historic title; not, in any

event, after an exercise of self-determination conducted in accordance with the requisites of international law, the bona fides of which has received international recognition by the political organs of the United Nations. Against this, historic claims and feudal pre-colonial titles are mere relics of another international legal era, one that ended with the setting of the sun on the age of colonial imperium.

The lands and people claimed by the Philippines formerly constituted most of an integral British dependency. In accordance with the law pertaining to decolonization, its population exercised their right of self-determination. What remains is no mere boundary dispute. It is an attempt to keep alive a right to reverse the free and fair decision taken almost 40 years ago by the people of North Borneo in the exercise of their legal right to self-determination. The Court cannot be a witting party to that.

Sovereignty and Development of Natural Resources

United Nations General Assembly Resolution 1803, 14 December 1962, “Permanent Sovereignty over Natural Resources”⁷²

The General Assembly,

Recalling its resolutions 523 (VI) of 12 January 1952 and 626 (VII) of 21 December 1952,

Bearing in mind its resolution 1314 (XIII) of 12 December 1958, by which it established the Commission on Permanent Sovereignty over Natural Resources and instructed it to conduct a full survey of the status of permanent sovereignty over natural wealth and resources as a basic constituent of the right to self-determination, with recommendations, where necessary, for its strengthening, and decided further that, in the conduct of the full survey of the status of the permanent sovereignty of peoples and nations over their natural wealth and resources, due regard should be paid to the rights and duties of States under international law and to the importance of encouraging international cooperation in the economic development of developing countries,

Bearing in mind its resolution 1515 (XV) of 15 December 1960, in which it recommended that the sovereign right of every State to dispose of its wealth and

⁷² United Nations General Assembly Resolution 1803 (XVII) of 14 December 1962, GAOR (Supp., No. 17 at 15), U.N. Doc. A/5217.

its natural resources should be respected, Considering that any measure in this respect must be based on the recognition of the inalienable right of all States freely to dispose of their natural wealth and resources in accordance with their national interests, and on respect for the economic independence of States,

Considering that nothing in paragraph 4 below in any way prejudices the position of any Member State on any aspect of the question of the rights and obligations of successor States and Governments in respect of property acquired before the accession to complete sovereignty of countries formerly under colonial rule,

Noting that the subject of succession of States and Governments is being examined as a matter of priority by the International Law Commission,

Considering that it is desirable to promote international co-operation for the economic development of developing countries, and that economic and financial agreements between the developed and the developing countries must be based on the principles of equality and of the right of peoples and nations to self-determination,

Considering that the provision of economic and technical assistance, loans and increased foreign investment must not be subject to conditions which conflict with the interests of the recipient State, Considering the benefits to be derived from exchanges of technical and scientific information likely to promote the development and use of such resources and wealth, and the important part which the United Nations and other international organizations are called upon to play in that connection,

Attaching particular importance to the question of promoting the economic development of developing countries and securing their economic independence,

Noting that the creation and strengthening of the inalienable sovereignty of States over their natural wealth and resources reinforces their economic independence,

Desiring that there should be further consideration by the United Nations of the subject of permanent sovereignty over natural resources in the spirit of international co-operation in the field of economic development, particularly that of the developing countries,

I

Declares that:

1. The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.

2. The exploration, development and disposition of such resources, as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities.

3. In cases where authorization is granted, the capital imported and the earnings on that capital shall be governed by the terms thereof, by the national legislation in force, and by international law. The profits derived must be shared in the proportions freely agreed upon, in each case, between the investors and the recipient State, due care being taken to ensure that there is no impairment, for any reason, of that State's sovereignty over its natural wealth and resources.

4. Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication.

5. The free and beneficial exercise of the sovereignty of peoples and nations over their natural resources must be furthered by the mutual respect of States based on their sovereign equality.

6. International co-operation for the economic development of developing countries, whether in the form of public or private capital investments, exchange of goods and services, technical assistance, or exchange of scientific information, shall be such as to further their independent national development and shall be based upon respect for their sovereignty over their natural wealth and resources.

7. Violation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirit and principles of the

Charter of the United Nations and hinders the development of international co-operation and the maintenance of peace.

8. Foreign investment agreements freely entered into by or between sovereign States shall be observed in good faith; States and international organizations shall strictly and conscientiously respect the sovereignty of peoples and nations over their natural wealth and resources in accordance with the Charter and the principles set forth in the present resolution.

Territorial Sovereignty and the Seas

Fisheries Jurisdiction Case (United Kingdom v. Iceland), 1974⁷³

[Jurisdiction over fishing claims in territorial waters, I.C.J. Summary of Opinion]⁷⁴

The Court recalled that in 1948 the Althing (the Parliament of Iceland) had passed a law concerning the Scientific Conservation of the Continental Shelf Fisheries, which empowered the Government to establish conservation zones wherein all fisheries should be subject to Icelandic rules and control to the extent compatible with agreements with other countries. ...Following a number of incidents and a series of negotiations, Iceland and the United Kingdom agreed on an Exchange of Notes which took place on 11 March 1961 and specified inter alia that the United Kingdom would no longer object to a 12-mile fishery zone, that Iceland would continue to work for the implementation of the 1959 resolution regarding the extension of fisheries jurisdiction but would give the United Kingdom six months' notice of such extension and that "in case of a dispute in relation to such extension, the matter shall, at the request of either Party be referred to the International Court of Justice."

In 1971, the Icelandic Government announced that the agreement on fisheries jurisdiction with the United Kingdom would be terminated and that the limit of exclusive Icelandic fisheries jurisdiction would be extended to 50 miles. ...On 14 July 1972 new Regulations were introduced whereby Iceland's fishery Limits would be extended to 50 miles as from 1 September 1972 and all fishing activities by foreign vessels inside those limits be prohibited. Their enforcement

⁷³ Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974, p. 3.

⁷⁴ Fisheries Jurisdiction Case, Summary of the Judgement, I.C.J. Summaries, available at: <http://www.I.C.J.-cij.org/docket/files/55/5979.pdf>.

gave rise, while proceedings before the Court were continuing and Iceland was refusing to recognize the Court's decisions, to a series of incidents and negotiations which resulted [in] an interim agreement between the United Kingdom and Iceland..."pending a settlement of the substantive dispute...

[Opinion of the Court]⁷⁵

11. In the course of the written proceedings, the following submissions were presented on behalf of the Government of the United Kingdom:

"The United Kingdom asks the Court to adjudge and declare:

(a) That there is no foundation in international law for the claim by Iceland to be entitled to extend its fisheries jurisdiction by establishing a zone of exclusive fisheries jurisdiction extending to 50 nautical miles from the baselines hereinbefore referred to; and that its claim is therefore invalid; and

(b) that questions concerning the conservation of fish stocks in the waters around Iceland are not susceptible in international law to regulation by the unilateral extension by Iceland of its exclusive fisheries jurisdiction to 50 nautical miles from the aforesaid baselines but are matters that may be regulated, as between Iceland and the United Kingdom, by arrangements agreed between those two countries,..."

...49. The Applicant has challenged the Regulations promulgated by the Government of Iceland on 14 July 1972, and since the Court has to pronounce on this challenge, the ascertainment of the law applicable becomes necessary. As the Court stated in the Fisheries case: "The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law." (I.C.J. Reports 1951, p. 132.) The Court will therefore proceed to the determination of the existing rules of international law relevant to the settlement of the present dispute.

50. The Geneva Convention on the High Seas of 1958, which was adopted "as generally declaratory of established principles of international law," defines in Article 1 the term "high seas" as "all parts of the sea that are not included in the territorial sea or in the internal waters of a State." Article 2 then declares that "The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty" and goes on to provide that the

⁷⁵ Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974, p. 3.

freedom of the high seas comprises, inter alia, both for coastal and non-coastal States, freedom of navigation and freedom of fishing. The freedoms of the high seas are however made subject to the consideration that they “shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas.”

51. The breadth of the territorial sea was not defined by the 1958 Convention on the Territorial Sea and the Contiguous Zone. It is true that Article 24 of this Convention limits the contiguous zone to 12 miles “from the baseline from which the breadth of the territorial sea is measured.” At the 1958 Conference, the main differences on the breadth of the territorial sea were limited at the time to disagreements as to what limit, not exceeding 12 miles, was the appropriate one. The question of the breadth of the territorial sea and that of the extent of the coastal State’s fishery jurisdiction were left unsettled at the 1958 Conference. These questions were referred to the Second Conference on the Law of the Sea, held in 1960. Furthermore, the question of the extent of the fisheries jurisdiction of the coastal State, which had constituted a serious obstacle to the reaching of an agreement at the 1958 Conference, became gradually separated from the notion of the territorial sea. This was a development which reflected the increasing importance of fishery resources for all States.

52. The 1960 Conference failed by one vote to adopt a text governing the two questions of the breadth of the territorial sea and the extent of fishery rights. However, after that Conference the law evolved through the practice of States on the basis of the debates and near-agreements at the Conference. Two concepts have crystallized as customary law in recent years arising out of the general consensus revealed at that Conference. The first is the concept of the fishery zone, the area in which a State may claim exclusive fishery jurisdiction independently of its territorial sea; the extension of that fishery zone up to a 12-mile limit from the baselines appears now to be generally accepted. The second is the concept of preferential rights of fishing in adjacent waters in favour of the coastal State in a situation of special dependence on its coastal fisheries, this preference operating in regard to other States concerned in the exploitation of the same fisheries, and to be implemented in the way indicated in paragraph 57 below.

53. In recent years the question of extending the coastal State’s fisheries jurisdiction has come increasingly to the forefront. The Court is aware that a number of States has asserted an extension of fishery limits. The Court is also aware of present endeavours, pursued under the auspices of the United Nations, to achieve in a third Conference on the Law of the Sea the further codification and progressive development of this branch of the law, as it is of various proposals and preparatory documents produced in this framework, which

must be regarded as manifestations of the views and opinions of individual States and as vehicles of their aspirations, rather than as expressing principles of existing law. The very fact of convening the third Conference on the Law of the Sea evidences a manifest desire on the part of all States to proceed to the codification of that law on a universal basis, including the question of fisheries and conservation of the living resources of the sea. ...So it was in the past, and so it necessarily is today. In the circumstances, the Court, as a court of law, cannot render judgment *sub specie legis ferendae*, or anticipate the law before the legislator has laid it down...

57. The contemporary practice of States leads to the conclusion that the preferential rights of the coastal State in a special situation are to be implemented by agreement between the States concerned, either bilateral or multilateral, and, in case of disagreement, through the means for the peaceful settlement of disputes provided for in Article 33 of the Charter of the United Nations...

59. There can be no doubt of the exceptional dependence of Iceland on its fisheries. That exceptional dependence was explicitly recognized by the Applicant in the Exchange of Notes of 11 March 1961, and the Court has also taken judicial notice of such recognition, by declaring that it is “necessary to bear in mind the exceptional dependence of the Icelandic nation upon coastal fisheries for its livelihood and economic development” (I.C.J. Reports 1972, p. 16, para. 23).

60. The preferential rights of the coastal State come into play only at the moment when an intensification in the exploitation of fishery resources makes it imperative to introduce some system of catch-limitation and sharing of those resources, to preserve the fish stocks in the interests of their rational and economic exploitation. This situation appears to have been reached in the present case...

61. The Icelandic regulations challenged before the Court have been issued and applied by the Icelandic authorities as a claim to exclusive rights thus going beyond the concept of preferential rights. Article 2 of the Icelandic Regulations of 14 July 1972 States: “Within the fishery limits all fishing activities by foreign vessels shall be prohibited in accordance with the provisions of Law No. 33 of 19 June 1922, concerning Fishing inside the Fishery Limits.” Article 1 of the 1922 Law provides: “Only Icelandic citizens may engage in fishing in the territorial waters of Iceland, and only Icelandic boats or ships may be used for such fishing.” The language of the relevant government regulations indicates that their object is to establish an exclusive fishery zone, in which all fishing by vessels registered in other States, including the United Kingdom, would be prohibited.

62. The concept of preferential rights is not compatible with the exclusion of all fishing activities of other States. A coastal State entitled to preferential rights is not free, unilaterally and according to its own uncontrolled discretion, to determine the extent of those rights. The characterization of the coastal State's rights as preferential implies a certain priority, but cannot imply the extinction of the concurrent rights of other States, and particularly of a State which, like the Applicant, has for many years been engaged in fishing in the waters in question, such fishing activity being important to the economy of the country concerned... Accordingly, the fact that Iceland is entitled to claim preferential rights does not suffice to justify its claim unilaterally to exclude the Applicant's fishing vessels from all fishing activity in the waters beyond the limits agreed to in the 1961 Exchange of Notes...

67. The provisions of the Icelandic Regulations of 14 July 1972 and the manner of their implementation disregard the fishing rights of the Applicant. Iceland's unilateral action thus constitutes an infringement of the principle enshrined in Article 2 of the 1958 Geneva Convention on the High Seas which requires that all States, including coastal States, in exercising their freedom of fishing, pay reasonable regard to the interests of other States...

71. Due recognition must be given to the rights of both Parties, namely the rights of the United Kingdom to fish in the waters in dispute, and the preferential rights of Iceland. Neither right is an absolute one: the preferential rights of a coastal State are limited according to the extent of its special dependence on the fisheries and by its obligation to take account of the rights of other States and the needs of conservation; the established rights of other fishing States are in turn limited by reason of the coastal State's special dependence on the fisheries and its own obligation to take account of the rights of other States, including the coastal State, and of the needs of conservation.

Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), 2001⁷⁶

196. Bahrain claims that Qit'at Jaradah comes under Bahraini sovereignty, since it has displayed its authority over it in various ways, and that this was recognized by the British Government in 1947. In this respect it has referred to a number of activities, including the erection of a beacon, the ordering of the drilling of an artesian well, the granting of an oil concession, and the licensing

⁷⁶ Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Merits, Judgment, I.C.J. Reports 2001, p. 40.

of fish traps. Qatar contends that Qit'at Jaradah, being a low-tide elevation, cannot be appropriated, and that, since it is situated in the part of the territorial sea which belong to Qatar, Qatar has sovereign rights over it.

197. The Court first notes that Qit'at Jaradah is a very small island situated within the 12-mile limit of both States. According to the report of the expert commissioned by Bahrain, at high tide its length and breadth are about 12 by 4 metres, whereas at low tide they are 600 and 75 metres. At high tide, its altitude is approximately 0.4 metres.

Certain types of activities invoked by Bahrain such as the drilling of artesian wells would, taken by themselves, be considered controversial as acts performed a titre de souverain. The construction of navigational aids, on the other hand, can be legally relevant in the case of very small islands. In the present case, taking into account the size of Qit'at Jaradah, the activities carried out by Bahrain on that island must be considered sufficient to support Bahrain's claim that it has sovereignty over it.

198. In this context the Court recalls that the Permanent Court of International Justice observed in the Legal Status of Eastern Greenland case that

“It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim.” (P.C.I.J., Series A/B, No. 53, p. 46.).

Maritime Delimitation in the Black Sea (Romania v. Ukraine), 2009⁷⁷

(Territorial Demarcation)

The Court notes that both Parties consider the coast of the Crimean Peninsula between Cape Tarkhankut and Cape Sarych, as well as the Ukrainian coast from their common territorial boundary running for a short distance in a north and subsequently in a north-easterly direction until the Nistru/Dniester Firth (Romania designates this point as Point S) as the relevant Ukrainian coast. Their disagreement concerns the coast extending from this point until Cape Tarkhankut.

⁷⁷ Maritime Delimitation in the Black Sea (Romania v. Ukraine), Summary of the Judgment, I.C.J. Summaries, available at: <http://www.I.C.J.-cij.org/docket/files/132/14989.pdf> Full case, see Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, I.C.J. Reports 2009, p. 61.

The Court, in considering the issue in dispute, would recall two principles underpinning its jurisprudence on this issue: first, that the “land dominates the sea” in such a way that coastal projections in the seaward direction generate maritime claims (North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969, p. 51, para. 96); second, that the coast, in order to be considered as relevant for the purpose of the delimitation, must generate projections which overlap with projections from the coast of the other party. Consequently “the submarine extension of any part of the coast of one Party which, because of its geographic situation, cannot overlap with the extension of the coast of the other, is to be excluded from further consideration by the Court” (Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982, p. 61, para. 75).

The Court therefore cannot accept Ukraine’s contention that the coasts of Karkinit’ska Gulf form part of the relevant coast. The coasts of this gulf face each other and their submarine extension cannot overlap with the extensions of Romania’s coast. The coasts of Karkinit’ska Gulf do not project in the area to be delimited. Therefore, these coasts are excluded from further consideration by the Court...

6. Relevant maritime area⁷⁸

The Court observes that the legal concept of the “relevant area” has to be taken into account as part of the methodology of maritime delimitation.

In the first place, depending on the configuration of the relevant coasts in the general geographical context and the methods for the construction of their seaward projections, the relevant area may include certain maritime spaces and exclude others which are not germane to the case in hand.

Secondly, the relevant area is pertinent to checking disproportionality. This will be done as the final phase of the methodology. The purpose of delimitation is not to apportion equal shares of the area, nor indeed proportional shares. The test of disproportionality is not in itself a method of delimitation. It is rather a means of checking whether the delimitation line arrived at by other means needs adjustment because of a significant disproportionality in the ratios between the maritime areas which would fall to one party or other by virtue of the delimitation line arrived at by other means, and the lengths of their respective coasts.

The Court further observes that for the purposes of this final exercise in

⁷⁸ Id. Opinion of I.C.J. decision at paras. 106-114.

the delimitation process the calculation of the relevant area does not purport to be precise and is approximate. The object of delimitation is to achieve a delimitation that is equitable, not an equal apportionment of maritime areas (North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969, p. 22, para. 18; Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Judgment, I.C.J. Reports 1993, p. 67, para. 64).

The Court notes that the delimitation will occur within the enclosed Black Sea, with Romania being both adjacent to, and opposite Ukraine, and with Bulgaria and Turkey lying to the south. It will stay north of any area where third party interests could become involved...

7. Delimitation methodology⁷⁹

When called upon to delimit the continental shelf or exclusive economic zones, or to draw a single delimitation line, the Court proceeds in defined stages.

These separate stages, broadly explained in the case concerning Continental Shelf (Libyan Arab Jamahiriya/Malta) (Judgment, I.C.J. Reports 1985, p. 46, para. 60), have in recent decades been specified with precision. First, the Court will establish a provisional delimitation line, using methods that are geometrically objective and also appropriate for the geography of the area in which the delimitation is to take place. So far as delimitation between adjacent coasts is concerned, an equidistance line will be drawn unless there are compelling reasons that make this unfeasible in the particular case (see Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment of 8 October 2007, para. 281). So far as opposite coasts are concerned, the provisional delimitation line will consist of a median line between the two coasts. No legal consequences flow from the use of the terms “median line” and “equidistance line” since the method of delimitation is the same for both.

Equidistance and median lines are to be constructed from the most appropriate points on the coasts of the two States concerned, with particular attention being paid to those protuberant coastal points situated nearest to the area to be delimited. The Court considers elsewhere the extent to which the Court may, when constructing a single-purpose delimitation line, deviate from the base points selected by the parties for their territorial seas. When construction of a provisional equidistance line between adjacent States is called for, the Court will have in mind considerations relating to both parties' coastlines when choosing its own base points for this purpose. The line thus adopted is

⁷⁹ Id. at paras. 115-122.

heavily dependent on the physical geography and the most seaward points of the two coasts.

In keeping with its settled jurisprudence on maritime delimitation, the first stage of the Court's approach is to establish the provisional equidistance line. At this initial stage of the construction of the provisional equidistance line the Court is not yet concerned with any relevant circumstances that may obtain and the line is plotted on strictly geometrical criteria on the basis of objective data.

In the present case the Court thus begins by drawing a provisional equidistance line between the adjacent coasts of Romania and Ukraine, which will then continue as a median line between their opposite coasts.

The course of the final line should result in an equitable solution (Articles 74 and 83 of UNCLOS). Therefore, the Court will at the next, second stage consider whether there are factors calling for the adjustment or shifting of the provisional equidistance line in order to achieve an equitable result (Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002, p. 441, para. 288). The Court has also made clear that when the line to be drawn covers several zones of coincident jurisdictions, "the so-called equitable principles/relevant circumstances method may usefully be applied, as in these maritime zones this method is also suited to achieving an equitable result" (Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment of 8 October 2007, para. 271).

This is the second part of the delimitation exercise to which the Court will turn, having first established the provisional equidistance line.

Finally, and at a third stage, the Court will verify that the line (a provisional equidistance line which may or may not have been adjusted by taking into account the relevant circumstances) does not, as it stands, lead to an inequitable result by reason of any marked disproportion between the ratio of the respective coastal lengths and the ratio between the relevant maritime area of each State by reference to the delimitation line. A final check for an equitable outcome entails a confirmation that no great disproportionality of maritime areas is evident by comparison to the ratio of coastal lengths.

This is not to suggest that these respective areas should be proportionate to coastal lengths - as the Court has said "the sharing out of the area is therefore the consequence of the delimitation, not vice versa" (Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Judgment, I.C.J. Reports 1993, p. 67, para. 64)....

11. The disproportionality test⁸⁰

The Court now turns to check that the result thus far arrived at, so far as the envisaged delimitation line is concerned, does not lead to any significant disproportionality by reference to the respective coastal lengths and the apportionment of areas that ensue. This Court agrees with the observation that “it is disproportion rather than any general principle of proportionality which is the relevant criterion or factor... there can never be a question of completely refashioning nature... it is rather a question of remedying the disproportionality and inequitable effects produced by particular geographical configurations or features” (Anglo-French Continental Shelf Case, RIAA, Vol. XVIII, p. 58, para. 101).

The continental shelf and exclusive economic zone allocations are not to be assigned in proportion to length of respective coastlines. Rather, the Court will check, *ex post facto*, on the equitableness of the delimitation line it has constructed (Delimitation of the maritime boundary between Guinea and Guinea-Bissau, RIAA, Vol. XIX, paras. 94-95).

This checking can only be approximate. Diverse techniques have in the past been used for assessing coastal lengths, with no clear requirements of international law having been shown as to whether the real coastline should be followed, or baselines used, or whether or not coasts relating to internal waters should be excluded.

The Court cannot but observe that various tribunals, and the Court itself, have drawn different conclusions over the years as to what disparity in coastal lengths would constitute a significant disproportionality which suggested the delimitation line was inequitable, and still required adjustment. This remains in each case a matter for the Court’s appreciation, which it will exercise by reference to the overall geography of the area....

12. The maritime boundary delimiting the continental shelf and exclusive economic zones⁸¹

The Court observes that a maritime boundary delimiting the continental shelf and exclusive economic zones is not to be assimilated to a State boundary separating territories of States. The former defines the limits of maritime zones where under international law coastal States have certain sovereign rights for defined purposes. The latter defines the territorial limits of State sovereignty. Consequently, the Court considers that no confusion as to the nature of the maritime boundary delimiting the exclusive economic zone and the continental shelf arises and will thus employ this term.

⁸⁰ Id. at paras. 210-216.

⁸¹ Id. at paras. 217-218.

CHAPTER 5 STATE RESPONSIBILITY

State Responsibility for Internationally Wrongful Acts

International Law Commission Draft Articles⁸²

Chapter I

GENERAL PRINCIPLES

Article 1. Responsibility of a State for its internationally wrongful acts

Every internationally wrongful act of a State entails the international responsibility of that State.

Commentary

(1) Article 1 states the basic principle underlying the articles as a whole, which is that a breach of international law by a State entails its international responsibility. An internationally wrongful act of a State may consist in one or more actions or omissions or a combination of both. Whether there has been an internationally wrongful act depends, first, on the requirements of the obligation which is said to have been breached and, secondly, on the framework conditions for such an act....

Article 2. Elements of an internationally wrongful act of a State

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

⁸² U.N. International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001. Full articles and comments available at: http://untreaty.un.org/ilc/texts/9_6.htm.

- (a) is attributable to the State under international law; and
- (b) constitutes a breach of an international obligation of the State.

Commentary

Article 2 specifies the conditions required to establish the existence of an internationally wrongful act of the State, i.e. the constituent elements of such an act. Two elements are identified. First, the conduct in question must be attributable to the State under international law. Secondly, for responsibility to attach to the act of the State, the conduct must constitute a breach of an international legal obligation in force for that State at that time.

Article 3. Characterization of an act of a State as internationally wrongful

The characterization of an act of a State as internationally wrongful is governed by international law.

Such characterization is not affected by the characterization of the same act as lawful by internal law.

Commentary

(1) Article 3 makes explicit a principle already implicit in article 2, namely that the characterization of a given act as internationally wrongful is independent of its characterization as lawful under the internal law of the State concerned. There are two elements to this. First, an act of a State cannot be characterized as internationally wrongful unless it constitutes a breach of an international obligation, even if it violates a provision of the State's own law. Secondly and most importantly, a State cannot, by pleading that its conduct conforms to the provisions of its internal law, escape the characterization of that conduct as wrongful by international law.

Breach of an International Obligation

United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980⁸³

56. The principal facts material for the Court's decision on the merits of the present case have been set out earlier in this Judgment. Those facts have to be looked at by the Court from two points of view. First, it must determine

⁸³ United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, I.C.J. Reports 1980, p. 3.

how far, legally, the acts in question may be regarded as imputable to the Iranian State. Secondly, it must consider their compatibility or incompatibility with the obligations of Iran under treaties in force or under any other rules of international law that may be applicable. The events which are the subject of the United States' claims fall into two phases which it will be convenient to examine separately.

Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), 1997⁸⁴

78. Moreover, in practice, the operation of Variant C led Czechoslovakia to appropriate, essentially for its use and benefit, between 80 and 90 per cent of the waters of the Danube before returning them to the main bed of the river, despite the fact that the Danube is not only a shared international watercourse but also an international boundary river.

Czechoslovakia submitted that Variant C was essentially no more than what Hungary had already agreed to and that the only modifications made were those which had become necessary by virtue of Hungary's decision not to implement its treaty obligations. It is true that Hungary, in concluding the 1977 Treaty, had agreed to the damming of the Danube and the diversion of its waters into the bypass canal. But it was only in the context of a joint operation and a sharing of its benefits that Hungary had given its consent. The suspension and withdrawal of that consent constituted a violation of Hungary's legal obligations, demonstrating, as it did, the refusal by Hungary of joint operation; but that cannot mean that Hungary forfeited its basic right to an equitable and reasonable sharing of the resources of an international watercourse. The Court accordingly concludes that Czechoslovakia, in putting Variant C into operation, was not applying the 1977 Treaty but, on the contrary, violated certain of its express provisions, and, in so doing, committed an internationally wrongful act.

Rainbow Warrior Case (New Zealand v. France), 1990⁸⁵

56. The reason is that the general principles of International Law concerning State responsibility are equally applicable in the case of breach of treaty obligation, since in the international law field there is no distinction between

⁸⁴ Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), Judgment, I.C.J. Reports 1997, p. 7.

⁸⁵ Arbitration Tribunal 1990, vol. XX (Sales No.E/F93.V.3), p. 215 (1990). (p. 251, para. 75).

contractual and tortious responsibility, so that any violation by a State of any obligation, of whatever origin, gives rise to State responsibility and consequently, to the duty of reparation. The particular treaty itself might of course limit or extend the general Law of State Responsibility, for instance by establishing a system of remedies for it. The Permanent Court proclaimed this fundamental principle in the Chorzow Factory (Jurisdiction) case, stating:

It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation, therefore, is the indispensable complement of a failure to apply a convention (P.C.I.J., Series A, Nos. 9, 21 (1927)).

And the present Court has said:

It is clear that refusal to fulfill a treaty obligation involves international responsibility (Peace Treaties (second phase) 1950, I.C.J. Reports, 221, 228). The conclusion to be reached on this issue is that, without prejudice to the terms of the agreement which the Parties signed and the applicability of certain important provisions of the Vienna Convention on the Law of Treaties, the existence in this case of circumstances excluding wrongfulness as well as the questions of appropriate remedies, should be answered in the context and in the light of the customary Law of State Responsibility.

Attribution of Conduct to a State

Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, I.C.J. Advisory Opinion, 1999⁸⁶

[p. 87] The Court concludes that the Government of Malaysia had an obligation, under Article 105 of the Charter and under the General Convention, to inform its Courts of the position taken by the Secretary-General. According to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State. This rule, which is of a customary character, is reflected in Article 6 of the Draft Articles on State Responsibility adopted provisionally by the International Law Commission on first reading, which provides:

⁸⁶ Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999, p. 62.

“The conduct of an Organ of the State shall be considered as an act of that State under international law, whether that Organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character, and whether it holds a superior or a subordinated position in the organization of the State.” (Yearbook of the International Law Commission, 1973, Vol. II, p. 193.)

Because the Government did not transmit the Secretary-General’s finding to the competent Courts, and the Minister for Foreign Affairs did not refer to it in his own certificate, Malaysia did not comply with the above-mentioned obligation.

Separate Opinion of Judge Oda

[p. 107 S.O. Oda] (Paragraph (2) (a) of the operative part) The Malaysian national courts decided to examine Mr. Cumaraswamy’s plea in the merits phase of the proceedings against him. Malaysia, as a State, is responsible for the actions of its national courts in allowing the proceedings against Mr. Cumaraswamy to be pursued, rather than dismissing them. In other words, it is Malaysia, as a State, that is responsible for the failure of its organs - the judicial power in this case - to ensure Mr. Cumaraswamy’s legal immunity. The matter of whether or not an executive department of the Malaysian Government informed its courts of the position taken by the Secretary-General is not a relevant issue in this case.

Separate Opinion of Judge Rezek

[p. 109 S.O. Rezek] I share the views of the majority on these points, but I would wish to emphasize that the obligation incumbent upon Malaysia is not merely to notify the Malaysian courts of the finding of the Secretary-General, but to ensure that the immunity is respected.

This is in no way to suggest a course of conduct incompatible with the very notion of the independence of the judiciary (which independence, moreover, constitutes the subject-matter of the Special Rapporteur’s mission). The Government will ensure respect for immunity if, having endorsed the finding of the Secretary-General, it uses all the means at its disposal in relation to the judiciary (action by the public prosecutor or the advocate-general in the majority of countries) in order to have that immunity applied, in exactly the same way as it defends its own interests and positions before the courts. Admittedly, where the judiciary is an independent power, it is always possible that, notwithstanding the Government’s efforts, immunity may finally be denied by the highest judicial instance. In that hypothetical case, just as in the concrete one of the refusal by the Malaysian courts to deal with the question of immunity in *limine litis*, Malaysia would incur international responsibility vis-a-vis the United Nations by reason of the acts of a power other than the executive. That would

not be a situation unknown to international law, or indeed a rare occurrence in the history of international relations.

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), 1986⁸⁷

109. What the Court has to determine at this point is whether or not the relationship of the contras to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the contras, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government. Here it is relevant to note that in May 1983 the assessment of the Intelligence Committee, in the Report referred to in paragraph 95 above, was that the contras “constitute[d] an independent force” and that the “only element of control that could be exercised by the United States” was “cessation of aid.” Paradoxically this assessment serves to underline, a contrario, the potential for control inherent in the degree of the contras’ dependence on aid. Yet despite the heavy subsidies and other support provided to them by the United States, there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the contras as acting on its behalf....

111. In the view of the Court it is established that the contra force has, at least at one period, been so dependent on the United States that it could not conduct its crucial or most significant military and paramilitary activities without the multi-faceted support of the United States. This finding is fundamental in the present case. Nevertheless, adequate direct proof that all or the great majority of contra activities during that period received this support has not been, and indeed probably could not be, advanced in every respect. It will suffice the Court to stress that a degree of control by the United States Government, as described above, is inherent in the position in which the contra force finds itself in relation to that Government....

115. The Court has taken the view (paragraph 110 above) that United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the contras, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the contras in

⁸⁷ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 14.

the course of their military or paramilitary operations in Nicaragua. All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the contras without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.

116. The Court does not consider that the assistance given by the United States to the contras warrants the conclusion that these forces are subject to the United States to such an extent that any acts they have committed are imputable to that State. It takes the view that the contras remain responsible for their acts, and that the United States is not responsible for the acts of the contras, but for its own conduct vis-a-vis Nicaragua, including conduct related to the acts of the contras. What the Court has to investigate is not the complaints relating to alleged violations of humanitarian law by the contras, regarded by Nicaragua as imputable to the United States, but rather unlawful acts for which the United States may be responsible directly in connection with the activities of the contras. The lawfulness or otherwise of such acts of the United States is a question different from the violations of humanitarian law of which the contras may or may not have been guilty. It is for this reason that the Court does not have to determine whether the violations of humanitarian law attributed to the contras were in fact committed by them. At the same time, the question whether the United States Government was, or must have been, aware at the relevant time that allegations of breaches of humanitarian law were being made against the contras is relevant to an assessment of the lawfulness of the action of the United States. In this respect the material facts are primarily those connected with the issue in 1983 of a manual of psychological operations...

155. Secondly, even supposing it well established that military aid is reaching the armed opposition in El Salvador from the territory of Nicaragua, it still remains to be proved that this aid is imputable to the authorities of the latter country. Indeed, the applicant State has in no way sought to conceal the possibility of weapons en route to the armed opposition in El Salvador crossing its territory but it denies that this is the result of any deliberate official policy on its part. As the Court observed in 1949:

“it cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that that State necessarily knew, or ought to

have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors. This fact, by itself and apart from other circumstances, neither involves prima facie responsibility nor shifts the burden of proof.” (Corfu Channel, I.C.J. Reports 1949, p. 18.)...

157. ... if the flow of arms is in fact reaching El Salvador without either Honduras or El Salvador or the United States succeeding in preventing it, it would clearly be unreasonable to demand of the Government of Nicaragua a higher degree of diligence than is achieved by even the combined efforts of the other three States. In particular, when Nicaragua is blamed for allowing consignments of arms to cross its territory, this is tantamount, where El Salvador is concerned, to an admission of its inability to stem the flow. This is revealing as to the predicament of any government, including that of Nicaragua, faced with this arms traffic: its determination to put a stop to it would be likely to fail. More especially, to the extent that some of this aid is said to be successfully routed through Honduras, this accusation against Nicaragua would also signify that Honduras, which is not suspected of seeking to assist the armed opposition in El Salvador, is providing involuntary proof that it is by no means certain that Nicaragua can combat this clandestine traffic any better than Honduras. As the means at the disposal of the governments in the region are roughly comparable, the geographical obstacles, and the intrinsic character of any clandestine arms traffic, simply show that this traffic may be carried on successfully without any complicity from governmental authorities, and even when they seek to put a stop to it. Finally, if it is true that the exceptionally extensive resources deployed by the United States have been powerless to prevent this traffic from keeping the Salvadorian armed opposition supplied, this suggests even more clearly how powerless Nicaragua must be with the much smaller resources at its disposal for subduing this traffic if it takes place on its territory and the authorities endeavour to put a stop to it.

158. Confining itself to the regional States concerned, the Court accordingly considers that it is scarcely possible for Nicaragua’s responsibility for an arms traffic taking place on its territory to be automatically assumed while the opposite assumption is adopted with regard to its neighbours in respect of similar traffic. Having regard to the circumstances characterizing this part of Central America, the Court considers it more realistic, and consistent with the probabilities, to recognize that an activity of that nature, if on a limited scale, may very well be pursued unbeknown to the territorial government.

Separate Opinion of Judge Ago

[pp. 188-189 S.O. Ago] On the other hand, the negative answer returned by the Court to the Applicant’s suggestion that the misdeeds committed by some

members of the contra forces should be considered as acts imputable to the United States of America is likewise in conformity with the provisions of the International Law Commission's draft.⁸⁸ It would indeed be inconsistent with the principles governing the question to regard members of the contra forces as persons or groups acting in the name and on behalf of the United States of America. Only in cases where certain members of those forces happened to have been specifically charged by United States authorities to commit a particular act, or carry out a particular task of some kind on behalf of the United States, would it be possible so to regard them. Only in such instances does international law recognize, as a rare exception to the rule, that the conduct of persons or groups which are neither agents nor organs of a State, nor members of its apparatus even in the broadest acceptance of that term, may be held to be acts of that State.

James Crawford, "Human Rights and State Responsibility"⁸⁹

Attribution to the State of human rights violations by non-State actors

(a) Sub-State units and organs of the State

The position is clearest, where the entity performing an act is a unit of the State. The acts of the territorial subdivisions and administrative organs comprising the State are assimilated for purposes of international responsibility to the State itself. This holds, regardless of the position under municipal law. The international law of responsibility does not allow the State to escape responsibility by pleading separation between, for example, Arizona and the United States, or a French administrative agency and France, even as municipal law may assign legal consequences to the distinctions. The subsidiary parts and the State as a whole are treated, for purposes of responsibility, as one and the same. This position is reflected in the Draft Articles:

"Article 4

Conduct of organs of a State

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever the

⁸⁸ I refer to Articles 11 (Conduct of persons not acting on behalf of the State) and 8 (Attribution to the State of the conduct of persons acting in fact on behalf of the State), read together.

⁸⁹ 12th Raymond & Beverly Sackler Distinguished Lecture Series. Human Rights and State Responsibility. James Crawford. [Reprinted with permission of the author]

position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.”

The rule set out in Article 4 was in play, in the several cases in which the United States was challenged under the Vienna Convention on Consular Relations for derogations of the rights of individuals sentenced to death for crimes under the laws of certain of the United States—e.g., Virginia (*in Breard (Paraguay v. USA)*⁹⁰), Arizona (*in LaGrand (Germany v USA)*⁹¹) and Arizona, Arkansas, California, Illinois, Nevada, Ohio, Oklahoma, Oregon and Texas (*in Avena*).⁹²

The position is the same with administrative organs as with territorial units. The International Court in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* said:

“According to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State. This rule... is of a customary character.”⁹³

The State will not avoid responsibility, merely by showing that its organ or individual agent “exceed[ed] its authority or contravene[ed] instructions.” Only where the acts in question have been done in a wholly private capacity, without colour of State authority, will responsibility be avoided. This rule is set out in ARSIWA Article 7:

“Excess of authority or contravention of instructions

The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.”

The rule of Article 7 has been expressed in the human rights setting. For example, the Inter-American Court of Human Rights in the *Velásquez Rodríguez* case said:

⁹⁰ I.C.J. Reports 1998 p 248.

⁹¹ I.C.J. Reports 2001 p 466.

⁹² I.C.J. Reports 2004 p 12.

⁹³ I.C.J. Reports 1999 p 62, 87 (para 62).

“This conclusion [that there has been a breach of the American Convention on Human Rights] is independent of whether the organ or official has contravened provisions of internal law or overstepped the limits of his authority: under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law.”⁹⁴

(b) Private individuals and non-State entities

The more difficult cases, for determining whether the responsibility of the State is implicated, are those in which the acts in question are done by a private party.

(i) Presumption that private parties are autonomous from the State

The conduct of any human being or legal entity, if it has a link of nationality, habitual residence or incorporation to a particular State, might be attributed to that State. But international law acknowledges the autonomy of individuals and the organisations they constitute, and it also views the State as distinct from its nationals. Thus there is a presumption, more or less strong depending on the context, that the conduct of private persons is not as such attributable to the State. This was demonstrated by the *Tellini* case in 1923. An international commission had been established to delimit the border between Greece and Albania. Its Chairman and several of its members were assassinated on Greek territory. The League of Nations Council referred questions arising out of the incident to a Committee of Jurists. The Committee said:

“The responsibility of a State is only involved by the commission in its territory of a political crime against the persons of foreigners if the State has neglected to take all reasonable measures for the prevention of the crime and the pursuit, arrest and bringing to justice of the criminal.”⁹⁵

The rules of State responsibility are limitative, in the sense that a State is not responsible for the conduct of non-State actors, unless the State has specifically agreed to accept attribution or the circumstances fall under one of the exceptional categories identified in the rules. The Iran-United States Claims Tribunal said, “in order to attribute an act to the State, it is necessary to identify with reasonable certainty the actors and their association with the State.”⁹⁶

⁹⁴ Inter-Am Ct. H.R. Ser C No 4 (1989), 95 ILR 259, 296 (para 170).

⁹⁵ League of Nations, OJ, 5th Year, No. 4 (April 1924), p 524.

⁹⁶ *Yeager v. Islamic Republic of Iran* (1987) 17 Iran-U.S.C.T.R. 92, 101-2.

Having established that the position is not absolute, that the conduct of private parties is not to be attributed to the State, it falls to be considered under what circumstances such conduct will implicate State responsibility.

(ii) Non-State actors as agents of the State

A non-State actor might be engaged by the State to “exercise elements of the governmental authority.” Where this is the case, conduct of the non-State actor may be attributed to the State. According to ARSIWA Article 5,

“The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.”

There are various situations in which non-State actors are agents of a State. For example, in recent years, in some countries, public organs have contracted with private security firms to take over the management of prisons. This is an example of a private party acting as agent of the State—a situation in which its acts will be attributed to the State for international law purposes. Prison management, it would seem almost as a matter of course, is one area that gives rise to challenges under human rights law.⁹⁷ Alfred Aman expresses concern that private prison companies might (1) influence public authorities to increase the number of sentences and thus the number of “clients.” Aman admits that “[t] here is no evidence that private providers attempt to either influence sentencing or statute drafting in order to increase the number of prisoners”—but identifies this as a risk nonetheless. In his view the removal of public monitoring organs from private prisons presents the risk that the prison managers will be unaccountable for violations of human rights.⁹⁸

(iii) Non-State actors under the direction or control of a State

Situations also may be presented, in which the State, though it has not formally engaged a private party as its agent, nonetheless directs or controls its activity. Under Article 8 of the ILC Articles:

⁹⁷ Some 140,000 prison beds in the U.S, UK and Australia are managed by private firms, and problems of international human rights law have been identified in this: Colin Fenwick, “Private Use of Prisoner’s Labor: Paradoxes of International Human Rights Law,” (2005) 27 *Human Rights Quarterly* 249.

⁹⁸ Alfred C. Aman, Jr., “Privatization, Prisons, Democracy, and Human Rights: The Need to Extend the Province of Administrative Law,” (2005) 12 *Indiana J Global Legal Studies* 511, 543-5.

“The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”

The rule set out in Article 8 has arisen in practice in connection with State support for insurrectionist movements opposing the government of another State.

(c) Armed opposition groups: attribution of their acts to the State

The actions of an armed opposition group, engaged, for example, in a civil war against government forces of a State, are not normally to be attributed to the State. However, there are situations in which the conduct of such a group may be attributed to the State on the territory of which it operates; or to another State. The position of armed opposition groups under the law of responsibility is particularly relevant to the question of human rights, as violations of human rights may proliferate in a situation of insurrection against the established government of a State.

Where an armed opposition group is acting on the instructions or under the direction or control of another State, the conduct of the group may be attributed to that State. The standard, however, is stringent, and international tribunals require a clear finding that particular conduct was effectively under the foreign State’s direction or control, or taking place on the foreign State’s instruction, before responsibility will be attributed to the foreign State. The International Court, in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua* held that

“[D]espite the heavy subsidies and other support provided to them by the United States, there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the contras as acting on its behalf... All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the contras without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military

or paramilitary operations in the course of which the alleged violations were committed.”⁹⁹

The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia formulated the position somewhat differently—expressly distinguishing its approach from that of the International Court in the Nicaragua case. In *Prosecutor v Tadić*, the Chamber said:

“The requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals. The degree of control may, however, vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control.”¹⁰⁰

The ICTY was concerned with the criminal responsibility of individuals, and this distinguishes its position from that of the International Court in the Nicaragua case, where State responsibility was in issue. Moreover, the question under consideration in *Tadić* was whether international humanitarian law applied to the case—not whether responsibility existed for particular acts.

A non-State group may find itself exercising a public function, where the government of the State has disappeared, and the exercise of the public function is necessary. In such a situation, the conduct of the non-State group may be attributed to the State. This is an exceptional case, but not unheard of. Post-revolutionary situations, for example, may give rise to this form of attribution, as did the situation during the Islamic Revolution in Iran.

It is a well-established position, reflected, for example, in the early 20th century Mexican and Venezuelan mixed claims commissions, that the activities of an insurrectionist movement, which then succeeds in taking over the State, are attributable to the State.

⁹⁹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, Merits, I.C.J. Rep 1986 p 14, 62, 64-5 (para 109, 115).

¹⁰⁰ *Case IT-94-1, Prosecutor v Tadić (1999)* 38 ILM 1518, 1541 (para 117) (emphasis original).

Circumstances Precluding Wrongfulness

Rainbow Warrior Arbitration (New Zealand v France), 1987¹⁰¹

76. Under the title “Circumstances Precluding Wrongfulness” the International Law Commission proposed in Articles 29 to 35 a set of rules which include three provisions, on force majeure and fortuitous event (Article 31), distress (Article 32), and state of necessity (Article 33), which may be relevant to the decision on this case.

77. ...[T]here are several reasons for excluding the applicability of the excuse of force majeure in this case. As pointed out in the report of the International Law Commission, Article 31 refers to “a situation facing the subject taking the action, which leads it, as it were, despite itself, to act in a manner not in conformity with the requirements of an international obligation incumbent on it” (Yrbk. I.J.C., 1979, vol. II, para. 2, p. 122, emphasis in the original). Force majeure is “generally invoked to justify involuntary, or at least unintentional conduct,” it refers “to an irresistible force or an unforeseen external event against which it has no remedy and which makes it ‘materially impossible’ for it to act in conformity with the obligation,” since “no person is required to do the impossible” (Ibid., p. 123, para. 4)...

...New Zealand is right in asserting that the excuse of force majeure is not of relevance in this case because the test of its applicability is of absolute and material impossibility, and because a circumstance rendering performance more difficult or burdensome does not constitute a case of force majeure. Consequently, this excuse is of no relevance in the present case.

78. Article 32 of the Articles drafted by the International Law Commission deals with another circumstance which may preclude wrongfulness in international law, namely, that of the “distress” of the author of the conduct which constitutes the act of State whose wrongfulness is in question....The commentary of the International Law Commission explains that “‘distress’ means a situation of extreme peril in which the organ of the State which adopts that conduct has, at that particular moment, no means of saving himself or persons entrusted to his care other than to act in a manner not in conformity with the requirements of the obligation in question”.... The question therefore is to determine whether the circumstances of distress in a case of extreme urgency

¹⁰¹ 26 ILM 1346, Special Arbitration Tribunal (1987).

involving elementary humanitarian considerations affecting the acting organs of the State may exclude wrongfulness in this case.

79. In accordance with the previous legal considerations, three conditions would be required to justify the conduct followed by France in respect to Major Mafart and Captain Prieur:

1) The existence of very exceptional circumstances of extreme urgency involving medical or other considerations of an elementary nature, provided always that a prompt recognition of the existence of those exceptional circumstances is subsequently obtained from the other interested party or is clearly demonstrated.

2) The reestablishment of the original situation of compliance with the assignment in Hao as soon as the reasons of emergency invoked to justify the repatriation had disappeared.

3) The existence of a good faith effort to try to obtain the consent of New Zealand in terms of the 1986 Agreement.

The Case of Major Mafart

80. The New Zealand reaction to the French initiative for the removal of Major Mafart appears to have been conducted in conformity with the above considerations...

81. The sending of Dr. Croxson to examine Major Mafart the same day of the arrival of the latter in Paris had the same implication indicated above, namely, that if the alleged conditions of urgency justifying the evacuation were verified, consent would very likely have been given to what was until then a unilateral removal....Dr. Croxson's first report, of 14 December 1987, accepts that Major Mafart needed "detailed investigations which were not available in Hao" and his answer to the crucial question of whether there was justification for the emergency evacuation is equivocal.

83. This sixth report, dated 12 February 1988, on the other hand, evidences that there was by that time a clear obligation of the French authorities to return Major Mafart to Hao, by reason of the disappearance of the urgent medical emergency which had determined his evacuation. This report, together with the absence of other medical reports showing the recurrence of the symptoms which determined the evacuation, demonstrates that Major Mafart should have been returned to Hao at least on 12 February 1988, and that failure to do so constituted a breach by the French Government of its obligations under the First Agreement. This breach is not justified by the decision of the French authorities to retain Major Mafart in metropolitan France on the ground that he was "unfit to serve overseas."

88. ...Both parties recognized that the return of Major Mafart to Hao depended mainly on his state of health. Thus, the French Ministry of Foreign Affairs in its note of 30 December 1987 to the New Zealand Embassy referring to France's respect for the 1986 Agreement had said that Major Mafart will return to Hao when his state of health allowed. Consequently, there was no valid ground for Major Mafart continuing to remain in metropolitan France and the conclusion is unavoidable that this omission constitutes a material breach by the French Government of the First Agreement.

The Case of Captain Prieur

89. As to the situation of Captain Prieur, the French authorities advised the New Zealand Government, on 3 May 1988, that she was pregnant, adding that a medical report indicated that "this pregnancy should be treated with special care..." The advice added that "the medical facilities on Hao are not equipped to carry out the necessary medical examinations and to give Mrs. Prieur the care required by her condition."...

93. The facts above, which are not disputed, show that New Zealand would not oppose Captain Prieur's departure, if that became necessary because of special care which might be required by her pregnancy...

94. On the other hand, it appears that during the day of 5 May the French Government suddenly decided to present the New Zealand Government with the *fait accompli* of Captain Prieur's hasty return for a new reason, the health of Mrs. Prieur's father, who was seriously ill, hospitalized for cancer.

96. ...during the day of 5 May 1988, France did not seek New Zealand's approval in good faith for Captain Prieur's sudden departure; and accordingly, that the return of Captain Prieur, who left Hao on Thursday, 5 May at 11.30 p.m. (French time) and arrived in Paris on Friday, 6 May, thus constituted a violation of the obligations under the 1986 Agreement.

97. Moreover, France continued to fall short of its obligations by keeping Captain Prieur in Paris after the unfortunate death of her father on 16 May 1988...

99. In summary, the circumstances of distress, of extreme urgency and the humanitarian considerations invoked by France may have been circumstances excluding responsibility for the unilateral removal of Major Mafart without obtaining New Zealand's consent, but clearly these circumstances entirely fail to justify France's responsibility for the removal of Captain Prieur and from the breach of its obligations resulting from the failure to return the two officers to Hao (in the case of Major Mafart once the reasons for their removal had disappeared). There was here a clear breach of its obligations and a breach of a material character.

***Gabčíkovo-Nagymaros Project (Hungary v. Slovakia),
1997***¹⁰²

49. The Court will now consider the question of whether there was, in 1989, a state of necessity which would have permitted Hungary, without incurring international responsibility, to suspend and abandon works that it was committed to perform in accordance with the 1977 Treaty and related instruments.

50. In the present case, the Parties are in agreement in considering that the existence of a state of necessity must be evaluated in the light of the criteria laid down by the International Law Commission in Article 33 of the Draft Articles on the International Responsibility of States that it adopted on first reading. That provision is worded as follows:

“Article 33. State of necessity

1. A state of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that State not in conformity with an international obligation of the State unless:

- (a) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and
- (b) the act did not seriously impair an essential interest of the State towards which the obligation existed.

2. In any case, a state of necessity may not be invoked by a State as a ground for precluding wrongfulness:

- (a) if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law; or
- (b) if the international obligation with which the act of the State is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation; or
- (c) if the State in question has contributed to the occurrence of the state of necessity.”(Yearbook of the International Law Commission, 1980, Vol. II, Part 2, p. 34.)

In its Commentary, the Commission defined the “state of necessity” as being

¹⁰² Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), Judgment, I.C.J. Reports 1997, p. 7.

“the situation of a State whose sole means of safeguarding an essential interest threatened by a grave and imminent peril is to adopt conduct not in conformity with what is required of it by an international obligation to another State” (ibid., para. 1).

It concluded that “the notion of state of necessity is ... deeply rooted in general legal thinking” (ibid., p. 49, para. 31).

51. The Court considers, first of all, that the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation. It observes moreover that such ground for precluding wrongfulness can only be accepted on an exceptional basis. The International Law Commission was of the same opinion when it explained that it had opted for a negative form of words in Article 33 of its Draft

“in order to show, by this formal means also, that the case of invocation of a state of necessity as a justification must be considered as really constituting an exception - and one even more rarely admissible than is the case with the other circumstances precluding wrongfulness...” (ibid., p. 51, para. 40).

Thus, according to the Commission, the state of necessity can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met.

52. In the present case, the following basic conditions set forth in Draft Article 33 are relevant: it must have been occasioned by an “essential interest” of the State which is the author of the act conflicting with one of its international obligations; that interest must have been threatened by a “grave and imminent peril”; the act being challenged must have been the “only means” of safeguarding that interest; that act must not have “seriously impair[ed] an essential interest” of the State towards which the obligation existed; and the State which is the author of that act must not have “contributed to the occurrence of the state of necessity.” Those conditions reflect customary international law. The Court will now endeavor to ascertain whether those conditions had been met at the time of the suspension and abandonment, by Hungary, of the works that it was to carry out in accordance with the 1977 Treaty.

53. The Court has no difficulty in acknowledging that the concerns expressed by Hungary for its natural -environment in the region affected by the Gabčíkovo-Nagymaros Project related to an “essential interest” of that State, within the meaning given to that expression in Article 33 of the Draft of the International Law Commission.

The Commission, in its Commentary, indicated that one should not, in that context, reduce an “essential interest” to a matter only of the “existence” of the State, and that the whole question was, ultimately, to be judged in the light of the particular case (see Yearbook of the International Law Commission, 1980, Vol. II, Part 2, p. 49, para. 32); at the same time, it included among the situations that could occasion a state of necessity, “a grave danger to... the ecological preservation of all or some of [the] territory [of a State]” (*ibid.*, p. 35, para. 3); and specified, with reference to State practice, that “It is primarily in the last two decades that safeguarding the ecological balance has come to be considered an ‘essential interest’ of all States.” *Ibid.*, p. 39, para. 14.) The Court recalls that it has recently had occasion to stress, in the following terms, the great significance that it attaches to respect for the environment, not only for States but also for the whole of mankind:

“the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.” (Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, pp. 241-242, para. 29.)

54. The verification of the existence, in 1989, of the “peril” invoked by Hungary, of its “grave and imminent” nature, as well as of the absence of any “means” to respond to it, other than the measures taken by Hungary to suspend and abandon the works, are all complex processes. As the Court has already indicated (see paragraphs 33 *et seq.* above), Hungary on several occasions expressed, in 1989, its “uncertainties” as to the ecological impact of putting in place the Gabčíkovo-Nagymaros barrage system, which is why it asked insistently for new scientific studies to be carried out.

The Court considers, however, that, serious though these uncertainties might have been they could not, alone, establish the objective existence of a “peril” in the sense of a component element of a state of necessity. The word “peril” certainly evokes the idea of “risk”; that is precisely what distinguishes “peril” from material damage. But a state of necessity could not exist without a “peril” duly established at the relevant point in time; the mere apprehension of a possible “peril” could not suffice in that respect. It could moreover hardly be otherwise, when the “peril” constituting the state of necessity has at the same time to be “grave” and “imminent.” “Imminence” is synonymous with “immediacy” or “proximity” and goes far beyond the concept of “possibility.” As the International Law Commission emphasized in

its commentary, the “extremely grave and imminent” peril must “have been a threat to the interest at the actual time” (Yearbook of the International Law Commission, 1980, Vol. II, Part 2, p. 49, para. 33). That does not exclude, in the view of the Court, that a “peril” appearing in the long term - might be held to be “imminent” as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable.

The Hungarian argument on the state of necessity could not convince the Court unless it was at least proven that a real, “grave” and “imminent” “peril” existed in 1989 and that the measures taken by Hungary were the only possible response to it...

57. The Court concludes from the foregoing that, with respect to both Nagymaros and Gabčíkovo, the perils invoked by Hungary, without prejudging their possible gravity, were not sufficiently established in 1989, nor were they “imminent”; and that Hungary had available to it at that time means of responding to these perceived perils other than the suspension and abandonment of works with which it had been entrusted. What is more, negotiations were under way which might have led to a review of the Project and the extension of some of its time-limits, without there being need to abandon it. The Court infers from this that the respect by Hungary, in 1989, of its obligations under the terms of the 1977 Treaty would not have resulted in a situation “characterized so aptly by the maxim *summum jus summa injuria*” (Yearbook of the International Law Commission, 1980, Vol. II, Part 2, p. 49, para. 31).

Moreover, the Court notes that Hungary decided to conclude the 1977 Treaty, a Treaty which - whatever the political circumstances prevailing at the time of its conclusion - was treated by Hungary as valid and in force until the date declared for its termination in May 1992. As can be seen from the material before the Court, a great many studies of a scientific and technical nature had been conducted at an earlier time, both by Hungary and by Czechoslovakia. Hungary was, then, presumably aware of the situation as then known, when it assumed its obligations under the Treaty. Hungary contended before the Court that those studies had been inadequate and that the state of knowledge at that time was not such as to make possible a complete evaluation of the ecological implications of the Gabčíkovo-Nagymaros Project. It is nonetheless the case that although the principal object of the 1977 Treaty was the construction of a System of Locks for the production of electricity, improvement of navigation on the Danube and protection against flooding, the need to ensure the protection of the environment had not escaped the parties, as can be seen from Articles 15, 19 and 20 of the Treaty.

What is more, the Court cannot fail to note the positions taken by Hungary after the entry into force of the 1977 Treaty. In 1983, Hungary asked that the works under the Treaty should go forward more slowly, for reasons that were essentially economic but also, subsidiarily, related to ecological concerns. In 1989, when, according to Hungary itself, the state of scientific knowledge had undergone a significant development, it asked for the works to be speeded up, and then decided, three months later, to suspend them and subsequently to abandon them. The Court is not however unaware that profound changes were taking place in Hungary in 1989, and that, during that transitory phase, it might have been more than usually difficult to co-ordinate the different points of view prevailing from time to time.

The Court infers from all these elements that, in the present case, even if it had been established that there was, in 1989, a state of necessity linked to the performance of the 1977 Treaty, Hungary would not have been permitted to rely upon that state of necessity in order to justify its failure to comply with its treaty obligations, as it had helped, by act or omission to bring it about.

80. Slovakia also maintained that it was acting under a duty to mitigate damages when it carried out Variant C. It stated that “It is a general principle of international law that a party injured by the non-performance of another contract party must seek to mitigate the damage he has sustained.”

It would follow from such a principle that an injured State which has failed to take the necessary measures to limit the damage sustained would not be entitled to claim compensation for that damage which could have been avoided. While this principle might thus provide a basis for the calculation of damages, it could not, on the other hand, justify an otherwise wrongful act...

83. In order to be justifiable, a countermeasure must meet certain conditions (see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* Merits, Judgment, I.C.J. Reports 1986, p. 127, para. 249. See also *Arbitral Award of 9 December 1978 in the case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France*, United Nations, Reports of International Arbitral Awards (RIAA), Vol. XVII, pp. 443 et seq.; also Articles 47 to 50 of the Draft Articles on State Responsibility adopted by the International Law Commission on first reading, “Report of the International Law Commission on the work of its forty-eighth session, 6 May-26 July 1996,” Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10), pp. 144-145.).

In the first place it must be taken in response to a previous international wrongful act of another State and must be directed against that State. Although not primarily presented as a countermeasure, it is clear that Variant C was a response to Hungary’s suspension and abandonment of works and that it was

directed against that State; and it is equally clear, in the Court's view, that Hungary's actions were internationally wrongful.

84. Secondly, the injured State must have called upon the State committing the wrongful act to discontinue its wrongful conduct or to make reparation for it. It is clear from the facts of the case, as recalled above by the Court (see paragraphs 61 et seq.), that Czechoslovakia requested Hungary to resume the performance of its treaty obligations on many occasions.

85. In the view of the Court, an important consideration is that the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question.

In 1929, the Permanent Court of International Justice, with regard to navigation on the River Oder, stated as follows:

“[the] community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the user of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others” (Territorial Jurisdiction of the International Commission of the River Oder, Judgment No. 16, 1929, P.C.I.J., Series A, No. 23, p. 27).

Modern development of international law has strengthened this principle for non-navigational uses of international watercourses as well, as evidenced by the adoption of the Convention of 21 May 1997 on the Law of the Non-Navigational Uses of International Watercourses by the United Nations General Assembly.

The Court considers that Czechoslovakia, by unilaterally assuming control of a shared resource, and thereby depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube - with the continuing effects of the diversion of these waters on the ecology of the riparian area of the Szigetköz - failed to respect the proportionality which is required by international law.

86. Moreover, as the Court has already pointed out (see paragraph 78), the fact that Hungary had agreed in the context of the original Project to the diversion of the Danube (and, in the Joint Contractual Plan, to a provisional measure of withdrawal of water from the Danube) cannot be understood as having authorized Czechoslovakia to proceed with a unilateral diversion of this magnitude without Hungary's consent.

87. The Court thus considers that the diversion of the Danube carried out by Czechoslovakia was not a lawful countermeasure because it was not pro-

portionate. It is therefore not required to pass upon one other condition for the lawfulness of a countermeasure, namely that its purpose must be to induce the wrongdoing State to comply with its obligations under international law, and that the measure must therefore be reversible.

Dissenting Opinion of Judge Herczegh

[pp. 182-183 –D.O. Herczegh] State of necessity is a very narrow concept in general international law. In the course of the International Law Commission's work on the codification of State responsibility, the great majority of its members were of the view "that any possibility of the notion of state of necessity being applied where it is really dangerous must certainly be prevented, but that this should not be so in cases where it is and will continue to be [a] useful ..." "The imperative need for compliance with the law must not be allowed to result in situations so aptly characterized by the maxim *summum jus summa injuria*" (Yearbook of the International Law Commission, 1980, Vol. 11, Part 2, p. 49, para. 31). Thus the International Law Commission, expressing an almost general approach and conviction, stressed that the situation had to involve an "essential" interest of the State in question. That "essential" character naturally depends upon the circumstances in which a State finds itself, which cannot be defined beforehand, in the abstract. The peril threatening the essential interest must be extremely grave and imminent, and it must have been avertable only by means conflicting with an international obligation. In a state of necessity, there is a "grave danger to the existence of the State itself, to its political or economic survival, the maintenance of conditions in which its essential services can function, the keeping of its internal Peace, the survival of part of its population, the ecological preservation of all or some of its territory ..." (ibid., p. 35, para. 3).

Invoking a state of necessity is not a way to terminate treaty obligations lawfully, that is, to terminate an international treaty. However, the party in question will be released from the consequences of the violation of international law, since it acted in a state of necessity. The state of necessity is a circumstance which exonerates from responsibility: in other words, it exonerates the author of the unlawful act from that international responsibility. Hence the problem has not been resolved - and cannot be resolved - by the law of treaties, but pertains to the provisions of the international law of State responsibility.

Dissenting Opinion of Judge Fleischhauer

[pp. 212-213 D.O. Fleischhauer] The principle that no State may profit from its own violation of a legal obligation does not condone excessive retaliation. The principle, as stated by the Permanent Court and applied to the present case, means that one Party, Hungary, would not be entitled to avail itself of the

fact that the other Party, Czechoslovakia, has not fulfilled an obligation if the first Party, Hungary, has by an illegal act prevented the other, Czechoslovakia, from fulfilling the obligation in question. This, however, is not the case here. The obligation not fulfilled by Czechoslovakia is the duty to respect Hungary's entitlement to an equitable and reasonable share in the waters of the Danube. Hungary has not made it impossible for Czechoslovakia to respect that right; as I have pointed out above, the unilateral realization of Variant C by Czechoslovakia was neither automatic nor the only possible reaction to Hungary's breaches of the Treaty. A broader interpretation of the principle in question which would disregard the requirement of proportionality, would mean that the right to countermeasures would go further, in respect to disproportionate intersecting violations of a treaty, as it goes under general international law. It is therefore wrong to apply the principle quite schematically to cases where there are intersecting ("reciprocal") violations of a treaty as the Court does where it states "that although it has found that both Hungary and Czechoslovakia failed to comply with their obligations under the 1977 Treaty, this reciprocal wrongful conduct did not bring the Treaty to an end nor justify its termination" (para. 114).

Dissenting Opinion of Judge Vereshchetin

[p. 222 D.O. Vereshchetin] The basic conditions for the lawfulness of a countermeasure are (1) the presence of a prior illicit act, committed by the State at which the countermeasure is targeted; (2) the necessity of the countermeasure; and (3) its proportionality in the circumstances of the case. Certain kinds of acts are entirely prohibited as countermeasures, but they are not relevant to the present case (these acts being the threat or use of force, extreme economic or political coercion, infringement of the inviolability of diplomatic agents, derogations from basic human rights or norms of jus cogens).

[p. 230-231 D.O. Vereshchetin] Article 30 of the International Law Commission's Draft on State Responsibility, which codifies general international law, provides:

"The wrongfulness of an act of a State not in conformity with an obligation of that State toward another State is precluded if the act constitutes a measure legitimate under international law against that other State, in consequence of an internationally wrongful act of that other State."

All the conditions required by Article 30 of the International Law Commission's Draft on State Responsibility are met in the present case. Variant C was conceived as a provisional and reversible solution (see para. 10 above), which may be explained as an attempt to induce Hungary to comply with its 1977 Treaty obligations and it cannot be considered a disproportionate reaction.

Therefore, even assuming that the construction and the putting into operation of Variant C could be characterized as an internationally wrongful act committed by Czechoslovakia, its wrongfulness would be precluded because it was a legitimate countermeasure.

The Judgment takes a different view and “considers that Czechoslovakia, by unilaterally assuming control of a shared resource, and thereby depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube - with the continuing effects of the diversion of these waters on the ecology of the riparian area of the Szigetköz - failed to respect the proportionality which is required by international law” (see para. 85).

However, “the withdrawal of water from the Danube” is regulated by Article 14 of the 1977 Treaty. Not only Article 14 but also all the Treaty provisions that may support the conduct of Czechoslovakia, continued by Slovakia, have to be applied to determine whether or not it was lawful, since the Judgment acknowledges that the 1977 Treaty and related instruments are in force between the parties.

In my opinion, it is not necessary to choose between the aforementioned grounds to justify the action undertaken by Czechoslovakia, continued by Slovakia, because the juridical consequences are the same, i.e., the building and putting into operation of Variant C was not an internationally wrongful act committed by Czechoslovakia; and Slovakia, as its sole successor State, has not committed any internationally wrongful act in operating Variant C to date.

Legal Consequences of International Wrongful Act

***Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), 1997*¹⁰³**

Dissenting Opinion of Judge Skubiszewski

[pp. 239-240 D.O.Skubiszewski] A State that concluded a treaty with another State providing for the execution of a project like Gabčíkovo-Nagymaros cannot, when that project is near completion, simply say that all should be cancelled and the only remaining problem is compensation. This is a situation

¹⁰³ Ibid.

where, especially under equitable principles, the solution must go beyond mere pecuniary compensation. The Court has found that the refusal by Hungary to implement the Treaty was unlawful. By breaching the Treaty, Hungary could not deprive Czechoslovakia and subsequently Slovakia of all the benefits of the Treaty and reduce their rights to that of compensation. The advanced stage of the work on the Project made some performance imperative in order to avoid harm: Czechoslovakia and Slovakia had the right to expect that certain parts of the Project would become operational.

Thus, pecuniary compensation could not, in the present case, wipe out even some, not to speak of all, of the consequences of the abandonment of the Project by Hungary. How could an indemnity compensate for the absence of flood protection, improvement of navigation and production of electricity? The attainment of these objectives of the 1977 Treaty was legitimate not only under the Treaty but also under general law and equity. The benefits could in no way be replaced and compensated by the payment of a sum of money. Certain works had to be established and it was vital that they be made operational. For the question here is not one of damages for loss sustained, but the creation of a new system of use and utilization of the water.

Arrest Warrant (Democratic Republic of the Congo v. Belgium), 2002¹⁰⁴

75. The Court has already concluded (see paragraphs 70 and 71) that the issue and circulation of the arrest warrant of 11 April 2000 by the Belgian authorities failed to respect the immunity of the incumbent Minister for Foreign Affairs of the Congo and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by Mr. Yerodia under international law. Those acts engaged Belgium's international responsibility. The Court considers that the findings so reached by it constitute a form of satisfaction which will make good the moral injury complained of by the Congo.

76. However, as the Permanent Court of International Justice stated in its Judgment of 13 September 1928 in the case concerning the Factory at Chorzów:

“[t]he essential principle contained in the actual notion of an illegal act - a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals - is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the

¹⁰⁴ Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 3.

situation which would, in all probability, have existed if that act had not been committed” (P.C.I.J., Series A, No. 17, p. 47).

In the present case, “the situation which would, in all probability, have existed if [the illegal act] had not been committed” cannot be re-established merely by a finding by the Court that the arrest warrant was unlawful under international law. The warrant is still extant, and remains unlawful, notwithstanding the fact that Mr. Yerodia has ceased to be Minister for Foreign Affairs. The Court accordingly considers that Belgium must, by means of its own choosing, cancel the warrant in question and so inform the authorities to whom it was circulated.

77. The Court sees no need for any further remedy: in particular, the Court cannot, in a judgment ruling on a dispute between the Congo and Belgium, indicate what that judgment’s implications might be for third States, and the Court cannot therefore accept the Congo’s submissions on this point.

Dissenting Opinion Judge Oda

[p. 53 D.O. Oda] I find little sense in the Court’s finding in paragraph (3) of the operative part of the Judgment, which in the Court’s logic appears to be the consequence of the finding set out in paragraph (2) (Judgment, para. 78). Given that the Court concludes that the violation of international law occurred in 2000 and the Court would appear to believe that there is nothing in 2002 to prevent Belgium from issuing a new arrest warrant against Mr. Yerodia, this time as a former Foreign Minister and not the incumbent Foreign Minister, there is no practical significance in ordering Belgium to cancel the arrest warrant of April 2000. If the Court believes that this is an issue of the sovereign dignity of the Congo and that that dignity was violated in 2000, thereby causing injury at that time to the Congo, the harm done cannot be remedied by the cancellation of the arrest warrant; the only remedy would be an apology by Belgium. But I do not believe that Belgium caused any injury to the Congo because no action was ever taken against Mr. Yerodia pursuant to the warrant. Furthermore, Belgium was under no obligation to provide the Congo with any assurances that the incumbent Foreign Minister’s immunity from criminal jurisdiction would be respected under the 1993 Law, as amended in 1999, but that is not the issue here.

[p. 89-90 J.S.O. Higgins, Kooijmans, Buergenthal] In paragraph (3) of the *dispositif*, the Court “[f]inds that the Kingdom of Belgium must, by means of its own choosing, cancel the arrest warrant of 11 April 2000 and so inform the authorities to whom that warrant was circulated.” In making this finding, the Court

relies on the proposition enunciated in the Factory at Chorzyw case pursuant to which “reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would ... have existed if that act had not been committed” (P.C.I.J., Series A, No. 17, p. 47). Having previously found that the issuance and circulation of the warrant by Belgium was illegal under international law, the Court concludes that it must be withdrawn because “the warrant is still extant, and remains unlawful, notwithstanding the fact that Mr. Yerodia has ceased to be Minister for Foreign Affairs.”

We have been puzzled by the Court’s reliance on the Factory at Chorzyw case to support its finding in paragraph (3) of the *dispositif*. It would seem that the Court regards its order for the cancellation of the warrant as a form of *restitutio in integrum*. Even in the very different circumstances which faced the Permanent Court in the Factory at Chorzyw case, *restitutio in integrum* in the event proved impossible. Nor do we believe that restoration of the status quo ante is possible here, given that Mr. Yerodia is no longer Minister for Foreign Affairs.

Moreover - and this is more important - the Judgment suggests that what is at issue here is a continuing illegality, considering that a call for the withdrawal of an instrument is generally perceived as relating to the cessation of a continuing international wrong (International Law Commission, Commentary on Article 30 of the Articles of State Responsibility, A/56/10 (2001), p. 216). However, the Court’s finding in the instant case that the issuance and circulation of the warrant was illegal, a conclusion which we share, was based on the fact that these acts took place at a time when Mr. Yerodia was Minister for Foreign Affairs. As soon as he ceased to be Minister for Foreign Affairs, the illegal consequences attaching to the warrant also ceased. The mere fact that the warrant continues to identify Mr. Yerodia as Minister for Foreign Affairs changes nothing in this regard as a matter of international law, although it may well be that a misnamed arrest warrant, which is all it now is, may be deemed to be defective as a matter of Belgian domestic law; but that is not and cannot be of concern to this Court. Accordingly, we consider that the Court erred in its finding on this point.

[pp. 83 D.O. Van den Wyngaert] I still need to give reasons for my vote against paragraph 78 (3) of the *dispositif*, calling for the cancellation and the “de-circulation” of the disputed arrest warrant. Even assuming, *arguendo*, that the arrest warrant was illegal in the year 2000, it was no longer illegal at the moment when the Court gave Judgment in this case. Belgium’s alleged breach of an international obligation did not have a continuing character: it may have lasted as long as Mr. Yerodia was in office, but it did not continue in time

thereafter. For that reason, I believe the International Court of Justice cannot ask Belgium to cancel and “decirculate” an act that is not illegal today.¹⁰⁵

Land and Maritime Boundary (Cameroon v. Nigeria: Equatorial Guinea Intervening), 2002¹⁰⁶

318. Cameroon, however, is not only asking the Court for an end to Nigeria’s administrative and military presence in Cameroonian territory but also for guarantees of non-repetition in the future. Such submissions are undoubtedly admissible (*La Grand (Germany v. United States of America)*, Judgment of 27 June 2001, paras. 117 et seq.). However, the Judgment delivered today specifies in definitive and mandatory terms the land and maritime boundary between the two States. With all uncertainty dispelled in this regard, the Court cannot envisage a situation where either Party, after withdrawing its military and police forces and administration from the other’s territory, would fail to respect the territorial sovereignty of that Party. Hence Cameroon’s submissions on this point cannot be upheld.

319. In the circumstances of the case, the Court considers moreover that, by the very fact of the present Judgment and of the evacuation of the Cameroonian territory occupied by Nigeria, the injury suffered by Cameroon by reason of the occupation of its territory will in all events have been sufficiently addressed. The Court will not therefore seek to ascertain whether and to what extent Nigeria’s responsibility to Cameroon has been engaged as a result of that occupation.

¹⁰⁵ See Art. 14 of the 2001 ILC Draft Articles on State Responsibility, United Nations doc. A/CN.4/L.602/Rev.1, concerning the extension in time of the breach of an international obligation, which states the following:

¹ The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.

² The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation ...”

¹⁰⁶ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, I.C.J. Reports 2002, p. 303.

CHAPTER 6 DISPUTE RESOLUTION AND INTERNATIONAL LAW COMPLIANCE

Disputes Between States

***Martin Dixon, “The Peaceful Settlement of Disputes”*¹⁰⁷**

According to Art. 2(3) of the United Nations Charter, all members ‘shall settle their international disputes by peaceful means in such a manner that international peace and security, and’ justice, are not endangered’. While this obligation is addressed primarily to members of the Organisation, there is no doubt that this principle is one of the; central obligations of international law which all states must observe. (*Legality of the Use of Force Case (Provisional Measures) Yugoslavia v Belgium etc. (1999) 39 ILM 950*). It is the natural counterpart to the prohibition of the use of force and may also have acquired the status of *jus cogens*. The forceful resolution of disputes, the use of force by one state to impose its will on another, is now legally obsolete and the obligation to settle disputes by peaceful* means is a corollary of this.

The precise scope of the obligation is, however, that states should settle disputes peacefully, not that they should settle them. In other words, there is no general rule requiring a state to settle its grievances. Rather, the rule is that if a state does decide to settle, this must be done in a peaceful manner. As we shall see, the absence of a general obligation to settle disputes is reflected in the fact that the jurisdiction of the International Court of Justice (and most other tribunals) is not compulsory. A state cannot be compelled to submit a dispute with another state to a third party for settlement unless it has given its consent in some form or other. The only exception to this is the obligation under Art. 33 of the Charter to settle disputes which are likely to endanger international peace and security. Furthermore, the obligation to settle disputes peacefully applies to international disputes only. There is no explicit rule in general international law requiring a state to settle internal grievances peacefully. A state may, therefore,

¹⁰⁷ Excerpt from Martin Dixon, *Textbook on International Law*, pp. 132-34, 136-37, 5th ed. (2005)[Reprinted with permission of Oxford University Press].

use force in its relations with its own citizens in its own territory, subject only to limitations imposed by human rights law or other specific obligations, such as the requirements of a mandatory resolution of the Security Council. Conversely, it is also clear that a dispute may be 'international' even though the parties (or some of them) are not states. Recent examples are the dispute between the Bosnian Muslims, Serbs and Croats and the disputes between rival groups in Sudan. Consequently, the obligation to settle disputes peacefully encompasses all disputes occurring on the international plane, including those considered in the previous chapter arising between a state and a foreign company over an internationalized contract (e.g. *Texaco v Libya* (1977) 53ILR 389).

It is vital that the obligation to settle disputes peacefully should be supported by practical means. In fact, international law knows many methods of dispute settlement and it is important to remember that the International Court of Justice plays only a small part in this process. There are many other tribunals—international, regional and bilateral—which resolve disputes 'judicially', as well as several ways in which disputes can be resolved 'diplomatically'. While there are no set criteria by which to identify a 'judicial' means of settlement, generally this is taken to mean the settlement of a dispute according to international law, usually by an impartial third party, the outcome of which is legally binding on the disputants. The growing list of cases settled by the International Tribunal for the Law of the Sea (ITLOS) is a good example. However, even in modes of dispute settlement which are essentially 'diplomatic', international law is not irrelevant. In direct negotiations, for example, each side will have a battery of legal principles with which to support its economic and political arguments. Consequently, it should not be thought that any of the various methods of dispute settlement are exclusively 'judicial' or 'diplomatic'. International law will play a part in each, varying from being the sole criterion before the I.C.J. to one of several in 'negotiations' and 'mediation'. Similarly, there is no exclusive method by which any particular dispute, or any aspect of it, need be resolved, as seen by the many methods specified in the Law of the Sea Convention of 1982. In practice, the means of dispute settlement are cumulative and they do not operate in isolation.

10.1 Negotiation

As in national law, the most common method of settlement is direct negotiations between the parties. This 'method' accounts for the great majority of settlements between states and appears to be the one most preferred. There is no set procedure for negotiations and these may be at arm's length or face to face. Necessarily any negotiated settlement will be legally binding only if this is the wish of the parties, and then it may be encapsulated in a treaty. Other-

wise, the terms of the agreement may be recorded in an exchange of notes or diplomatic memoranda having no legal effect. Further, while international law may play a significant part in the negotiations between the parties, as with the dispute between Congo and Uganda concerning alleged acts of aggression and intervention 1999/2000, it is clear that political, economic and social considerations are also important. This is not surprising given that international law does not operate in a vacuum. Direct negotiations between the parties enable the states concerned to reach a comprehensive settlement, having regard to all the factors, of which international law may be one.

Occasionally, a state may be able to underpin its negotiations with the threat of legal proceedings. This is not as potent a weapon as it is in national law because of the absence of compulsory judicial settlement of disputes. However, where available, the threat or reality of judicial settlement may be used to crystallize an issue between the states and force a resolution, as with Congo and Uganda. Nevertheless, it is often the case that neither party wishes to use judicial means precisely because of the narrow focus this entails. It has been suggested that once a state has voluntarily entered into negotiations, it is under a binding legal obligation to negotiate in good faith. If this was a rule of international law, it would seem to require states to act honestly and reasonably and to make a genuine attempt to reach a settlement. It would not mean that they had to settle the dispute, but that having made an attempt, they should carry it through in good faith. In reality this obligation is probably too vague to be of any practical value although it should be remembered that it is quite possible for states to bind themselves by treaty to proceed to negotiations should a dispute arise and here it would seem that there is both a legal obligation to negotiate and, perhaps, an obligation to make genuine and reasonable efforts to reach a solution.

10.2 Mediation and good offices

Although it is quite possible to distinguish mediation and good offices from negotiation, in practice they are very much part of the same process. ‘Good offices’ are a preliminary to direct negotiations between the parties. The person offering his ‘good offices’—usually a neutral trusted by both sides—will attempt to persuade the parties to negotiate. Such was the task of the US Secretary of State, Alexander Haig, in the days preceding “the United Kingdom’s reoccupation of the Falkland Islands, and has been the role of the UN and OAU in the dispute between Congo and Uganda. Mediation is simply a continuation of this, and often the mediator will be the person who originally brought the parties together. A mediator is a person, again approved by both parties, who takes part in the negotiations and whose task is to suggest the terms of a settlement and

to attempt to bring about a compromise between the two opposing views. In recent years, the UN Secretary-General has offered his 'good offices' in a variety of situations and has then gone on to mediate when the parties have come together. An example was the dispute-between the Soviet Union, Pakistan and Afghanistan concerning the presence of Soviet troops in the latter's territory. A similar function seems to have been served by the EU and UN 'peace envoys' in respect of the conflicts in the former Yugoslavia.

10.3 Inquiry

The use of commissions of inquiry is most often intended to establish the factual basis for a settlement between states. The parties to a dispute will agree to refer the matter to an impartial body whose task is to produce an unbiased finding of facts. It is then up to the parties to negotiate a settlement on the basis of these facts. While it is rare that the parties agree to be legally bound to accept the findings of such an inquiry, in practice it is just as rare for their conclusions to be ignored. The commission of inquiry is invaluable in the present system of international law where no compulsory fact-finding machinery exists and where, in reality, many disputes are compounded by the simple truth that neither party is prepared to accept the other's version of events.

10.4 Settlement by the United Nations

The United Nations has a variety of institutionalized and informal methods through which states may settle disputes. Obviously, the 'good offices' of the Secretary-General and judicial settlement by the I.C.J. (an organ of the UN) fall into this category. (These are dealt with separately; see 10.2 and 10.8.).

10.4.1 The General Assembly

The General Assembly has wide-ranging authority to make recommendations for the settlement of disputes. Subject to the primacy of the Security Council in matters comprising a threat to or breach of the peace, the Assembly 'may recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely, to impair the general welfare or friendly welfare among nations' (UN Charter Art. 14). However, as with the great majority of Assembly resolutions, these 'recommendations' are not legally binding and the Assembly has no power to make authoritative and binding determinations of fact. It cannot impose a settlement on the parties, although it may often provide the impetus that is needed for a negotiated solution. In practice, the effect of Assembly discussions and resolutions is variable. Any formal determination or recommendation must necessarily carry some weight, but it is also true that the Assembly is a political body that makes decisions according to block allegiances rather than impartial judgment. The Assembly contributed significantly to the

solution of the problem of the former South-West Africa (now Namibia) and has buttressed the Secretary-General in his efforts to bring peace to Iran and Iraq. Yet it has had little success with the dispute between India and Pakistan over Kashmir and the prospects for a solution to the Cypriot problem—once very rosy—now look less promising. Much depends, as always, on the will of the parties to a dispute, rather than on the will of the Assembly. Indeed, the political nature of the Assembly means that questions of international law are not always at the front of its concern and it would seem more suited to the solution of political and economic disputes, especially those in which the Assembly itself has an interest. Thus, the Assembly will be vital in matters concerning statehood and membership, as it was with China in 1974 the states of the former Yugoslavia in 1992 and in East Timor in 2002. These are issues having considerable legal significance in respect of which the Assembly has particular expertise.

10.4.2 The Security Council

Under Chapter VI of the Charter (Pacific Settlement of Disputes), the Security Council has various powers and responsibilities in respect of the settlement of disputes. First, if all other means have failed, the parties to a dispute which is likely to endanger international peace and security are under an obligation to refer it to the Security Council. Second, any member or non-member of the Organisation may, without the parties' consent, refer any dispute to the Council to see if it is likely to endanger the maintenance of international peace and security. In both cases, the Council may recommend appropriate procedures or methods of settlement, as well as the actual terms of a compromise. In practice, the procedural aspects of these provisions are quite readily invoked, especially the reference power enjoyed by uninvolved states. Generally, the Council is reluctant to make a concrete recommendation without the participation of all interested parties, as was the case with the India/Pakistan conflict in 1971. It is also clear that the Security Council cannot actually impose a settlement on the parties, save only that its residual power to deal with threats to the peace and acts of aggression remains intact (e.g. the Congo/Uganda/Rwanda Resolution, 16 June 2000, SC Res. 1304 (2000)) and this could conceivably lead to the Council imposing a settlement if the preconditions of Art. 39 were established (breach of the peace, threat to the peace, act of aggression). Again, however, the Security Council is primarily concerned with political, not legal matters, and its task is to keep the peace rather than to judge the rights and wrongs of a dispute. According to Art. 36(3) of the Charter, the Council must bear in mind that 'legal disputes should as a general rule be referred by the parties to the International Court of Justice', although it has no power to force states to submit to this jurisdiction. In this respect, note must be taken of three I.C.J. decisions which bear on the relationship between the Council and the

Court. In the Lockerbie Case one of the grounds upon which the I.C.J. decided not to grant 'interim measures of protection' to the plaintiff state (on which see below) was that the Security Council had taken concrete measures in respect of the dispute after determining that the matter fell, within Art. 39: This illustrates not only that most disputes have both a legal and a political dimension, but also that the Security Council can assume paramount responsibility for dispute settlement in such cases as it deems appropriate. Conversely, in the Case Concerning Armed Activities on the Territory of the Congo (Congo v Uganda) (Provisional Measures), 1 July 2000, the I.C.J. did grant interim measures of protection to Congo, which in terms were very similar to those 'demanded' in SC Resolution 1304 of 16 June 2000. Apparently, in contrast to Security Council action in the Lockerbie Case, in the Congo situation the Council had not reached a decision determinative of the rights which Congo now claimed deserved protection. No doubt this is a logically defensible distinction, but it requires a fine judgment by the Court. Thirdly, in the Advisory Opinion concerning the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory 2004 I.C.J. Rep, the Court again touched on the relationship of the UN with the Court (including, but not specifically, the Security Council). Admittedly, this was an Advisory Opinion rather than a judgment in a contentious case, but the Court seems clear that the mere fact that other UN bodies are considering a dispute is no bar to the Court considering the legal aspects of the same dispute.

10.4.3 Other agencies

A number of specialized agencies operating under the general aegis of the United Nations may also assist in the resolution of disputes between states. These agencies deal with a variety of matters of a specific nature and they provide a forum for discussion and an impetus to settlement in much the same way as the General Assembly. Included in this category are the International Labour Organisation, the International Monetary Fund, the International Civil Aviation Authority and the International Atomic Energy Agency.

10.5 Conciliation

Conciliation can be regarded either as a 'non-judicial' or a 'semi-judicial' procedure for the settlement of disputes. Once again the process of conciliation may deal with a variety of questions, including matters of international law. Bearing this in mind, conciliation denotes the reference of a dispute to a third party, often a commission or committee, whose task is to produce a report recommending proposals for settlement. Conciliation commissions are different from commissions of inquiry because the latter do not produce concrete proposals. In this regard, conciliation is similar to arbitration. However, here also there is one vital difference. Generally, the reports of- conciliation commis-

sions are not legally binding on the parties, although the simple fact that the matter has been referred to a third party combined with the force of a formal recommendation means that the great majority of proposed settlements are not ignored. The report and the proposed solution of the conciliation commission may, of course, form the basis for future negotiations. Conciliation is, then, the middle ground between inquiry and arbitration. A settlement is proposed by a neutral third party, but it is not binding. Conciliation commissions were established by the 1899 and 1907 Hague Conventions for the Pacific Settlement of Disputes and by the General Act for the Pacific Settlement of Disputes 1928. A more recent example is provided by the Jan Meyen Conciliation Commission (Iceland v Norway) (1981) 20 ILM 797 on maritime delimitation. Conciliation commissions may be used as one of the dispute settlement procedures established by the 1982 Convention on the Law of the Sea.

10.6 Settlement by regional machinery

There is a great variety of regional organisations that are instrumental in the peaceful settlement of disputes. These range from political bodies such as the Organisation of American States and the Organisation of African Unity (see e.g. its role in the Congo/Uganda dispute), to economic forums such as the Caribbean Community and Common Market, (Carricom) and the World Trade Organisation (formerly GATT), to more judicial bodies such as the European Court of Human Rights, the Central American Court of Justice and Inter-American Court of Human Rights. In this context, note must also be taken of the political-legal Dispute Settlement Mechanism of the Organisation for Security and Co-operation in Europe (formerly the CSCE). This Organisation has increased in importance following the massive political changes in Eastern Europe in the late twentieth century. Obviously, these forums are eminently suitable for the resolution of local disputes, and their precise terms of reference will vary accordingly.

10.7 Arbitration

The International Law Commission has defined arbitration as ‘a procedure for the settlement of disputes between states by a binding award on the basis of law and as a result of an undertaking voluntarily accepted’. It is the most commonly used ‘judicial’ means for the settlement of disputes much more so than reference to the International Court of Justice. Arbitration awards have contributed significantly to the development of many areas of international law, and this has not diminished even now that we have more established standing courts. The decisions of the US-Mexican Claims Commission 1926, for example, did much to clarify the law of state responsibility, and the arbitral award in the Island of Palmas Case (1928) 2 RIAA 829, is the *locus classicus* on acquisition of territory. The US-Iran Claims Tribunal resolved many of the disputes that arose

out of the rupture of relations between these two states in 1979 and has made significant pronouncements on the law relating to expropriation of foreign-owned property (e.g. the *Amoco Finance Case* 15 Iran-US CTR 189 (1987)).

Like all methods of pacific settlement in international law, arbitration is voluntary. States must consent beforehand to the exercise of jurisdiction by the arbitrators. This may be done on an ad hoc basis, as with the *Guinea/Guinea-Bissau Maritime Delimitation Case* 77 ILR 636 and the *Canada/France Maritime Delimitation* (1992) 31 ILM 114S, or consent may be given in advance to a specific procedure, as with the Permanent Court of Arbitration, although the submission of actual disputes may depend on further consent. This last body, established by the 1899 and 1907 Hague Conventions on Pacific Settlement, provides an institutionalized procedure for the settlement of disputes by arbitration and recent moves have been made to revive its role in dispute settlement. A recent example is the *Eritrea/Yemen Arbitration Concerning Maritime Delimitation*, 1999, it must also be remembered that arbitration proceedings are not limited to the determination of disputes between states. An important function of arbitration, and one which the I.C.J. cannot undertake, is to settle disputes between states and other bodies having international personality. Typically, such arbitrations involve states and multinational corporations, although exceptionally individuals may be given the right to claim directly against a state. One of the most important examples of an arbitration procedure for non-states and states is the International Centre for the Settlement of Investment Disputes, established by International Convention in 1964, which provides a forum for the settlement of disputes between states and corporations arising out of capital investment in the former's territory. Two examples of arbitrations heard under this framework are *AAPL v Sri Lanka* and *Southern Pacific v Egypt*, both important in the law of state responsibility. In addition, there is now a set of Model Rules for International Commercial Arbitration (28 ILM 231) again reflecting the practical importance of arbitration in the-world of commerce.

Moving away from the machinery of arbitration, what are its legal characteristics? In general parlance, 'arbitration' can denote any settlement achieved by reference to a third party. However, as the Permanent Court of Justice indicated in its Advisory Opinion on the Interpretation of the Treaty of Lausanne Case. (1925) PCIJ Ser. B-No. 12, arbitration in international law has a more specific meaning. First, arbitration is a procedure for the settlement of a legal dispute. Arbitration is concerned with the rights and duties of the parties under international law and a settlement is achieved by the application of this law to the facts of the case. This is not to say that political or economic factors are irrelevant, but rather that they, of themselves, cannot affect the outcome. Like the I.C.J., arbitration is concerned primarily with questions of international law.

U.N. Charter, Chapter I (Art. 1-2) and Chapter VI (Arts. 33-38)

UN CHARTER

CHAPTER I: PURPOSES AND PRINCIPLES

Article 1

The Purposes of the United Nations are:

To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

To be a centre for harmonizing the actions of nations in the attainment of these common ends.

Article 2

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

The Organization is based on the principle of the sovereign equality of all its Members.

All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.

All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.

The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII...

CHAPTER VI: PACIFIC SETTLEMENT OF DISPUTES

Article 33

The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

Article 34

The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.

Article 35

Any Member of the United Nations may bring any dispute, or any situation of the nature referred to in Article 34, to the attention of the Security Council or of the General Assembly.

A state which is not a Member of the United Nations may bring to the attention of the Security Council or of the General Assembly any dispute to which it is a party if it accepts in advance, for the purposes of the dispute, the obligations of pacific settlement provided in the present Charter.

The proceedings of the General Assembly in respect of matters brought to its attention under this Article will be subject to the provisions of Articles 11 and 12.

Article 36

The Security Council may, at any stage of a dispute of the nature referred to in Article 33 or of a situation of like nature, recommend appropriate procedures or methods of adjustment.

The Security Council should take into consideration any procedures for the settlement of the dispute which have already been adopted by the parties.

In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.

Article 37

Should the parties to a dispute of the nature referred to in Article 33 fail to settle it by the means indicated in that Article, they shall refer it to the Security Council.

If the Security Council deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action under Article 36 or to recommend such terms of settlement as it may consider appropriate.

Article 38

Without prejudice to the provisions of Articles 33 to 37, the Security Council may, if all the parties to any dispute so request, make recommendations to the parties with a view to a pacific settlement of the dispute.

U.N. Resolution “Manila Declaration” on State Obligations for Peaceful Settlement of Disputes¹⁰⁸

37/10 The General Assembly,

Reaffirming the principle of the Charter of the United Nations that all States shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered,

Conscious that the Charter of the United Nations embodies the means and an essential framework for the peaceful settlement of international disputes, the continuance of which is likely to endanger the maintenance of international peace and security,

¹⁰⁸ General Assembly resolution 37/10 of 15 November 1982, GAOR (68th Plen. Sess.) U.N. Doc. A/Res/37/10 (1982).

Recognizing the important role of the United Nations and the need to enhance its effectiveness in the peaceful settlement of international disputes and the maintenance of international peace and security, in accordance with the principles of justice and international law, in conformity with the Charter of the United Nations,

Reaffirming the principle of the Charter of the United Nations that all States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations,

Reiterating that no State or group of States has the right to intervene, directly or indirectly, for any reason whatsoever, in the internal or external affairs of any other State,

Reaffirming the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,

Bearing in mind the importance of maintaining and strengthening international peace and security and the development of friendly relations among States, irrespective of their political, economic and social systems or levels of economic development,

Reaffirming the principle of equal rights and self-determination of peoples as enshrined in the Charter of the United Nations and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations and in other relevant resolutions of the General Assembly,

Stressing the need for all States to desist from any forcible action which deprives peoples, particularly peoples under colonial and racist regimes or other forms of alien domination, of their inalienable right to self-determination, freedom and independence, as referred to in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,

Mindful of existing international instruments as well as respective principles and rules concerning the peaceful settlement of international disputes, including the exhaustion of local remedies whenever applicable,

Determined to promote international co-operation in the political field and to encourage the progressive development of international law and its codification, particularly in relation to the peaceful settlement of international disputes,

Solemnly declares that:

I

1. All States shall act in good faith and in conformity with the purposes and principles enshrined in the Charter of the United Nations with a view to avoiding disputes among themselves likely to affect friendly relations among States, thus contributing to the maintenance of international peace and security. They shall live together in peace with one another as good neighbours and strive for the adoption of meaningful measures for strengthening international peace and security.

2. Every State shall settle its international disputes exclusively by peaceful means in such a manner that international peace and security, and justice, are not endangered.

3. International disputes shall be settled on the basis of the sovereign equality of States and in accordance with the principle of free choice of means in conformity with obligations under the Charter of the United Nations and with the principles of justice and international law. Recourse to, or acceptance of, a settlement procedure freely agreed to by States with regard to existing or future disputes to which they are parties shall not be regarded as incompatible with the sovereign equality of States.

4. States parties to a dispute shall continue to observe in their mutual relations their obligations under the fundamental principles of international law concerning the sovereignty, independence and territorial integrity of States, as well as other generally recognized principles and rules of contemporary international law.

5. States shall seek in good faith and in a spirit of co-operation an early and equitable settlement of their international disputes by any of the following means: negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional arrangements or agencies or other peaceful means of their own choice, including good offices. In seeking such a settlement, the parties shall agree on such peaceful means as may be appropriate to the circumstances and the nature of their dispute.

6. States parties to regional arrangements or agencies shall make every effort to achieve pacific settlement of their local disputes through such regional arrangements or agencies before referring them to the Security Council. This does not preclude States from bringing any dispute to the attention of the Security Council or of the General Assembly in accordance with the Charter of the United Nations.

7. In the event of failure of the parties to a dispute to reach an early solution by any of the above means of settlement, they shall continue to seek a peaceful

solution and shall consult forthwith on mutually agreed means to settle the dispute peacefully. Should the parties fail to settle by any of the above means a dispute the continuance of which is likely to endanger the maintenance of international peace and security, they shall refer it to the Security Council in accordance with the Charter of the United Nations and without prejudice to the functions and powers of the Council set forth in the relevant provisions of Chapter VI of the Charter.

8. States parties to an international dispute, as well as other States, shall refrain from any action whatsoever which may aggravate the situation so as to endanger the maintenance of international peace and security and make more difficult or impede the peaceful settlement of the dispute, and shall act in this respect in accordance with the purposes and principles of the United Nations.

9. States should consider concluding agreements for the peaceful settlement of disputes among them. They should also include in bilateral agreements and multilateral conventions to be concluded, as appropriate, effective provisions for the peaceful settlement of disputes arising from the interpretation or application thereof.

10. States should, without prejudice to the right of free choice of means, bear in mind that direct negotiations are a flexible and effective means of peaceful settlement of their disputes. When they choose to resort to direct negotiations, States should negotiate meaningfully, in order to arrive at an early settlement acceptable to the parties. States should be equally prepared to seek the settlement of their disputes by the other means mentioned in the present Declaration.

11. States shall in accordance with international law implement in good faith all the provisions of agreements concluded by them for the settlement of their disputes.

12. In order to facilitate the exercise by the peoples concerned of the right to self-determination as referred to in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, the parties to a dispute may have the possibility, if they agree to do so and as appropriate, to have recourse to the relevant procedures mentioned in the present Declaration, for the peaceful settlement of the dispute.

13. Neither the existence of a dispute nor the failure of a procedure of peaceful settlement of disputes shall permit the use of force or threat of force by any of the States parties to the dispute.

II

1. Member States should make full use of the provisions of the Charter of the United Nations, including the procedures and means provided for therein, particularly Chapter VI, concerning the peaceful settlement of disputes.

2. Member States shall fulfill in good faith the obligations assumed by them in accordance with the Charter of the United Nations. They should, in accordance with the Charter, as appropriate, duly take into account the recommendations of the Security Council relating to the peaceful settlement of disputes. They should also, in accordance with the Charter, as appropriate, duly take into account the recommendations adopted by the General Assembly, subject to Articles 11 and 12 of the Charter, in the field of peaceful settlement of disputes.

3. Member States reaffirm the important role conferred on the General Assembly by the Charter of the United Nations in the field of peaceful settlement of disputes and stress the need for it to discharge effectively its responsibilities. Accordingly, they should:

- (a) Bear in mind that the General Assembly may discuss any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations and, subject to Article 12 of the Charter, recommend measures for its peaceful adjustment;
- (b) Consider making use, when they deem it appropriate, of the possibility of bringing to the attention of the General Assembly any dispute or any situation which might lead to international friction or give rise to a dispute;
- (c) Consider utilizing, for the peaceful settlement of their disputes, the subsidiary organs established by the General Assembly in the performance of its functions under the Charter;
- (d) Consider, when they are parties to a dispute brought to the attention of the General Assembly, making use of consultations within the framework of the Assembly, with a view to facilitating an early settlement of their dispute.

4. Member States should strengthen the primary role of the Security Council so that it may fully and effectively discharge its responsibilities, in accordance with the Charter of the United Nations, in the area of the settlement of disputes or of any situation the continuance of which is likely to endanger the maintenance of international peace and security. To this end they should:

- (a) Be fully aware of their obligation to refer to the Security Council such a dispute to which they are parties if they fail to settle it by the means indicated in Article 33 of the Charter;
- (b) Make greater use of the possibility of bringing to the attention of the Security Council any dispute or any situation which might lead to international friction or give rise to a dispute;
- (c) Encourage the Security Council to make wider use of the opportunities provided for by the Charter in order to review disputes or situations the continuance of which is likely to endanger the maintenance of international peace and security;
- (d) Consider making greater use of the fact-finding capacity of the Security Council in accordance with the Charter;
- (e) Encourage the Security Council to make wider use, as a means to promote peaceful settlement of disputes, of the subsidiary organs established by it in the performance of its functions under the Charter;
- (f) Bear in mind that the Security Council may, at any stage of a dispute of the nature referred to in Article 33 of the Charter or of a situation of like nature, recommend appropriate procedures or methods of adjustment;
- (g) Encourage the Security Council to act without delay, in accordance with its functions and powers, particularly in cases where international disputes develop into armed conflicts.

5. States should be fully aware of the role of the International Court of Justice, which is the principal judicial organ of the United Nations. Their attention is drawn to the facilities offered by the International Court of Justice for the settlement of legal disputes, especially since the revision of the Rules of the Court.

States may entrust the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future.

States should bear in mind:

- (a) That legal disputes should as a general rule be referred by the parties to the International Court of Justice, in accordance with the provisions of the Statute of the Court;
- (b) That it is desirable that they:

- (i) Consider the possibility of inserting in treaties, whenever appropriate, clauses providing for the submission to the International Court of Justice of disputes which may arise from the interpretation or application of such treaties;
- (ii) Study the possibility of choosing, in the free exercise of their sovereignty, to recognize as compulsory the jurisdiction of the International Court of Justice in accordance with Article 36 of its Statute;
- (iii) Review the possibility of identifying cases in which use may be made of the International Court of Justice.

The organs of the United Nations and the specialized agencies should study the advisability of making use of the possibility of requesting advisory opinions of the International Court of Justice on legal questions arising within the scope of their activities, provided that they are duly authorized to do so.

Recourse to judicial settlement of legal disputes, particularly referral to the International Court of Justice, should not be considered an unfriendly act between States.

6. The Secretary-General should make full use of the provisions of the Charter of the United Nations concerning the responsibilities entrusted to him. The Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security. He shall perform such other functions as are entrusted to him by the Security Council or by the General Assembly. Reports in this connection shall be made whenever requested to the Security Council or the General Assembly.

[The Resolution] Urges all States to observe and promote in good faith the provisions of the present Declaration in the peaceful settlement of their international disputes;

Declares that nothing in the present Declaration shall be construed as prejudicing in any manner the relevant provisions of the Charter or the rights and duties of States, or the scope of the functions and powers of the United Nations organs under the Charter, in particular those relating to the peaceful settlement of disputes;

Declares that nothing in the present Declaration could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United

Nations, particularly peoples under colonial and racist regimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration;

Stresses the need, in accordance with the Charter, to continue efforts to strengthen the process of the peaceful settlement of disputes through progressive development and codification of international law, as appropriate, and through enhancing the effectiveness of the United Nations in this field.

International Law Implementation and Compliance

Vyacheslov V. Gavrilov ¹⁰⁹

The fact that states in rule-making processes act as the creators of both domestic and international legal norms determines meaningful consistency of rules of conduct allowing them to join in the enforcement systems and regulate social relations. At that, international and national legal norms do not form a new system design but remain a part of their own systems of law that join together in a certain functional interaction.

In the international legal doctrine, three theories have been widely used – those of transformation, incorporation and implementation.

The birth and development of the theory of transformation is due to a dualistic approach to the problem of the relationship between international and domestic law. Just like dualism, it is based on the notion of independent existence and separate functioning of these two systems of law.

From the perspective of the adherents of this theory, the essence of the transformation process, and hence the legal mechanism for harmonizing international and national law norms “is in the change of the very vis obligandi of the international legal norm, in its orientation towards the ‘new’ recipients - subjects of domestic law, in fact in the change of the content of the norm that is associated with the introduction of the latter in another, now the domestic legal order.” As a result, this transformation creates a new national law of a

¹⁰⁹ Vyacheslav V. Gavrilov, *Notion and Interaction of International and National Legal Systems*, Vladivostok (2005), p. 216. [citations omitted] [Reprinted with permission of the author].

special kind, which is homogeneous to the original international norm in its content, but not identical to it, since it has technically become an internal law.

E. T. Usenko, one of the most famous Russian proponents of the concept of transformation of international legal norms within the framework of domestic law enforcement, while demonstrating the absolute necessity of this process, wrote that “the sovereignty of the state in principle excludes the possibility of action within its territory of the state will of other states, including the agreed will that is incorporated in the international law norm. In order for a rule, which is a norm of international law, to acquire legal force within the limits of a national law, it must acquire the force of a national legal norm. But it can only be done by a territorial sovereign, through issuing an appropriate national legal act.

The principle of the rule of state power does not mean that, within the borders of the country in question, there may only exist one legal regulator – the national law. The essence of the problem, therefore, is not that the international law norm, by its very nature and purpose, is not in a position to act as a regulator of relations at the domestic level, as the “transformists” assert, but rather whether the respective state allows it to act as such or not. Therefore, in our opinion, the international legal acts and practices can act as a source of norms directly governing the relationship among national legal entities of various countries or even one country where this is authorized by the respective state.

Unlike “transformists,” advocates of another popular theory of harmonization of international and national law norms - the incorporation theory - believe that international law norms automatically become part of national law (legislation) without a need for issuing any domestic legal regulations.

V.A. Kalanda thinks in this case it is a form of transformation, the meaning of which is an inclusion of international treaty norms in national legislation “through application of existing material norms of domestic law to give effect to an international agreement.”

The incorporation doctrine originated in the practice of English courts of the XVIII-XIX centuries and initially applied only to international customary norms in the UK's legal system. One of the most famous representatives of this theory, English lawyer William Blackstone, characterized its content in his “Commentaries” as follows: “[t]he right of peoples in all matters within its jurisdiction shall be accepted by the common law in its entirety and considered as part of the law of the country.” [Citation omitted] At that, with regard to the application of international treaty norms, English courts adhered to the theory of transformation.

One of the first states to embrace the doctrine of incorporation at the legislative level was the United States of America. In Section 2, Art. VI of the Constitution of the United States of 1787, the so-called supreme clause (supremacy clause) was introduced as follows: “This Constitution and the laws of the United States, which are issued for its execution, as well as the treaties which have been or will be signed by the United States’ authorities are the highest laws of the country and the judges of each state are obliged to execute them even if the Constitution or the laws in individual states contain contradicting provisions.” It is easy to notice that, in accordance with this rule, the basic principle of the theory of incorporation - “international law is part of the country’s law” - was extended to the international treaty rules.

In addition to the United States, countries to have proclaimed international law as part of the national law included Germany and Greece. Article 25 of the Constitution of the Federal Republic of Germany in 1949, provides that “the universally recognized norms of international law are an integral part of the law the Federation. They have the advantage over the laws and directly create rights and duties for the inhabitants of the federal territory.” And, according to Clause 1, Article 28 of the Constitution of Greece of 1975, “accepted norms of international law, as well as international agreements from the time of their ratification by the law and entry into force are an integral part of the domestic Greek law and take precedence over any provision of law that is contradictory to them.”

Other countries have declared the international legal norms as part of their domestic legislation. Thus, in accordance with Part 1 of Art. 96 of the Constitution of the Kingdom of Spain in 1978, “international treaties concluded in accordance with the law of and officially published in Spain are part of its internal legislation.” Similar provisions can be found in the constitutions of Kazakhstan, Kyrgyzstan, Ukraine and some other states.

It is easy to see that in the basis of the theory of incorporation there lies a monistic approach to the problem of the relation of international and national legal standards, but its essence amounts to declaring international law entirely and without change in its nature an integral part of domestic law. This is done on the basis of rules worked out by the jurisprudential practice of the respective state, or by direct reference to its constitutional norm. The essence of the theory of incorporation, therefore, can be summarized in the following main points:

1. International law and domestic law represent two systems of law that are consistent with each other. Therefore, the first may be an integral part of the second.

2. By virtue of specifying the constitutional norm or practice worked out by national courts, international treaties and (or) norms of general international

law become part of the national law (legislation) of the country in their entirety, without the need to issue any additional domestic legislation.

We should not forget these regulatory structures differ substantially from each other not only in terms of content and sources of legal norms, but also in the ways they are created and implemented. These legal systems are of different nature, scope of application, purpose, whereby they are cannot objectively be or become part of each other.

Quite revealing in this sense is a statement by German jurist D. Rauschnig, who, commenting on the provisions of Art. 25 of the Constitution of Germany, emphasized that the phrase contained therein, stating that “general norms of international law are an integral part of the law of the Federation,” can be misleading. “This provision does not mean that international law norms become national law norms of Germany. They remain to be the norms of international law. The meaning of this article of the Constitution is in that it requires application of such rules within the framework of the legal system of the Federal Republic of Germany.” Similarly, Professors T. Burgental and G. Maier note: “When we in the U.S. say, for example, that international law is “the law of the nation,” we really mean that it represents a part of our legal system.”

As pointed out by R. A. Møllerson, regardless of the dualistic or monistic approach to the correlation of international law and national law, “the national law of any state and international law are different systems of law and international treaties, regardless of the method of their conclusion or implementation, are the norms of international law that can operate within the state only with permission of the national law of the country. The only specificity is that, within the framework of the incorporation theory, such permission takes the form of announcing international law not as part of the legal system but rather as part of domestic law or legislation of the respective state.

The theory of incorporation, following the transformation theory, thus gives the wrong impression about the actual status of international law norms within the framework of national legal systems.

Firstly, within the framework of the theory of incorporation, no distinction is made between international legal norms designed to regulate relations arising within the state and relations that occur beyond its borders.

Secondly, the theory of incorporation (and, incidentally, that of transformation, too) does not consider the obvious fact that, even if international legal norms are aimed at achieving a certain degree of normalization of relations that involve national law subjects, they are not always suitable for direct regulation of these relations. This raises the problem of self-executing and nonself-executing

international treaties and provisions therein which has not been given a satisfactory resolution in any of the states that have declared international law as part of their domestic law. Furthermore, it should be borne in mind that some of these countries declared as part of their rights only conventional international legal norms, which, according to Professor J. Bederman, indicates the existence not only of those countries adhering to the concept of “contractual monism” but also the states that recognize only the “monism of common law norms.” And, this fact is not always taken into consideration within the framework of the theory of incorporation.

Thirdly, when declaring international legal norms as part of a country’s law, there appear a number of problems of a “technical” nature which have not received a uniform and comprehensive solution in the doctrine, the law and the enforcement practice of respective states. These problems, in particular, raise issues about the legal validity of international treaties conflicting with the provisions of national legal acts adopted later on, as well as about the relationship between the norms of international treaties concluded on behalf of the state by its various organs and the national legal norms of various levels.

Most of these problems and inaccuracies are rather successfully overcome within the framework of the theory of implementation which has been widely used in the legal doctrine in recent years.

The theory of implementation, just like the theory of transformation, is based on the assumption of independence of the systems of international law and domestic law. In other words, in accordance with the theory of implementation, the outcome of the harmonization is not that of transformation of international legal norms into national legal norms, not that of their declaration as part of domestic law, but granting the ability of the former to act in their own right in the legal system of the state through approval and support of the latter.

Similar ideas were expressed back in the 60’s of the last century, when the German Society of International Law put forward a theory of international legal norms’ implementation. In their view, the state can and should be limited, in this case, only to the act of effecting execution of the international legal norm. This act “does not transform one norm to another, it only serves the condition of domestic operation of the international legal norm, extrapolates its normativity to the domestic sphere. At this, the nature of the norm itself remains unchanged, it continues to be a norm of international law.”

The theory of “implementation” advanced here, in its broader sense, implies “implementation of international legal and domestic norms in compliance with domestic international law, as well as establishment of conditions for such implementation at international and domestic levels.”

The fundamental postulates of the theory of implementation can be summarized as follows:

1) International law and domestic law are two different systems of law. Therefore, international legal norms may serve as regulators of relations in the sphere of a state's domestic law only with approval of the relevant national legal norms.

2) The content of the mechanism of implementation of international legal norms depends on their form, content and the ultimate goal of international legal regulation.

Comparing the main provisions of the theories of transformation, incorporation and implementation, it is easy to see that, in this case, it is not so much about the dispute over the terms, as some researchers try to present it, but about a different vision of the content of a legal mechanism for implementing international legal norms within the framework of domestic legal orders. And, if you leave other numerous but comparatively less important differences "out of the equation," in the heart of the debate among these concepts' proponents there lies the question of whether international legal norms are directly applicable in the area of domestic relations, i.e. without declaring them as part of domestic law and without transforming international treaties into domestic laws. In our opinion, the truly correct answer to this question is given by the theory of implementation, and the answer is in the affirmative.

However, not everybody agrees with that. "We should not support the view of the direct effect of international legal norms, - writes A.M. Vasiliev, - their action is mediated through decisions of national public authorities in one form or another. ...The norm is a rule of repeated action. By virtue of this, it has to adapt to the sovereign national legal system, to get support from the state to become the system's part that is consistent with its other parts." B.L. Zimnenko also believes that the direct effect of international legal norms should be spoken about only conditionally, "bearing in mind that this action is mediated by a common referential norm."

Selected International Tribunals

International Court of Justice (I.C.J.)¹¹⁰

The Court

The International Court of Justice (I.C.J.) is the principal judicial organ of the United Nations (UN). It was established in June 1945 by the Charter of the United Nations and began work in April 1946.

The seat of the Court is at the Peace Palace in The Hague (Netherlands). Of the six principal organs of the United Nations, it is the only one not located in New York (United States of America).

The Court's role is to settle, in accordance with international law, legal disputes submitted to it by States and to give advisory opinions on legal questions referred to it by authorized United Nations organs and specialized agencies.

The Court is composed of 15 judges, who are elected for terms of office of nine years by the United Nations General Assembly and the Security Council. It is assisted by a Registry, its administrative organ. Its official languages are English and French.

Origins and History

The creation of the Court represented the culmination of a long development of methods for the pacific settlement of international disputes, the origins of which can be traced back to classical times.

Article 33 of the United Nations Charter lists the following methods for the pacific settlement of disputes between States: negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, and resort to regional agencies or arrangements; good offices should also be added to this list. Among these methods, certain involve appealing to third parties. For example, mediation places the parties to a dispute in a position in which they can themselves resolve their dispute thanks to the intervention of a third party. Arbitration goes further, in the sense that the dispute is submitted to the decision or award of an impartial third party, so that a binding settlement can be achieved. The same is true of judicial settlement (the method applied by the International Court of Justice), except that a court is subject to stricter rules than an arbitral tribunal, particularly in procedural matters.

Mediation and arbitration preceded judicial settlement in history. The former was known in ancient India and in the Islamic world, whilst numerous examples

¹¹⁰ See, <http://www.I.C.J.-cij.org/court/index.php?p1=1>.

of the latter are to be found in ancient Greece, in China, among the Arabian tribes, in maritime customary law in medieval Europe and in Papal practice.

The origins¹¹¹

The Permanent Court of International Justice (PCIJ)

Article 14 of the Covenant of the League of Nations gave the Council of the League responsibility for formulating plans for the establishment of a Permanent Court of International Justice (PCIJ), such a court to be competent not only to hear and determine any dispute of an international character submitted to it by the parties to the dispute, but also to give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly. It remained for the League Council to take the necessary action to give effect to Article 14. In December 1920, after an exhaustive study by a subcommittee, the Committee submitted a revised draft to the Assembly, which unanimously adopted it. This was the Statute of the PCIJ.

The PCIJ was thus a working reality. The great advance it represented in the history of international legal proceedings can be appreciated by considering the following:

- unlike arbitral tribunals, the PCIJ was a permanently constituted body governed by its own Statute and Rules of Procedure, fixed beforehand and binding on parties having recourse to the Court;
- it had a permanent Registry which, *inter alia*, served as a channel of communication with governments and international bodies;
- its proceedings were largely public and provision was made for the publication in due course of the pleadings, of verbatim records of the sittings and of all documentary evidence submitted to it;

Although the Permanent Court of International Justice was brought into being through, and by, the League of Nations, it was nevertheless not a part of the League. There was a close association between the two bodies, which found expression *inter alia* in the fact that the League Council and Assembly periodically elected the Members of the Court and that both Council and Assembly were entitled to seek advisory opinions from the Court, but the latter never formed an integral part of the League, just as the Statute never formed part of the Covenant. In particular, a Member State of the League of Nations was not by this fact alone automatically a party to the Court's Statute.

¹¹¹ I.C.J. website: <http://www.I.C.J.-cij.org/court/index.php?p1=1&p2=1>.

Between 1922 and 1940 the PCIJ dealt with 29 contentious cases between States and delivered 27 advisory opinions.

The International Court of Justice (I.C.J.)

The outbreak of war in September 1939 inevitably had serious consequences for the PCIJ, which had already for some years known a period of diminished activity. After its last public sitting on 4 December 1939, the Permanent Court of International Justice did not in fact deal with any judicial business and no further elections of judges were held. In 1940 the Court removed to Geneva, a single judge remaining at The Hague, together with a few Registry officials of Dutch nationality. It was inevitable that even under the stress of the war some thought should be given to the future of the Court, as well as to the creation of a new international political order.

In 1942 the United States Secretary of State and the Foreign Secretary of the United Kingdom declared themselves in favour of the establishment or re-establishment of an international court after the war, and the Inter-American Juridical Committee recommended the extension of the PCIJ's jurisdiction. Early in 1943, the United Kingdom Government took the initiative of inviting a number of experts to London to constitute an informal Inter-Allied Committee to examine the matter. This Committee, under the chairmanship of Sir William Malkin (United Kingdom), held 19 meetings, which were attended by jurists from 11 countries. In its report, which was published on 10 February 1944, it recommended:

- that the Statute of any new international court should be based on that of the Permanent Court of International Justice;
- that advisory jurisdiction should be retained in the case of the new Court;
- that acceptance of the jurisdiction of the new Court should not be compulsory;
- that the Court should have no jurisdiction to deal with essentially political matters.

Meanwhile, on 30 October 1943, following a conference between China, the USSR, the United Kingdom and the United States, a joint declaration was issued recognizing the necessity “of establishing at the earliest practicable date a general international organization, based on the principle of the sovereign equality of all peace-loving States, and open to membership by all such States, large and small, for the maintenance of international peace and security.”

This declaration led to exchanges between the Four Powers at Dumbarton Oaks, resulting in the publication on 9 October 1944 of proposals for the establishment of a general international organization, to include an international court of justice. The next step was the convening of a meeting in Washington, in April 1945, of a committee of jurists representing 44 States. This Committee, under the chairmanship of G. H. Hackworth (United States), was entrusted with the preparation of a draft Statute for the future international court of justice, for submission to the San Francisco Conference, which during the months of April to June 1945 was to draw up the United Nations Charter. The draft Statute prepared by the Committee was based on the Statute of the PCIJ and was thus not a completely fresh text. The Committee nevertheless felt constrained to leave a number of questions open which it felt should be decided by the Conference: should a new court be created? In what form should the court's mission as the principal judicial organ of the United Nations be stated? Should the court's jurisdiction be compulsory, and, if so, to what extent? How should the judges be elected? The final decisions on these points, and on the definitive form of the Statute, were taken at the San Francisco Conference, in which 50 States participated. The Conference decided against compulsory jurisdiction and in favour of the creation of an entirely new court, which would be a principal organ of the United Nations, on the same footing as the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council and the Secretariat, and with the Statute annexed to and forming part of the Charter. The chief reasons that led the Conference to decide to create a new court were the following:

- as the court was to be the principal judicial organ of the United Nations, it was felt inappropriate for this role to be filled by the Permanent Court of International Justice, which had up until then been linked to the League of Nations, then on the point of dissolution;
- the creation of a new court was more consistent with the provision in the Charter that all Member States of the United Nations would ipso facto be parties to the court's Statute;
- several States that were parties to the Statute of the PCIJ were not represented at the San Francisco Conference, and, conversely, several States represented at the Conference were not parties to the Statute.

There was a feeling in some quarters that the PCIJ formed part of an older order, in which European States had dominated the political and legal affairs of the international community, and that the creation of a new court would make it easier for States outside Europe to play a more influential role. This

has in fact happened as the membership of the United Nations grew from 51 in 1945 to 192 in 2006.

The San Francisco Conference nevertheless showed some concern that all continuity with the past should not be broken, particularly as the Statute of the PCIJ had itself been drawn up on the basis of past experience, and it was felt better not to change something that had seemed to work well. The Charter therefore plainly stated that the Statute of the International Court of Justice was based upon that of the PCIJ. At the same time, the necessary steps were taken for a transfer of the jurisdiction of the PCIJ so far as was possible to the International Court of Justice. In any event, the decision to create a new court necessarily involved the dissolution of its predecessor. The PCIJ met for the last time in October 1945 when it was decided to take all appropriate measures to ensure the transfer of its archives and effects to the new International Court of Justice, which, like its predecessor, was to have its seat in the Peace Palace. ...In April 1946, the PCIJ was formally dissolved, and the International Court of Justice, meeting for the first time, elected as its President Judge Josñ Gustavo Guerrero (El Salvador), the last President of the PCIJ. ...The first case was submitted in May 1947. It concerned incidents in the Corfu Channel and was brought by the United Kingdom against Albania.

Statute of the International Court of Justice

Chapter II - Competence of the Court, Article 34

1. Only states may be parties in cases before the Court.
2. The Court, subject to and in conformity with its Rules, may request of public international organizations information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative.
3. Whenever the construction of the constituent instrument of a public international organization or of an international convention adopted thereunder is in question in a case before the Court, the Registrar shall so notify the public international organization concerned and shall communicate to it copies of all the written proceedings.¹¹²

¹¹² http://www.I.C.J.-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER_II.

Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States), 1986¹¹³

Judicial settlement as alternative to friendly settlement

[pp. 142-143] The Court considers appropriate the request of Nicaragua for the nature and amount of the reparation due to it to be determined in a subsequent phase of the proceedings. While a certain amount of evidence has been provided, for example, in the testimony of the Nicaraguan Minister of Finance, of pecuniary loss sustained, this was based upon contentions as to the responsibility of the United States which were more far-reaching than the conclusions at which the Court has been able to arrive. The opportunity should be afforded Nicaragua to demonstrate and prove exactly what injury was suffered as a result of each action of the United States which the Court has found contrary to international law. Nor should it be overlooked that, while the United States has chosen not to appear or participate in the present phase of the proceedings, Article 53 of the Statute does not debar it from appearing to present its arguments on the question of reparation if it so wishes. On the contrary, the principle of the equality of the Parties requires that it be given that opportunity. It goes without saying, however, that in the phase of the proceedings devoted to reparation, neither Party may call in question such findings in the present Judgment as have become *res judicata*.

There remains the request of Nicaragua (paragraph 15 above) for an award, at the present stage of the proceedings, of \$370,200,000 as the “minimum (and in that sense provisional) valuation of direct damages.” There is no provision in the Statute of the Court either specifically empowering the Court to make an interim award of this kind, or indeed debarring it from doing so. In view of the final and binding character of the Court’s judgments under Articles 59 and 60 of the Statute, it would however only be appropriate to make an award of this kind, assuming that the Court possesses the power to do so, in exceptional circumstances, and where the entitlement of the State making the claim was already established with certainty and precision. Furthermore, in a case in which the respondent State is not appearing, so that its views on the matter are not known to the Court, the Court should refrain from any unnecessary act which might prove an obstacle to a negotiated settlement. It bears repeating that

“the judicial settlement of international disputes, with a view to which the Court has been established, is simply an alternative

¹¹³ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 14 (p. 142-143 of decision).

to the direct and friendly settlement of such disputes between the Parties; as consequently it is for the Court to facilitate, so far as is compatible with its Statute, such direct and friendly settlement ...” (Free Zones of Upper Savoy and the District of Gex, Order of 19 August 1929, P.C.I.J., Series A, No. 22, p. 13).

Accordingly, the Court does not consider that it can accede at this stage to the request made in the Fourth Submission of Nicaragua.

Boundary Disputes

***Malcolm Shaw, Boundary Treaties*¹¹⁴**

Boundary treaties, whereby either additional territory is acquired or lost or uncertain boundaries are clarified by agreement between the states concerned, constitute a root of the title in themselves. They constitute a special kind of treaty in that they establish an objective territorial regime valid erga omnes. Such a regime will not only create rights binding also upon third states, but will exist outside of the particular boundary treaty and thus will continue even if the treaty in question itself ceases to apply...

Accordingly, many boundary disputes in fact revolve around the question of treaty interpretation. It is accepted that a treaty should be interpreted in the light of Articles 31 and 32 of the Vienna Convention on the Law of Treaties, 1969, ‘in good faith, in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose’...

More generally, the difficulty in seeking to interpret both general concepts and geographical locations used in early treaties in the light of modern scientific knowledge has posed difficulties. In the Botswana/Namibia case, the Court, faced with the problem of identifying the ‘main channel’ of the River Chobe in the light of an 1890 treaty, emphasized that ‘the present – day state of scientific knowledge’ could be used in order to illustrate terms if that treaty. In the Eritrea/Ethiopia case, the Boundary Commission referred to the principle of contemporaneity, by which it meant that treaty should be interpreted by reference to the circumstances prevailing when the treaty was concluded. In particular, the determination of geographical name (whether of a place or of a river) depended upon the contemporary understanding of the location to which that name related at the time of the treaty. However, in seeking to

¹¹⁴ Quote from Malcolm N. Shaw, *International Law*, p. 417, 5th ed. (Cambridge University Press, 2003).

understand what that was reference to subsequent practice and to the objects of the treaty was often required. In interpreting a boundary treaty, in particular in seeking resolve ambiguities, the subsequent practice of the parties will be relevant. Even where such subsequent practice cannot in the circumstance constitute an authoritative interpretation of the treaty, it may be deemed to 'be useful' in the process of specifying the frontier in question. However, where the boundary line as specified in the pertinent instrument is clear, it cannot be changed by a court in the process of interpreting delimitation provisions.

***Frontier Dispute, (Burkina Faso v. Republic of Mali)*¹¹⁵**

[pp. 563-564] The Parties have argued at length over how the present dispute is to be classified in terms of a distinction sometimes made by legal writers between "frontier disputes" or "delimitation disputes," and "disputes as to attribution of territory." According to this distinction, the former refer to delimitation operations affecting what has been described as "a portion of land which is not geographically autonomous" whereas the object of the latter is the attribution of sovereignty over the whole of a geographical entity. Both Parties seem ultimately to have accepted that the present dispute belongs rather to the category of delimitation disputes, even though they fail to agree on the conclusions to be drawn from this. In fact, however, in the great majority of cases, including this one, the distinction outlined above is not so much a difference in kind but rather a difference of degree as to the way the operation in question is carried out. The effect of any delimitation, no matter how small the disputed area crossed by the line, is an apportionment of the areas of land lying on either side of the line. In the present case, it may be noted that the Special Agreement, in Article I, refers not merely to a line to be drawn, but to a disputed "area," which it defines as consisting of a "band" of territory encompassing the "region" of the Bāli. Moreover, the effect of any judicial decision rendered either in a dispute as to attribution of territory or in a delimitation dispute, is necessarily to establish a frontier....

[p. 566] The territorial boundaries which have to be respected may also derive from international frontiers which previously divided a colony of one State from a colony of another, or indeed a colonial territory from the territory of an independent State, or one which was under protectorate, but had retained its international personality. There is no doubt that the obligation to respect pre-existing international frontiers in the event of a State succession

¹¹⁵ Frontier Dispute (Burkina Faso v. Republic of Mali), Judgment, I.C.J. Reports 1986, p. 554

derives from a general rule of international law, whether or not the rule is expressed in the formula *uti possidetis*. Hence the numerous solemn affirmations of the intangibility of the frontiers existing at the time of the independence of African States, whether made by senior African statesmen or by organs of the Organization of African Unity itself are evidently declaratory rather than constitutive: they recognize and confirm an existing principle; and do not seek to consecrate a new principle or the extension to Africa of a rule previously applied only in another continent....

[p. 582] At the present stage of its reasoning the Chamber can confine itself to the statement of a principle. Whether in frontier delimitations or in international territorial conflicts, maps merely constitute information which varies in accuracy from case to case; of themselves, and by virtue solely of their existence, they cannot constitute a territorial title, that is, a document endowed by international law with intrinsic legal force for the purpose of establishing territorial rights. Of course, in some cases maps may acquire such legal force, but where this is so the legal force does not arise solely from their intrinsic merits: it is because such maps fall into the category of physical expressions of the will of the State or States concerned. This is the case, for example, when maps are annexed to an official text of which they form an integral part. Except in this clearly defined case, maps are only extrinsic evidence of varying reliability or unreliability which may be used, along with other evidence of a circumstantial kind, to establish or reconstitute the real facts....

[pp. 632-633] It should again be pointed out that the Chamber's task in this case is to indicate the line of the frontier inherited by both States from the colonizers on their accession to independence. For the reasons explained above, this task amounts to ascertaining and defining the lines which formed the administrative boundaries of the colony of Upper Volta on 31 December 1932. Admittedly, the Parties could have modified the frontier existing on the critical date by a subsequent agreement. If the competent authorities had endorsed the agreement of 15 January 1965, it would have been unnecessary for the purpose of the present case to ascertain whether that agreement was of a declaratory or modifying character in relation to the 1932 boundaries. But this did not happen, and the Chamber has received no mandate from the Parties to substitute its own free choice of an appropriate frontier for theirs. The Chamber must not lose sight either of the Court's function, which is to decide in accordance with international law such disputes as are submitted to it, nor of the fact that the Chamber was requested by the Parties in their Special Agreement not to give indications to guide them in determining their common frontier, but to draw a line, and a precise line.

As it has explained, the Chamber can resort to that equity *infra legem*, which both Parties have recognized as being applicable in this case (see paragraph 27 above). In this respect the guiding concept is simply that “Equity as a legal concept is a direct emanation of the idea of justice” (Continental Shelf (Tunisia/Libyan Arab Jamahiriya), I.C.J. Reports 1982, p. 60, para. 71). The Chamber would however stress more generally that to resort to the concept of equity in order to modify an established frontier would be quite unjustified. Especially in the African context, the obvious deficiencies of many frontiers inherited from colonization, from the ethnic, geographical or administrative standpoint, cannot support an assertion that the modification of these frontiers is necessary or justifiable on the ground of considerations of equity. These frontiers, however unsatisfactory they may be, possess the authority of the *uti possidetis* and are thus fully in conformity with contemporary international law. Apart from the case of a decision *ex aequo et bono* reached with the assent of the Parties, “it is not a matter of finding simply an equitable solution, but an equitable solution derived from the applicable law” (Fisheries Jurisdiction, I.C.J. Reports 1974, p. 33, para. 78). It is with a view to achieving a solution of this kind that the Chamber has to take account, not of the agreement of 15 January 1965, but of the circumstances in which that agreement was concluded.

Consideration of Arbitral Awards

Maritime Delimitation of Territory (Qatar v. Bahrain), 2001¹¹⁶

111. Bahrain maintains that the British decision of 1939 must be considered primarily as an arbitral award, which is *res judicata*. It claims that the Court does not have jurisdiction to review the award of another tribunal, basing its proposition on

“a virtual jurisprudence constante, not to review, invalidate or even confirm awards taken by other international tribunals, unless there is specific, express, additional consent to reopen the award.”

Thus Bahrain refers to the decision of 15 June 1939 by the Permanent Court of International Justice in the case of the *Soci t  Commerciale de Belgique* (P.C.I.J., Series A/B, No. 78, p. 160); and to those rendered by the present Court on

¹¹⁶ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, Judgment, I.C.J. Reports 2001, p. 40 at pg. 76-77, and 83-85.

18 November 1960 in the case concerning the Arbitral Award made by the King of Spain on 23 December 1906 (*Honduras v. Nicaragua*) (I.C.J. Reports 1960, p. 192), as well as on 12 November 1991 in the case concerning the Arbitral Award of 31 July 1989 (*Guinea-Bissau v. Senegal*), (I.C.J. Reports 1991, p. 53).

112. Qatar denies the relevance of the judgments cited by Bahrain. It contends that

“[N]one of them are in the slightest degree relevant to the issue which the Court has to determine in the present case, namely, whether the procedures followed by the British Government in 1938 and 1939 amounted to a process of arbitration which could result in an arbitral award binding upon the parties.”

Qatar also advances in support of its position the 19 October 1981 arbitral award rendered by the Court of Arbitration in the Dubai/Sharjah Border case; in that award, which in Qatar’s view was rendered under circumstances comparable to those of the present case, the Court of Arbitration concluded that boundary delimitation decisions taken by the British Government were not arbitral awards but rather administrative decisions of a binding character (International Law Reports, Vol. 91, p. 579; see also pp. 577, 583 and 585).

113. The Court will first consider the question whether the 1939 British decision must be deemed to constitute an arbitral award. The Court observes in this respect that the word arbitration, for purposes of public international law, usually refers to “the settlement of differences between States by judges of their own choice, and on the basis of respect for law.” This wording was adopted in Article 15 of the Hague Convention for the Pacific Settlement of International Disputes, dated 29 July 1899. It was repeated in Article 37 of the Hague Convention dated 18 October 1907, having the same object. It was adopted by the Permanent Court of International Justice in its Advisory Opinion of 21 November 1925, interpreting Article 3, paragraph 2, of the Treaty of Lausanne (P.C.I.J., Series B, No. 12, p. 26). It was reaffirmed in the work of the International Law Commission, which reserved the case where the parties might have decided that the requested decision should be taken *ex aequo et bono* (Report by Mr. Georges Scelle, Special Rapporteur of the Commission, Document A/CN.4/113, of 6 March 1958, Yearbook of the International Law Commission, 1958, Vol. II, p. 2). Finally, more recently, it was adopted by the Court of Arbitration called upon to settle the border dispute between Dubai and Sharjah in a dispute bearing some similarities to the present case (Dubai/Sharjah Border Arbitration, arbitral award of 19 October 1981, International Law Reports, Vol. 91, pp. 574 and 575).

114. The Court observes that in the present case no agreement existed between the Parties to submit their case to an arbitral tribunal made up of judges chosen by them, who would rule either on the basis of the law or ex

quo et bono. The Parties had only agreed that the issue would be decided by “His Majesty’s Government,” but left it to the latter to determine how that decision would be arrived at, and by which officials. It follows that the decision whereby, in 1939, the British Government held that the Hawar Islands belonged to Bahrain, did not constitute an international arbitral award...

139. The Court will begin by recalling that the 1939 decision is not an arbitral award (see paragraphs 113-114 above). This does not, however, mean that it was devoid of all legal effect. Quite to the contrary, the pleadings, and in particular the Exchange of Letters referred to above (see paragraphs 118 and 119 above), show that Bahrain and Qatar consented to the British Government settling their dispute over the Hawar Islands. The 1939 decision must therefore be regarded as a decision that was binding from the outset on both States and continued to be binding on those same States after 1971, when they ceased to be British protected States (see paragraph 65 above).

140. The validity of that decision was certainly not subject to the procedural principles governing the validity of arbitral awards. However as the British Political Agent undertook on 20 May 1938, and as was repeated in the letter of the Ruler of Qatar of 27 May 1938 (see paragraphs 119 and 120 above), this decision was to be rendered “in the light of truth and justice.”

141. In this connection, the Court observes in the first place that the Ruler of Qatar in that last letter entrusted the question of the Hawar Islands to the British Government for decision, notwithstanding that seven days before the British Political Agent had informed him that “by their formal occupation of the Islands for some time past the Bahrain Government possess a prima facie claim to them” and that it was therefore for the Ruler of Qatar to submit a “formal claim ... supported by a full and complete statement of the evidence” on which he relied (see paragraph 119 above). This procedure was followed and the competent British officials found that “[t]he Shaikh of Qatar ha[d] produced no evidence whatsoever” to counter the effectivité claimed by Bahrain, in particular its occupation of the islands since 1937 (see paragraph 128 above). Under these circumstances, while it is true that the competent British officials proceeded on the premise that Bahrain possessed prima facie title to the islands and that the burden of proving the opposite lay on the Ruler of Qatar, Qatar cannot maintain that it was contrary to justice to proceed on the basis of this premise when Qatar had been informed before agreeing to the procedure that this would occur and had consented to the proceedings being conducted on that basis.

142. The proceedings leading to the 1939 British decision summarized above (see paragraphs 118 to 133 above) further show that Qatar and Bahrain both had the opportunity to present their arguments in relation to the Hawar Islands and

the evidence supporting them. Qatar presented its claim in its letters of 10 and 27 May 1938. Bahrain's opposing claims were presented on 22 December 1938, with an annex containing the declarations of several witnesses. Qatar commented on this statement of Bahrain in its letter of 30 March 1939, to which testimonial evidence to support its arguments was also annexed. Thus the two Rulers were able to present their arguments and each of them was afforded an amount of time which the Court considers was sufficient for this purpose; Qatar's contention that it was subjected to unequal treatment therefore cannot be upheld.

143. Finally, the Court notes that, while the reasoning supporting the 1939 decision was not communicated to the Rulers of Bahrain and Qatar, this lack of reasons has no influence on the validity of the decision taken, because no obligation to state reasons had been imposed on the British Government when it was entrusted with the settlement of the matter.

144. Moreover, in the present case the reaction of the Ruler of Qatar was to inform the British Political Resident that he was "deeply astonished" by the decision, but he did not claim that it was invalid for lack of reasons. Qatar stated that it had provided enough evidence to support its position, and limited itself to requesting the British Government to re-examine its decision. Therefore, Qatar's contention that the 1939 British decision is invalid for lack of reasons cannot be upheld.

145. Finally, the fact that the Sheikh of Qatar had protested on several occasions against the content of the British decision of 1939 after he had been informed of it is not such as to render the decision inopposable to him, contrary to what Qatar maintains.

146. The Court accordingly concludes that the decision taken by the British Government on 11 July 1939 is binding on the Parties.

Inherent Right to Challenge Arbitral Award

*Arbitral Award (Guinea Bissau v. Senegal), 1989*¹¹⁷

42. Guinea-Bissau argues, secondly, that any arbitral award must, in accordance with general international law, be a reasoned one. Moreover, according to Article 9, paragraph 3, of the Arbitration Agreement, the Parties had specifically agreed that "the Award shall state in full the reasons on which it is based." Yet,

¹¹⁷ Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal), Judgment, I.C.J. Reports 1991, p. 53, p. 69, and p. 72, majority opinion, and p. 92 Judge Lachs dissent.

according to Guinea-Bissau, the Tribunal in this case did not give any reasoning in support of its refusal to reply to the second question put by the Parties or, at the very least, gave “wholly insufficient” reasoning, which did not even make it possible to “determine the line of argument followed” and did not “reply on any point to the questions raised and discussed during the arbitral proceedings.” On this ground also, it is claimed that the Award is null and void.

43. In paragraph 87 of the Award, referred to above, the Tribunal “bearing in mind the ... conclusions” that it had reached, together with “the wording of Article 2 of the Arbitration Agreement,” took the view that it was not called upon to reply to the second question put to it. This reasoning is brief, and could doubtless have been developed further. But the references in paragraph 87 to the Tribunal’s conclusions and to the wording of Article 2 of the Arbitration Agreement make it possible to determine, without difficulty, the reasons why the Tribunal decided not to answer the second question. By referring to the wording of Article 2 of the Arbitration Agreement, the Tribunal was taking note that, according to that Article, it was asked, first, whether the 1960 Agreement had “the force of law in the relations” between Guinea-Bissau and Senegal, and then, “in the event of a negative answer to the first question, what is the course of the line delimiting the maritime territories” of the two countries. By referring to the conclusions that it had already reached, the Tribunal was noting that it had, in paragraphs 80 et seq. of the Award, found that the 1960 Agreement, in respect of which it had already determined the scope of its substantive validity, was “valid and can be opposed to Senegal and to Guinea-Bissau.” Having given an affirmative answer to the first question, and basing itself on the actual text of the Arbitration Agreement, the Tribunal found as a consequence that it did not have to reply to the second question. That statement of reasoning, while succinct, is clear and precise. The second contention of Guinea-Bissau must also be dismissed...

47. By its argument set out above, Guinea-Bissau is in fact criticizing the interpretation in the Award of the provisions of the Arbitration Agreement which determine the Tribunal’s jurisdiction, and proposing another interpretation. However, the Court does not have to enquire whether or not the Arbitration Agreement could, with regard to the Tribunal’s competence, be interpreted in a number of ways, and if so to consider which would have been preferable. By proceeding in that way the Court would be treating the request as an appeal and not as a *recours en nullité*. The Court could not act in that way in the present case. It has simply to ascertain whether by rendering the disputed Award the Tribunal acted in manifest breach of the competence conferred on it by the Arbitration Agreement, either by deciding in excess of, or by failing to exercise, its jurisdiction.

Obligations of Negotiation

***Legality of the Threat or Use of Nuclear Weapons in Armed Conflict, I.C.J. Advisory Opinion, 1996*¹¹⁸**

98. Given the eminently difficult issues that arise in applying the law on the use of force and above all the law applicable in armed conflict to nuclear weapons, the Court considers that it now needs to examine one further aspect of the question before it, seen in a broader context. In the long run, international law, and with it the stability of the international order which it is intended to govern, are bound to suffer from the continuing difference of views with regard to the legal status of weapons as deadly as nuclear weapons. It is consequently important to put an end to this state of affairs: the long-promised complete nuclear disarmament appears to be the most appropriate means of achieving that result.

99. In these circumstances, the Court appreciates the full importance of the recognition by Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons of an obligation to negotiate in good faith a nuclear disarmament. This provision is worded as follows: “Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.”

The legal import of that obligation goes beyond that of a mere obligation of conduct ; the obligation involved here is an obligation to achieve a precise result- nuclear disarmament in all its aspects - by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith.

100. This twofold obligation to pursue and to conclude negotiations formally concerns the 182 States parties to the Treaty on the Non-Proliferation of Nuclear Weapons, or, in other words, the vast majority of the international community. Virtually the whole of this community appears moreover to have been involved when resolutions of the United Nations General Assembly concerning nuclear disarmament have repeatedly been unanimously adopted. Indeed, any realistic search for general and complete disarmament, especially nuclear disarmament, necessitates the CO-operation of all States.

¹¹⁸ Legality of the Threat or Use of Nuclear Weapons in Armed Conflict, Advisory Opinion, I. C. J. Reports 1996, at pp. 363-65, paragraphs 98-103.

101. Even the very first General Assembly resolution, unanimously adopted on 24 January 1946 at the London session, set up a commission whose terms of reference included making specific proposals for, among other things, “the elimination from national armaments of atomic weapons and of all other major weapons adaptable to mass destruction.” In a large number of subsequent resolutions, the General Assembly has reaffirmed the need for nuclear disarmament. Thus, in resolution 808 A (IX) of 4 November 1954, which was likewise unanimously adopted, it concluded “that a further effort should be made to reach agreement on comprehensive and CO-ordinated proposals to be embodied in a draft international disarmament convention providing for: . . .

(b) The total prohibition of the use and manufacture of nuclear weapons and weapons of mass destruction of every type, together with the conversion of existing stocks of nuclear weapons for peaceful purposes.”

The same conviction has been expressed outside the United Nations context in various instruments.

102. The obligation expressed in Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons includes its fulfilment in accordance with the basic principle of good faith. This basic principle is set forth in Article 2, paragraph 2, of the Charter. It was reflected in the Declaration on Friendly Relations between States (resolution 2625 (XXV) of 24 October 1970) and in the Final Act of the Helsinki Conference of 1 August 1975. It is also embodied in Article 26 of the Vienna Convention on the Law of Treaties of 23 May 1969, according to which “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.”

Nor has the Court omitted to draw attention to it, as follows:

“One of the basic principles governing the creation and perform of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international CO-operation, in particular in an age when this CO-operation in many fields is becoming increasingly essential.” (Nuclear Tests (Australia v. France), Judgment, I. C.J. Reports 1974, p. 268, para. 46.)

103. In its resolution 984 (1995) dated 11 April 1995, the Security Council took care to reaffirm “the need for all States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons to comply fully with all their obligations” and urged “all States, as provided for in Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons, to pursue negotiations in good faith on effective measures relating to nuclear disarmament and on a treaty on general and complete disarmament under strict and effective international control which remains a universal goal.”

The importance of fulfilling the obligation expressed in Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons was also reaffirmed in the final document of the Review and Extension Conference of the parties to the Treaty on the Non-Proliferation of Nuclear Weapons, held from 17 April to 12 May 1995.

In the view of the Court, it remains without any doubt an objective of vital importance to the whole of the international community today.

*European Court Of Justice*¹¹⁹

Since the establishment of the Court of Justice of the European Union in 1952, its mission has been to ensure that “the law is observed” “in the interpretation and application” of the Treaties.

As part of that mission, the Court of Justice of the European Union:

- reviews the legality of the acts of the institutions of the European Union,
- ensures that the Member States comply with obligations under the Treaties, and
- interprets European Union law at the request of the national courts and tribunals.

The Court thus constitutes the judicial authority of the European Union and, in cooperation with the courts and tribunals of the Member States, it ensures the uniform application and interpretation of European Union law.

The Court of Justice of the European Union, which has its seat in Luxembourg, consists of three courts: the Court of Justice, the General Court (created in 1988) and the Civil Service Tribunal (created in 2004). Since their establishment, approximately 15 000 judgments have been delivered by the three courts. As each Member State has its own language and specific legal system, the Court of Justice of the European Union is a multilingual institution. Its language arrangements have no equivalent in any other court in the world, since each of the official languages of the European Union can be the language of a case. The Court is required to observe the principle of multilingualism in full, because of the need to communicate with the parties in the language of the proceedings and to ensure that its case-law is disseminated throughout the Member States.

¹¹⁹ See, Court of Justice of the European Union, http://curia.europa.eu/jcms/jcms/Jo2_6999.

The Court of Justice of the European Union¹²⁰

The Court of Justice interprets EU law to make sure it is applied in the same way in all EU countries. It also settles legal disputes between EU governments and EU institutions. Individuals, companies or organisations can also bring cases before the Court if they feel their rights have been infringed by an EU institution.

Composition

The Court of Justice has one judge per EU country.

The Court is helped by eight ‘advocates-general’ whose job is to present opinions on the cases brought before the Court. They must do so publicly and impartially.

Each judge and advocate-general is appointed for a term of six years, which can be renewed. The governments of EU countries agree on whom they want to appoint.

To help the Court of Justice cope with the large number of cases brought before it, and to offer citizens better legal protection, a ‘General Court’ deals with cases brought forward by private individuals, companies and some organisations, and cases relating to competition law.

The ‘EU Civil Service Tribunal’ rules on disputes between the European Union and its staff.

Types of cases

The Court gives rulings on the cases brought before it. The five most common types of cases are:

1. requests for a preliminary ruling – when national courts ask the Court of Justice to interpret a point of EU law.
2. actions for failure to fulfill an obligation – brought against EU governments for not applying EU law.
3. actions for annulment – against EU laws thought to violate the EU treaties or fundamental rights.
4. actions for failure to act – against EU institutions for failing to make decisions required of them.
5. direct actions – brought by individuals, companies or organisations against EU decisions or actions.

¹²⁰ See, EUROPA, European Commission website: http://europa.eu/geninfo/legal_notices_en.htm.

1. Preliminary ruling procedure

The national courts in each EU country are responsible for ensuring that EU law is properly applied in that country. But there is a risk that courts in different countries might interpret EU law in different ways.

To prevent this happening, there is a 'preliminary ruling procedure'. If a national court is in doubt about the interpretation or validity of an EU law, it may – and sometimes must – ask the Court of Justice for advice. This advice is called a 'preliminary ruling'.

2. Proceedings for failure to fulfill an obligation

The Commission can start these proceedings if it believes that a member country is failing to fulfill its obligations under EU law. These proceedings may also be started by another EU country.

In either case, the Court investigates the allegations and gives its judgment. If the country is found to be at fault, it must put things right at once. If the Court finds that the country has not followed its ruling, it can issue a fine.

3. Actions for annulment

If any EU country, the Council, the Commission or (under certain conditions) Parliament believes that a particular EU law is illegal, it may ask the Court to annul it.

'Actions for annulment' can also be used by private individuals who want the Court to cancel a particular law because it directly and adversely affects them as individuals.

If the Court finds the law in question was not correctly adopted or is not correctly based on the Treaties, it may declare the law null and void.

4. Actions for failure to act

The Treaty requires Parliament, the Council and the Commission to make certain decisions under certain circumstances. If they fail to do so, member countries, other Community institutions and (under certain conditions) individuals or companies can lodge a complaint with the Court so as to have this failure to act officially recorded.

5. Direct actions

Any person or company who has suffered damage as a result of the action or inaction of the Community or its staff can bring an action seeking compensation before the General Court.

How cases are heard

A judge and an advocate general are assigned to each case that comes before the Court.

Cases submitted to the court are processed in two stages: a written stage and an oral stage.

1. Written stage

First, all the parties involved hand in a written statement to the judge responsible for the case. The judge then writes a summary of these statements and the case's legal background.

2. Oral stage

The second stage is the public hearing. Depending on how complex the case is, this can take place before a panel of 3, 5 or 13 judges or in front of the whole Court. At the hearing, lawyers from both sides put their case to the judges and the advocate general, who can question them.

The advocate-general then gives his or her opinion. After this, the judges discuss the case together and give their judgment.

Advocates-general are only required to give their opinion on the case if the Court believes that the particular case raises a new point of law. The Court does not necessarily follow the advocate-general's opinion.

The Court's judgments are majority decisions and are read out at public hearings. Pictures of hearings are frequently televised (Europe by Satellite).

The procedure for hearings in the General Court is similar, except that no opinion is given by an advocate-general.

Costa v. Enel, ECJ /European Community Supremacy (Italian Company) Nationalization of Italian Company¹²¹

By Law No 1643 of 6 December 1962 and subsequent decrees the Italian Republic nationalized the production and distribution of electric energy and created an organization, the Ente Nazionale Energia Elettrica (or ENEL) (National Electricity Board) to which the assets of the electricity undertakings were transferred.

In proceedings about the payment of an invoice for electricity between Flaminio Costa and ENEL, before the Giudice Conciliatore, Milan, Mr. Costa, as

¹²¹ Costa v Enel, European Court of Justice, 20 February 1964, Judgment, Issues of fact and of law.

a shareholder of Edison Volta, a company affected by the nationalization, and as an electricity consumer, requested the court to apply Article 177 of the EEC Treaty so as to obtain an interpretation of Articles 102, 93, 53 and 37 of the said Treaty, which Articles, he alleged, had been infringed by the Law of 6 December 1962. The Giudice Conciliatore, by order of 16 January 1964 acceding to this request, decided [to request the European Court of Justice to pronounce on the applicability of the EEC Treaty and Article 177 to the court's decision in Italy] The Italian Government submits that the request of the Giudice Conciliatore is 'absolutely inadmissible', inasmuch as a national court which is obliged to apply a national law cannot avail itself of Article 177.

By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.

By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.

The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty set out in Article 5 (2) and giving rise to the discrimination prohibited by Article 7.

The obligations undertaken under the Treaty establishing the Community would not be unconditional, but merely contingent, if they could be called in question by subsequent legislative acts of the signatories. Wherever the Treaty grants the States the right to act unilaterally, it does this by clear and precise provisions (for example Articles 15, 93 (3), 223, 224 and 225). Applications, by Member States for authority to derogate from the Treaty are subject to a special authorization procedure (for example Articles 8 (4), 17 (4), 25, 26, 73, the third subparagraph of Article 93 (2), and 226) which would lose their purpose if the Member States could renounce their obligations by means of an ordinary law.

The precedence of Community law is confirmed by Article 189, whereby a regulation 'shall be binding' and 'directly applicable in all Member States'. This provision, which is subject to no reservation, would be quite meaningless if a State could unilaterally nullify its effects by means of a legislative measure which could prevail over Community law.

It follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.

The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail. Consequently Article 177 is to be applied regardless of any domestic law, whenever questions relating to the interpretation of the Treaty arise.

The questions put to the Giudice Conciliatore regarding Articles 102, 93, 53, and 37 are directed first to enquiring whether these provisions produce direct effects and create individual rights which national courts must protect and if so what their meaning is.

Global Trade Disputes

See World Trade Organization Rules, Infra, Part II, Chapter 6

Human Rights Disputes

See International and Regional Tribunals, Infra, Part II, Chapter 2.

PART II

CHAPTER 1
USE OF FORCE*UN Charter and Prohibition of Use of Force****UN Charter, Article 2***

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles...

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

*UN Charter and Use of Force****“The UN Charter and the Use of Force,” Sir. Franklin Berman¹²²***

II. The Purpose of a Law on the Use of Force

The starting point is therefore that the law is under challenge from increasing demands for the use of force and for its legal validation. The remark may seem obvious, but I make it all the same to distance myself from a point of view that I have detected all too often amongst academic lawyers and legal commentators in my own country: the view namely that the essence of international law is to prevent force being used at all costs, to set up a sort of impenetrable barrier to its use. It is a view I frequently encountered as well amongst my

¹²² Sir. Franklin Berman, *The Singapore Yearbook of International Law*, 2004. 10 SYBIL 9–17 (2006). [Reprinted with the permission of the author and the Singapore Year Book of International Law].

diplomatic counterparts in other European capitals. If that is the characteristic European view, or were to become it, then it is hardly to be wondered at the tensions and strains that have crept into the Transatlantic relationship, as much between the lawyers as between the policy-makers.

It is not a view I share. It is inconsistent with our foundation legal text, the United Nations Charter; and it would make nonsense of that most successful of all defence alliances we remember today, the North Atlantic Treaty. If it were correct, then every time armed force was resorted to one would have to say that the legal system had failed, that it had broken down. That is not right; it may be true that resort to force shows that diplomacy has failed, that the political constraints on the escalation of disputes have broken down, but not the law. And that is so for at least one simple reason: that one of the prime functions of the law is to regulate the consequences of illegality. This is just as true of international law as of any other legal system. So the way I would phrase the essential purpose of international law is somewhat different. For me, international law has four functions in this vital area: to define (and define properly) the very limited number of situations in which the use of force is permissible; to regulate and control the use of force even when it is permissible; to determine when force that has been used was not permissible; and to regulate the consequences of resort to force, both permissible and impermissible.

It will be seen from this that I am by no means an advocate of a legal system that would open the door to frequent or regular uses of force. Quite the contrary. But no more am I the advocate of a legal system that would shrink from the challenge of defining (and, as I have already suggested, defining properly) the permissible uses of force, and drawing the necessary conclusions that follow from that.

The task is anything but an easy one; passions run high, and high political interests are engaged. Nor is the task straightforward, from a purely technical point of view. One can hardly pretend for example, looking at the record to date, that even our premier legal authority, the International Court of Justice, has made a particularly convincing job of it. Memories are still fresh of the Court's surprising dictum, in its Advisory Opinion on the Wall in the Occupied Palestinian Territory, that, as Israel did not claim that the attacks against it were imputable to a foreign State, and as the attacks in question originated within the Occupied Territory, Article 51 of the UN Charter "had no relevance" in the case.¹²³

¹²³ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, (Advisory Opinion of 9 July 2004), [2004] I.C.J. Rep. 136 at para. 103.

This dictum seemed on the face of it to limit the legal recognition of the right of self-defence to certain kinds of security threat only—a view that looks no less strange now than it did then. And in its most recent judgment, on certain aspects of that especially tragic conflict in the Congo¹²⁴, it is more by its silences than by clear words that the International Court corrects the unfortunate aspects of its earlier decision in the Nicaragua case¹²⁵. It ought now to be regarded as not open to doubt—for reasons both of legal principle and practical effectiveness—that the right of self-defence includes a right to respond in all cases of the unlawful threat or use of force, without abstract distinctions as to the source of the threat (or attack)¹²⁶. This is of course without prejudice to the question what form of response would be permissible in the particular circumstances of individual cases.

Perhaps this is therefore a good moment to stand back and reconsider what it is we want the legal controls on the use of force to do, as part of an international system equipped to deal with present-day problems under present-day conditions. That is certainly the approach taken by the UN Secretary-General's High-Level Panel on Threats, Challenges and Change¹²⁷, and by the Secretary-General himself in his report "In Larger Freedom"¹²⁸. What they say deserves great respect, and I will touch on it later.

III. National Interests and Common Interests

To my mind, the correct way to look at the problem is to map out the entire area against an analytical distinction of a fundamental kind: the distinction between the use of force in the protection of purely national interests, and the use of force in the common interest. The idea is not a new one. It reflects what is already in the UN Charter: in the Preamble to the Charter, it is stated that one of the fundamental aims behind the founding of the Organization was

¹²⁴ *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)* (2002-2005), online: <http://www.I.C.J.-cij.org/I.C.J.www/idocket/ico/icoframe.htm>.

¹²⁵ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)*, Merits, 1986 I.C.J. Rep. 14 [other citations omitted].

¹²⁶ See, in general, Chatham House, *Principles of International Law on the Use of Force by States in Self-Defence*, ILP WP 05/01 (2005), online: Chatham House <http://www.chathamhouse.org.uk/pdf/research/il/ILPForce.doc>.

¹²⁷ Report of the UN Secretary-General's High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, UN Doc. No. A/59/565 (2 December 2004), online: <http://www.un.org/secureworld/>.

¹²⁸ Report of the Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, UN Doc. No. A/59/2005 (21 March 2005), online: <http://www.un.org/largerfreedom>.

“to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest,” and in its coupling with the later reservation in Article 51 that nothing in the Charter “shall impair the inherent right of individual or collective self-defence.”

What matters however is not whether the point is new, but the enduring framework it offers for analysing the question before us, a framework consisting of: a set of principles to be accepted and of methods to be used, to ensure that force is either used in legitimate self-defence, or in the common interest, and not for any other purpose.

Why do I lay such stress on this basic proposition? Because the difference between using force in self-interest, and using force in the common interest is a fundamental one, from the conceptual point of view: it conditions the objectives for which force may legitimately be used, and the methods to be followed; and it controls, in an important way, what force may be used....

IV. Self-Defence

Distortions aside, the law of self-defence is by now well understood. It is controlled by the twin parameters of necessity and proportionality, which between them contain the capacity to adapt themselves to regulate both the circumstances in which and the degree to which force can legitimately be used¹²⁹. All that is needed, in addition, is to recognise that what necessity and proportionality measure themselves against is the threat faced by the defending State. Self-defence is designed to be the last-resort response available to a State to dispose of a threat against itself, and it arises inherently out of the legal nature of the State as the basic unit of international law. So self-defence is not, and never has been, a legal justification for punishment, or for retaliation, or for menacing deterrence; its deterrent effect lies rather in the political realm, in the combination of the practical and rhetorical willingness to stand up for one's rights, within the limits allowed by law¹³⁰.

And by the same token what the law allows by way of self-defence is what is necessary and sufficient to put paid to the unlawful threat. Some have stumbled over what they see as the paradox in the claim that self-defence following an actual use of force may justify more force than in the original attack. But there is no paradox, once the purpose of having a law of self-defence is taken into

¹²⁹ Deriving from the Webster/Ashburton correspondence over the Caroline Incident in 1841[other citations omitted].

¹³⁰ The long-established posture of NATO; see the Nuclear Weapons Advisory Opinion, *infra* note 9 at para. 48, for the International Court's recognition that “deterrence” is not of itself unlawful.

account. The calculus, of course, works both ways: self-defence may in some cases find its limits in a response less severe than the original attack.

Nothing in what I have said so far should contain the least cause for surprise. It is inherent in what lawyers are prone to use as their tablet of stone, Article 2(4) of the United Nations Charter, which proscribes the “threat” of force on exactly the same footing as the “use” of force. And as the International Court wisely pointed out in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, if an actual use of force would be illegal, then the threat to use it would be equally illegal¹³¹. To which I would add “and vice versa,” from which it simply has to follow, in my view, that the law of self-defence allows a forcible response to an unlawful threat—so long as the response meets the requirements both of necessity and proportionality. If the International Court said anything different in its Judgment in the US/Nicaragua case, then it was wrong....

V. Use of Force in the Common Interest

Which brings me to the second part: the use of force in the common interest. I have put the matter in those terms, rather than using the labels “humanitarian intervention,” “war against terrorism,” or “weapons of mass destruction,” in order to bring out the common thread between those three very different cases, namely that what is being thought to be achieved by the employment of force is the vindication of a common international interest.

The threat, in other words, is not to the particular interests of a given State or group of States, but to the well-being of international society at large. Note that the conditioning factor is once again a “threat.” Nor should that surprise us if we return to the United Nations Charter and remind ourselves that the first, and also the most wide-ranging, of the trilogy of malfunctions with which the Security Council is empowered to deal is “threats to the peace.” While “breaches of the peace” and “acts of aggression” are relatively confined in their operation, it is in ‘threats to the peace’ that the greatest inbuilt flexibility resides, and especially so when the issue is prevention not cure.

The important point is, however, that all of these threats imperil common interests, not those of individual States as such. As the Secretary-General again pointedly puts it: “As to genocide, ethnic cleansing and other such crimes against humanity are they not also threats to international peace and security, against which humanity should be able to look to the Security Council for protection?” Yes indeed, is my answer—with the sole exception that the Secretary-General uses ‘threats to international peace and security’ where I have used “common interests.”

¹³¹ Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion of 8 July 1996), [1996] I.C.J. Rep. 226 at para. 47.

Why he does so is obvious enough; he is moving within the textual framework of the Charter, and specifically the provisions governing the Security Council.

Legality of the Threat or Use of Nuclear Weapons, I.C.J. Advisory Opinion, 1996¹³²

37. The Court will now address the question of the legality or illegality of recourse to nuclear weapons in the light of the provisions of the Charter relating to the threat or use of force.

38. The Charter contains several provisions relating to the threat and use of force. In Article 2, paragraph 4, the threat or use of force against the territorial integrity or political independence of another State or in any other manner inconsistent with the purposes of the United Nations is prohibited. That paragraph provides:

“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.”

This prohibition of the use of force is to be considered in the light of other relevant provisions of the Charter. In Article 51, the Charter recognizes the inherent right of individual or collective self-defense if an armed attack occurs. A further lawful use of force is envisaged in Article 42, whereby the Security Council may take military enforcement measures in conformity with Chapter VII of the Charter.

39. These provisions do not refer to specific weapons. They apply to any use of force, regardless of the weapons employed. The Charter neither expressly prohibits, nor permits, the use of any specific weapon, including nuclear weapons. A weapon that is already unlawful per se, whether by treaty or custom, does not become lawful by reason of its being used for a legitimate purpose under the Charter....

46. Certain States asserted that the use of nuclear weapons in the conduct of reprisals would be lawful. The Court does not have to examine, in this context, the question of armed reprisals in time of peace, which are considered to be unlawful. Nor does it have to pronounce on the question of belligerent reprisals save to observe that in any case any right of recourse to such reprisals would, like self-defense, be governed inter alia by the principle of proportionality.

¹³² *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226.*

47. In order to lessen or eliminate the risk of unlawful attack, States sometimes signal that they possess certain weapons to use in self-defense against any State violating their territorial integrity or political independence. Whether a signalled intention to use force if certain events occur is or is not a “threat” within Article 2, paragraph 4, of the Charter depends upon various factors. If the envisaged use of force is itself unlawful, the stated readiness to use it would be a threat prohibited under Article 2, paragraph 4. Thus it would be illegal for a State to threaten force to secure territory from another State, or to cause it to follow or not follow certain political or economic paths. The notions of “threat” and “use” of force under Article 2, paragraph 4, of the Charter stand together in the sense that if the use of force itself in a given case is illegal - for whatever reason - the threat to use such force will likewise be illegal. In short, if it is to be lawful, the declared readiness of a State to use force must be a use of force that is in conformity with the Charter. For the rest, no State - whether or not it defended the policy of deterrence - suggested to the Court that it would be lawful to threaten to use force if the use of force contemplated would be illegal.

48. Some States put forward the argument that possession of nuclear weapons is itself an unlawful threat to use force. Possession of nuclear weapons may indeed justify an inference of preparedness to use them. In order to be effective, the policy of deterrence, by which those States possessing or under the umbrella of nuclear weapons seek to discourage military aggression by demonstrating that it will serve no purpose, necessitates that the intention to use nuclear weapons be credible. Whether this is a “threat” contrary to Article 2, paragraph 4, depends upon whether the particular use of force envisaged would be directed against the territorial integrity or political independence of a State, or against the Purposes of the United Nations or whether, in the event that it were intended as a means of defense, it would necessarily violate the principles of necessity and proportionality. In any of these circumstances the use of force, and the threat to use it, would be unlawful under the law of the Charter.

The Legality of Use of Force: Self Defense

UN Charter, Article 51

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Se-

curity Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

***Military and Paramilitary Activities in and against
Nicaragua (Nicaragua v. United States), 1986***¹³³

190. A further confirmation of the validity as customary international law of the principle of the prohibition of the use of force expressed in Article 2, paragraph 4, of the Charter of the United Nations may be found in the fact that it is frequently referred to in statements by State representatives as being not only a principle of customary international law but also a fundamental or cardinal principle of such law. The International Law Commission, in the course of its work on the codification of the law of treaties, expressed the view that 'the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*' (paragraph (1) of the commentary of the Commission to Article 50 of its draft Articles on the Law of Treaties, ILC Yearbook, 1966-II, p. 247). Nicaragua in its Memorial on the Merits submitted in the present case states that the principle prohibiting the use of force embodied in Article 2, paragraph 4, of the Charter of the United Nations 'has come to be recognized as *jus cogens*'. The United States, in its Counter-Memorial on the questions of jurisdiction and admissibility, found it material to quote the views of scholars that this principle is a 'universal norm', a 'universal international law', a 'universally recognized principle of international law', and a 'principle of *jus cogens*'...

195. In the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack. Reliance on collective self-defence of course does not remove the need for this. There appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks. In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also 'the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to' (*inter alia*) an actual armed attack conducted by regular forces, 'or

¹³³ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 14.

its substantial involvement therein'. This description, contained in Article 3, paragraph (g), of the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX), may be taken to reflect customary international law. The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces. But the Court does not believe that the concept of 'armed attack' includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States. It is also clear that it is the State which is the victim of an armed attack which must form and declare the view that it has been so attacked. There is no rule in customary international law permitting another State to exercise the right of collective self-defence on the basis of its own assessment of the situation. Where collective self-defence is invoked, it is to be expected that the State for whose benefit this right is used will have declared itself to be the victim of an armed attack.

196. The question remains whether the lawfulness of the use of collective self-defence by the third State for the benefit of the attacked State also depends on a request addressed by that State to the third State. A provision of the Charter of the Organization of American States is here in point: and while the Court has no jurisdiction to consider that instrument as applicable to the dispute, it may examine it to ascertain what light it throws on the content of customary international law...

199. At all events, the Court finds that in customary international law, whether of a general kind or that particular to the inter-American legal system, there is no rule permitting the exercise of collective self-defence in the absence of a request by the State which regards itself as the victim of an armed attack. The Court concludes that the requirement of a request by the State which is the victim of the alleged attack is additional to the requirement that such a State should have declared itself to have been attacked...

201. To justify certain activities involving the use of force, the United States has relied solely on the exercise of its right of collective self-defence. However the Court, having regard particularly to the non-participation of the United States in the merits phase, considers that it should enquire whether customary international law, applicable to the present dispute, may contain other rules which may exclude the unlawfulness of such activities... [T]he Court must

enquire whether there is any justification for the activities in question, to be found not in the right of collective self-defence against an armed attack, but in the right to take counter-measures in response to conduct of Nicaragua which is not alleged to constitute an armed attack. It will examine this point in connection with an analysis of the principle of non-intervention in customary international law...

229. The Court must thus consider whether, as the Respondent claims, the acts in question of the United States are justified by the exercise of its right of collective self-defence against an armed attack. The Court must therefore establish whether the circumstances required for the exercise of this right of self-defence are present and, if so, whether the steps taken by the United States actually correspond to the requirements of international law. For the Court to conclude that the United States was lawfully exercising its right of collective self-defence, it must first find that Nicaragua engaged in an armed attack against El Salvador, Honduras or Costa Rica.

230. As regards El Salvador, the Court has found (paragraph 160 above) that it is satisfied that between July 1979 and the early months of 1981, an intermittent flow of arms was routed via the territory of Nicaragua to the armed opposition in that country. The Court was not however satisfied that assistance has reached the Salvadorian armed opposition, on a scale of any significance, since the early months of 1981, or that the Government of Nicaragua was responsible for any flow of arms at either period. Even assuming that the supply of arms to the opposition in El Salvador could be treated as imputable to the Government of Nicaragua, to justify invocation of the right of collective self-defence in customary international law, it would have to be equated with an armed attack by Nicaragua on El Salvador. As stated above, the Court is unable to consider that, in customary international law, the provision of arms to the opposition in another State constitutes an armed attack on that State. Even at a time when the arms flow was at its peak, and again assuming the participation of the Nicaraguan Government, that would not constitute such armed attack.

231. Turning to Honduras and Costa Rica, the Court has also stated (paragraph 164 above) that it should find established that certain trans-border incursions into the territory of those two States, in 1982, 1983 and 1984, were imputable to the Government of Nicaragua. Very little information is however available to the Court as to the circumstances of these incursions or their possible motivations, which renders it difficult to decide whether they may be treated for legal purposes as amounting, singly or collectively, to an 'armed attack' by Nicaragua on either or both States. The Court notes that during the Security Council debate in March/April 1984, the representative of Costa Rica

made no accusation of an armed attack, emphasizing merely his country's neutrality and support for the Contadora process (S/PV.2529, pp. 13-23); the representative of Honduras however stated that 'my country is the object of aggression made manifest through a number of incidents by Nicaragua against our territorial integrity and civilian population' (ibid., p. 37). There are however other considerations which justify the Court in finding that neither these incursions, nor the alleged supply of arms to the opposition in El Salvador, may be relied on as justifying the exercise of the right of collective self-defence.

232. The exercise of the right of collective self-defence presupposes that an armed attack has occurred; and it is evident that it is the victim State, being the most directly aware of that fact, which is likely to draw general attention to its plight. It is also evident that if the victim State wishes another State to come to its help in the exercise of the right of collective self-defence, it will normally make an express request to that effect. Thus in the present instance, the Court is entitled to take account, in judging the asserted justification of the exercise of collective self-defence by the United States, of the actual conduct of El Salvador, Honduras and Costa Rica at the relevant time, as indicative of a belief by the State in question that it was the victim of an armed attack by Nicaragua, and of the making of a request by the victim State to the United States for help in the exercise of collective self-defence.

233. The Court has seen no evidence that the conduct of those States was consistent with such a situation, either at the time when the United States first embarked on the activities which were allegedly justified by self-defence or indeed for a long period subsequently. So far as El Salvador is concerned, it appears to the Court that while El Salvador did in fact officially declare itself the victim of an armed attack, and did ask for the United States to exercise its right of collective self-defence, this occurred only on a date much later than the commencement of the United States activities which were allegedly justified by this request. The Court notes that on 3 April 1984, the representative of El Salvador before the United Nations Security Council, while complaining of the 'open foreign intervention practised by Nicaragua in our internal affairs' (S/PV.2528, p. 58), refrained from stating that El Salvador had been subjected to armed attack, and made no mention of the right of collective self-defence which it had supposedly asked the United States to exercise. Nor was this mentioned when El Salvador addressed a letter to the Court in April 1984, in connection with Nicaragua's complaint against the United States. It was only in its Declaration of Intervention filed on 15 August 1984, that El Salvador referred to requests addressed at various dates to the United States for the latter to exercise its right of collective self-defence (para. XII), asserting on this occasion that it had been the victim of aggression from Nicaragua 'since at

least 1980'. In that Declaration, El Salvador affirmed that initially it had 'not wanted to present any accusation or allegation [against Nicaragua] to any of the jurisdictions to which we have a right to apply', since it sought 'a solution of understanding and mutual respect' (para. III).

234. As to Honduras and Costa Rica, they also were prompted by the institution of proceedings in this case to address communications to the Court; in neither of these is there mention of armed attack or collective self-defence. As has already been noted (paragraph 231 above), Honduras in the Security Council in 1984 asserted that Nicaragua had engaged in aggression against it, but did not mention that a request had consequently been made to the United States for assistance by way of collective self-defence. On the contrary, the representative of Honduras emphasized that the matter before the Security Council 'is a Central American problem, without exception, and it must be solved regionally' (S/PV.2529, p. 38), i.e., through the Contadora process. The representative of Costa Rica also made no reference to collective self-defence. Nor, it may be noted, did the representative of the United States assert during that debate that it had acted in response to requests for assistance in that context.

235. There is also an aspect of the conduct of the United States which the Court is entitled to take into account as indicative of the view of that State on the question of the existence of an armed attack. At no time, up to the present, has the United States Government addressed to the Security Council, in connection with the matters the subject of the present case, the report which is required by Article 51 of the United Nations Charter in respect of measures which a State believes itself bound to take when it exercises the right of individual or collective self-defence. The Court, whose decision has to be made on the basis of customary international law, has already observed that in the context of that law, the reporting obligation enshrined in Article 51 of the Charter of the United Nations does not exist. It does not therefore treat the absence of a report on the part of the United States as the breach of an undertaking forming part of the customary international law applicable to the present dispute. But the Court is justified in observing that this conduct of the United States hardly conforms with the latter's avowed conviction that it was acting in the context of collective self-defence as consecrated by Article 51 of the Charter. This fact is all the more noteworthy because, in the Security Council, the United States has it-self taken the view that failure to observe the requirement to make a report contradicted a State's claim to be acting on the basis of collective self-defence (S/PV.2187).

236. Similarly, while no strict legal conclusion may be drawn from the date of El Salvador's announcement that it was the victim of an armed attack, and the date of its official request addressed to the United States concerning the

exercise of collective self-defence, those dates have a significance as evidence of El Salvador's view of the situation. The declaration and the request of El Salvador, made publicly for the first time in August 1984, do not support the contention that in 1981 there was an armed attack capable of serving as a legal foundation for United States activities which began in the second half of that year. The states concerned did not behave as though there were an armed attack at the time when the activities attributed by the United States to Nicaragua, without actually constituting such an attack, were nevertheless the most accentuated; they did so behave only at a time when these facts fell furthest short of what would be required for the Court to take the view that an armed attack existed on the part of Nicaragua against El Salvador....

238. Accordingly, the Court concludes that the plea of collective self-defence against an alleged armed attack on El Salvador, Honduras or Costa Rica, advanced by the United States to justify its conduct toward Nicaragua, cannot be upheld; and accordingly that the United States has violated the principle prohibiting recourse to the threat or use of force by the acts listed in paragraph 227 above, and by its assistance to the contras to the extent that this assistance 'involve[s] a threat or use of force' (paragraph 228 above).

Legality of the Threat or Use of Nuclear Weapons, I.C.J. Advisory Opinion, 1996¹³⁴

40. The entitlement to resort to self-defense under Article 51 is subject to certain constraints. Some of these constraints are inherent in the very concept of self-defense. Other requirements are specified in Article 51.

41. The submission of the exercise of the right of self-defense to the conditions of necessity and proportionality is a rule of customary international law. As the Court stated in the case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America): there is a "specific rule whereby self-defense would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law" (I.C.J. Reports 1986, p.94, para. 176). This dual condition applies equally to Article 51 of the Charter, whatever the means of force employed.

42. The proportionality principle may thus not in itself exclude the use of nuclear weapons in self-defense in all circumstances. But at the same time, a

¹³⁴ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226.

use of force that is proportionate under the law of self-defense, must, in order to be lawful, also meet the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law.

43. Certain States have in their written and oral pleadings suggested that in the case of nuclear weapons, the condition of proportionality must be evaluated in the light of still further factors. They contend that the very nature of nuclear weapons, and the high probability of an escalation of nuclear exchanges, mean that there is an extremely strong risk of devastation. The risk factor is said to negate the possibility of the condition of proportionality being complied with. The Court does not find it necessary to embark upon the quantification of such risks; nor does it need to Enquirer into the question whether tactical nuclear weapons exist which are sufficiently precise to limit those risks: it suffices for the Court to note that the very nature of all nuclear weapons and the profound risks associated therewith are further considerations to be borne in mind by States believing they can exercise a nuclear response in self-defense in accordance with the requirements of proportionality.

44. Beyond the conditions of necessity and proportionality, Article 51 specifically requires that measures taken by States in the exercise of the right of self-defense shall be immediately reported to the Security Council; this article further provides that these measures shall not in any way affect the authority and responsibility of the Security Council under the Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security. These requirements of article 51 apply whatever the means of force used in self-defense...

96. Furthermore, the Court cannot lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defence, in accordance with Article 51 of the Charter, when its survival is at stake.

Nor can it ignore the practice referred to as “policy of deterrence,” to which an appreciable section of the international community adhered for many years. The Court also notes the reservations which certain nuclear-weapon States have appended to the undertakings they have given, notably under the Protocols to the Treaties of Tlatelolco and Rarotonga, and also under the declarations made by them in connection with the extension of the Treaty on the Non-Proliferation of Nuclear Weapons, not to resort to such weapons.

97. Accordingly, in view of the present state of international law viewed as a whole, as examined above by the Court, and of the elements of fact at its disposal, the Court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defense, in which its very survival would be at stake.

Ruth Wedgwood, “UN Peace Keeping Operations and the Use of Force”¹³⁵

Peacekeeping was born, if you like, in the interstices of the U.N. Charter. The famous joke is that peacekeeping is authorized under chapter “6^{1/2}” of the Charter – mid way between the Council’s procedures for conciliation and its procedures for deploying force. (When my students go to the Charter and announce they can’t find chapter “6^{1/2},” I always tell them it’s in the fine print.) Peacekeeping was supposed to be limited in function. It was intended as an interpositional buffer, an armed observation force, designed to discourage adversaries from violating a ceasefire or peace agreement. But it was a minimal show of force, almost a form of bird watching, boundary observation by men who happened to wear uniforms. Peacekeepers could keep apart parties agreeing to a truce and discourage the small provocations of night time forays and border encounters. Having neutral observers on the border gave a bit of dignity to the fact of separation. It gave the parties a reason why they were not obliged to “have at” each other every foggy night....

The classical account of peacekeeping – the view of older U.N. hands such as Sir Marrack Goulding and Sir Brian Urquhart, and the reason why some people in the U.N. fervently believed that the organization should not go into Bosnia – says that at least three conditions must be met for peacekeeping to work. First, consent of the parties to peacekeepers’ presence, upon entry and throughout the mission. Second, the minimal use of force, mustering arms only in self-defense. And third, neutrality between the parties – for peacekeeping was not an attempt to change the outcome of a war or conflict. (The moral adequacy of “neutrality” has been contested when the U.N. deploys in circumstances where one side is the aggressor or abuses the laws of war.)....

Whether a matter of philosophy or political skittishness, the U.N. and its members have often proved unwilling to use armed force in circumstances where a robust deployment might be effective. This is often ascribed to member states’ reluctance to jeopardize their forces. Failure to deploy robustly may also signal an implicit sympathy with one of the sides in the conflict. But it is engendered as well by an ethos of nonviolence within the United Nations itself – a lingering doubt about the necessary use of defensive force in the international community, perhaps a belief that the thin personality of a multilateral organization cannot sustain the morally contentious choices that are made by nation states in defense of their own existence¹³⁶. So U.N. forces were put

¹³⁵ Ruth Wedgwood, “United Nations Peacekeeping Operations and the Use of Force,” 5 Washington University Journal of Law & Policy 69 (2001).

¹³⁶ When military force is not used in an intelligent and morally responsible way, it

on the ground in Bosnia with the very limited mandate of delivering food and humanitarian assistance....

The real peacekeeping lesson of the last ten years is that the idea of separating chapter 6^{1/2} from chapter 7 is not realistic. Peacekeeping is not segregable from robust peace enforcement. Too many situations quickly turn sour, and one cannot always predict the course of events in advance. One almost needs a “Powell-Weinberger” doctrine for the U.N. itself – a willingness to go in with overwhelming force, in the confidence that the capacity to respond is the best guarantee of cooperation. It is an illusion that the international personality of the U.N. will suffice to deter combatants in civil conflicts, and the illusion has repeatedly led to disaster.

Nurullah Yamali, “The Use of Force For Collective Security and Peacekeeping at the End of the Twentieth Century”¹³⁷

When the first peacekeeping operation established, the former UN Secretary-General Dag Hammarskjöld described peacekeeping operations as “Chapter Six and a Half,” falling conceptually between Chapter VI and Chapter VII of the Charter¹³⁸. Indeed, the peacekeeping operations cannot be defined as a peaceful resolution or an enforcement power.

Cox claims that “the constitutional basis of the UN peacekeeping operations is the “broad mandate” of Article 1 of the Charter¹³⁹.” Literally, in the Charter the first purpose of the UN is described as “To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace.”

According to this provision the UN has the authority to take the most effective measure in the conditions of day-to-day in order to maintain international peace and security. In the Certain Expenses request for Advisory Opinion the International Court of Justice adopted the same view related to the issue of their constitutionality....

sometimes leads the international community to use other forms of coercion, such as economic sanctions, which can be much harder on a civilian population, as we have seen in Haiti and Iraq. Attitudes towards the discrete use of military force must take account of the often greater cost of alternatives.

¹³⁷ E-journal of Ministry of Justice, Turkey. <http://www.justice.gov.tr/e-journal/pdf/LW7042.pdf> [reprinted with permission of the author].

¹³⁸ Amy E. Eckert, Comment, “United Nations Peacekeeping in Collapsed States,” 5 J. Int’l L. & Prac. 273, 282- 84 (1996).

¹³⁹ Katherine E. Cox, “Beyond Self-Defense: United Nations Peacekeeping Operations and the Use of Force,” (1999) 27 Denv. J. Int’l L. & Pol’y 239.

Besides that, the peacekeeping operations rely on three fundamental principles that contribute to their constitutional basis. The first principle is the solution of the issue about the legal basis for the emplacement and presence of a peacekeeping force within a state. The emplacement and the continuous presence of a peacekeeping operation requires the state's consent, otherwise it will be a violation of the Article 2 (7) of the Charter, which prevents the UN to intervene in matters within the domestic jurisdiction of the states [citation omitted]. A UN peacekeeping force should be "strictly impartial"¹⁴⁰....

The last fundamental principle of the peacekeeping operations is to use of force only in self-defense. The force of use in peacekeeping operations has two aspects, the first is minimum use of force and the second is the use force for self-defense only¹⁴¹. A clear definition of "the use of force except in self defense" have been made in the case of UNEF I, "men engaged in the operation may never take the initiative in the use of armed force, but are entitled to respond with force to an attack with arms, including attempts to use of force to make them withdraw from positions which they occupy under orders from the Commander, acting under the authority of the Assembly and within the scope of its resolutions."¹⁴² In this definition the key point is not to take the initiative in the use of armed force. Sloan describes this limitation as the distinction between peacekeeping and peace enforcement¹⁴³.

Anticipatory/Preemptive Use of Force

Louis-Philippe Rouillard, "The Caroline Case: Anticipatory Self-Defense in Contemporary International Law"¹⁴⁴

The Affair of the Caroline and the McLeod Case

The Caroline incident concerns a steamboat bearing that name used for revolutionary purposes in the rebellion of Upper Canada, a Province of the Dominion

¹⁴⁰ Viseman, H. "Peacekeeping in the International Context" in Rikhye, I.J., and Skjelsbaek, K. (ed.) "The United Nations and Peacekeeping: Results, Limits and Prospects," (International Peace Academy, New York, 1990) p.32.

¹⁴¹ Murphy, R., "United Nations Peacekeeping in Lebanon and Somalia, and the Use of Force" 8 J. Conflict & Security L. 71 (2003).

¹⁴² Sloan, J., "The Use of Offensive Force in U.N. Peacekeeping: A Cycle of Boom and Bust?" *Hastings Int'l & Comp. L. Rev.* 385 (2007).

¹⁴³ *Ibid.*

¹⁴⁴ Miskolc Journal of International Law. <http://www.uni-miskolc.hu/~wwwdrint/mjil.htm>. Reprinted with permission of the author. [Citations omitted]

of Great Britain ; nowadays the Province of Ontario, Canada. The rebellion of 1837 was rooted in the political system of cronyism that pervaded colonial politics in the British colonies of the Canadas, both Lower and Upper. It flared because of insensitivities of the British authorities towards the complaints of the inhabitants of the Canada and the confrontationist attitude of the Crown. While much have been made of the democratic and nationalistic issues of the Quebeckers, the rebellion had more to do with a non-representative system and underlying patronage. The rebellion of Lower Canada was over by the end of the summer and that of Upper Canada was in disarray by December 1837. At that time, the remnants of the rebels fled to the United States where they tried to raise support for further continuation of the rebellion in Buffalo (New York). This presence and threat caused to international peace between Great Britain and the United States was known to the American authorities. Instructions were issued to the districts attorneys of Vermont, Michigan and New York stating the President's intention to respect its international obligations and abstaining from any intervention in the domestic affairs of another nation [8].

On December 13, 1837 the rebel MacKenzie issued a proclamation for rebellion and recruited American help for the invasion of Upper Canada. A headquarter was set up on Navy island, a small island part of British territory across the Niagara River where the shores between Canada and the United States are at a very close point. These movements created enough attention on the British side of the river as to have the Lieutenant-Governor of Upper Canada send a message to the Governor of the State of New York to inform him of the situation. No answer came back. Between the 13th and the 28th of December, 1837, up to 300 men under the leadership of an appointed an American 'general' named Van Rausselear were armed and joined the headquarters of the Canadian rebels on Navy Island. By the night of December 29, 1837, this force was seen growing to 1000 armed men. Reinforcements were made through constant movements from the American shore to Navy Island, between three in the afternoon and dusk.

Seeing the use made of the ship, Colonel Allan Napier McNab, the officer commanding the British forces at Chippewa, judged that the destruction of the Caroline would prevent further reinforcements to Navy Island and deprive the rebels of their mean of invasion. He therefore ordered an expedition to be sent out for this purpose. According to the master of the Caroline, the ship was docked and moored at Fort Schlosser for the night with ten officers and crew on board, as well as twenty-three Americans who asked to be permitted to spend the night as they could not found lodging at the tavern nearby. Around midnight, a force of 70 to 80 from several small boats boarded the Caroline and commenced warfare with muskets, swords and cutlasses. The

vessel was abandoned by all hands, the only efforts of its crew being to flee. Thus captured, the vessel was left to the possession of the British forces that cut her loose, towed her into the current of the river, set her on fire and let her descend the current towards the Niagara Falls, where she was destroyed. Twelve persons were initially said to have been killed or disappeared.

As was established after investigations, it is a force of 45 men in 5 boats under the command of Commander Andrew Drew (Royal Navy), acting upon orders of Colonel McNab, that boarded, set fire to and let the ship descend adrift. The place where the Caroline was moored was at Schlosser, a small landing point in the State of New York less than 5 kilometres upstream from the Niagara Falls, rather than Fort Schlosser, an old and abandoned American fort of the War of 1812 between the United States and Great Britain which was higher upstream from the falls.

Contrary to the opinions expressed at first, it is not 12 persons that died during that night, but two: Amos Durfee, killed on the docks by a bullet in the head, and a cabin boy known as "Little Billy," shot while trying to escape the Caroline. Two prisoners were made: an American citizen of 19 years old and a Canadian fugitive. Both were let go: the American with enough money to pay for the ferry back to the United States and the Canadian after spending some time in the guard room at Chippewa.

On January 5, 1838, President Van Buren sent a message to Congress to ask for full power to prevent injuries being inflicted upon neighbouring nations by unlawful acts of American citizens or persons within the territories of the United States and General Scott was sent to the frontier with letters to the Governors of New York and Vermont, calling the militias. The rebels were dispersed, but some continued the struggle within secret societies called Hunters' Lodges. This led to another short-lived rebellion in Canada in 1838, but it was harshly and swiftly dealt with. In Canada, the impact of these rebellions was the Act of the Union of both Canadas into a single province of the Dominion, attempting to assimilate French-Canadian to diminish the likelihood of another attempt. The impact on the relations of the United States and the British Crown was one where a true settlement of the North-eastern boundary had to be reached if war was to be averted. While the facts of the incident could be made light of were it not for the death of two persons, they are nonetheless of much importance as the whole doctrine of anticipatory self-defence rest upon them.

The legal argument concerning the case started with the note sent on January 5, 1838 by the American Secretary of State Forsyth to the British Minister at Washington, Fox, expressing surprise and regret for this incident

and warning that this incident would be made the subject of a demand for redress. Mr. Fox replied by letter on February 6, 1838 and stated three defences for the actions of the British forces, namely: 1) the piratical nature of the vessel, 2) the fact that the ordinary laws of the United States were not being enforced at the time, and were in fact overtly overborne by the rebels and 3) self-defence and self-preservation. This curt response to the American government marked an attitude of not taking the matter too seriously by the British Authorities. This exchange prompted the report of the Law Officers, but did not move the British Authorities to recognise any wrong-doing. This being judged unsatisfactory by the American government, the matter was brought up by the American ambassador in London, Stevenson, to the British Foreign Secretary, Lord Palmerston, who promised to look into the matter. The matter was indeed looked upon once more by the Law Officers. But their conclusion of March 25, 1838 and added to their report of February 21, 1838, was while the incident was regrettable, they felt that the actions of the British Authorities were absolutely necessary for the future and not retaliation for the past. As a result, they believed that the conduct of the British force had been, under the circumstances, justifiable by the Law of Nations. Arguments and reminders were made back and forth during the ensuing period, but none led to a satisfactory settlement of the question.

Meanwhile, the relations between the two nations remained difficult. The local population at Buffalo seemed inclined toward retaliation and conflict was quite possible. Also, British nationals in the United States suspected of having taken part in the events of the *Caroline* were made to stand Juridical Examination on charges of participating in the attack. A man named Christie was arrested those charges on August 23, 1838. The Queen's Advocate, seized of the case, counseled the British Minister in Washington, Fox, in a dispatch dated November 6, 1838, that such an arrest cannot hold due to the fact that the actions that Mr. Christie is accused of are acts of public persons obeying the orders of superior authorities. Therefore, Mr. Christie could not be held accountable for these acts even if he had taken part in them.

Following this, a Canadian deputy sheriff named Alexander McLeod boasted of his part in the events of the *Caroline* during a passage through Lewiston, New York, on November 12, 1840. Acting on his ill-advised words, the American authorities arrested him immediately on charges of the murder of Amos Durfee and arson in connection of the burning of the *Caroline*.

On December 13, 1840, Fox addressed a note to Forsyth taking again the principles laid in the Christie case and by which public persons could not be held accountable for acts of governments. Forsyth replied that the arrest of

McLeod was made by the authorities of the State of New York and therefore infringement by the Federal government in the state's sphere of jurisdiction would not be appropriate. It is important to recall that President Van Buren was a former governor of the State of New York and was vying for re-election at the time of the exchange between Fox and Forsyth. The argument about States' jurisdiction and Federal competences was one of the most sensitive political issues in the American Union at that precise moment. Martin Van Buren lost the elections and the new government of William Henry Harrison took a more pragmatic approach to the problem of relations with Great Britain from its inaugural ceremony on March 4, 1841. Apt Minister, Fox felt the change of Administration opportune to demand the release of Alexander McLeod and sent a demand on March 12, 1841 to the new Secretary of State, Daniel Webster, who took a more lenient view than his predecessor on the matter. Indeed, the Harrison administration was of the opinion that while the Constitution of the United States created very clear fields of jurisdiction, the Federal Government was the one concerned with foreign relations and as a result it is most apt to intervene with the State of New York and obtain the release of a foreign national. Webster replied on March 15, 1841 that the American government is guided by the opinion that an individual who acts as part of a public force cannot answer personally for those acts. This principle applied to criminal lawsuits as well as civil ones.

Nonetheless, a last hurdle had to be crossed before McLeod could be released: that of judicial process. Since McLeod was accused and confined by reason of judicial process, he could only be released in this manner, this meaning that he had to be brought to courts so the prosecutor could enter a plea of *nolle prosequi* – no prosecution. Webster addressed a letter to Fox on April 24, 1841 explaining that while the laws of Great Britain permitted the prosecutor to enter this measure of *nolle prosequi* at any time during procedure, the laws of the State of New York only permitted this during sessions of the court.

This displeased Fox immensely as he pointed out that the whole point was not that McLeod be found not guilty but that he be not judged at all. Still, the Supreme Court of New York refused leave to enter a *nolle prosequi* and also refused a writ of habeas corpus. The only manner in which the court could see this done was by trial by jury. The trial of *The People v. McLeod* took place and no evidence of McLeod's participation could be brought to court. He was acquitted in October 1841.

This long delay of releasing McLeod and the still precarious relations between the North American neighbours led Great Britain to send a Special Minister to Washington to negotiate both issues in the person of Alexander

Baring, 1st Baron of Ashburton. During the course of their negotiations, both he and Secretary of State Webster exchanged a number of letters that formed the root of anticipatory self-defence.

The first such recorded instance is in the letter of July 27, 1842 where Webster expresses the notion that the principle of non-intervention is of a salutary nature and that simple neutrality is not sufficient for the government of the United States, and that it has therefore actively sought to prevent injury to Great Britain in its North American Provinces. Webster position therefore was that since the United States had respected its obligation under the Law of Nations, it was for Great Britain to justify its actions by demonstrating a:

“necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it. It must be shown that admonition or remonstrance to the persons on board the “Caroline” was impracticable, or would have been unavailing; it must be shown that daylight could not be waited for; that there could be no attempt at discrimination, between the innocent and the guilty; that it would not have been enough to seize and detain the vessel; but that there was a necessity, present and inevitable, for attacking her, in the darkness of the night, while moored to the shore, and while unarmed men were asleep on board, killing some, and wounding others, and then drawing her into the current, above the cataract, setting her on fire, and, careless to know whether there might not be in her the innocent with the guilty, or the living with the dead, committing her to a fate, which fills the imagination with horror.”

It was clearly the belief of Webster that Ashburton could not demonstrate this and that the terms were too strict to be interpreted in such a way as to justify the British actions, therefore preparing the way for reparations to be given to the United States. In this, he was sorely disappointed with the ingenious response of Lord Ashburton in his letter of July 28, 1842. Ashburton assented to the conditions presented by Webster as general principles of international law applicable to the case. He fully recognised the inviolability of the territories of independent nations for the maintenance of peace and

order amongst nations. However, he adds that there are occasional practices, including that of the United States, where this principle may and must be suspended.

Ashburton sets such instances as those where, for the shortest possible time and due to an overruling necessity and within the narrow confines of such a necessity, self-defence may be invoked. He firstly states that self-defence is the first law of nature and is recognised by every code that regulates the condition and the relations of man. Doing so, he recognises fully the general principles laid down by Webster and set his argument upon them but establishes a difference between expeditions across national border and the case of the *Caroline*. He presents the example of a situation where a man standing on grounds where you have no legal rights to chase him presents himself with a weapon long enough to reach you. He then asks how long one is supposed to wait when he has asked for succour and asked for relief and none are forwarding. By doing so, he recognised the efforts made by the United States to prevent American taking part in the Canadian rebellion, by underlines the inefficiency of its attempts.

Furthermore, Ashburton includes in his version of the events that the initial efforts to capture the *Caroline* was to seize her in British waters at Navy Island, and not on the American side but that since the orders of the rebel leaders were disobeyed, the *Caroline* went, docked and was moored at Schlosser point. It is only as he passed the point of Navy Island that Commander Drew did not see the ship there but on the American shore and that pursuant with his mission forged ahead. This statement addressed the question by which not a moment was left to deliberation, that the expedition was not planned with the intent of invading American territory from the outset by those circumstances and that the necessity of preventing the rebels from further use of the ship as a mean of invasion overwhelmed the normal respect of national territory.

Having recognised the general principles and explained the particulars of the overwhelming immediacy of the decision, Ashburton then turns toward the notion of necessity to answer the claims of Webster that nothing could justify the attack in the middle of the night against men asleep, killing and wounding some, then drawing the ship into the current, setting her on fire and letting her adrift into the current to be destroyed in the falls without knowing if guilty or innocents were on board.

Ashburton responded that the time of the night was purposely selected to ensure that the mission would result in the least loss of life possible and that it is the strength of the current that did not permit the vessel to be car-

ried off to the Canadian side. For this reason, it became necessary to set her on fire and draw into the stream to prevent injury to persons or property at Schlosser. He finishes the letter by recognizing that Her Majesty's Government should have apologized nonetheless for the matter, but that it does not make it wrongful in itself. And further continues to support that the treatment of individuals made personally responsible for acts of government was as unacceptable.

Webster responded to this note on August 6, 1842. In his letter, he further reaffirms the criterion laid in his letter of July 27 and while agreeing with the matters of apologies still recognised the general principles debated but still did not corroborate the facts of the case. Nonetheless, satisfied with the apologies, the President stipulated through Webster that this matter would not be brought forward again.

As a result the affair of the *Caroline* in 1837 and the subsequent case of *The People vs. McLeod* have established principles now firmly entrenched in *ius ad bellum* and *ius in bello*. In the case of the laws of armed conflicts, *McLeod's* case has confirmed the separation between public acts and individual responsibility. With regards to the right to use force in international law, the affair of the *Caroline* case has once again confirmed the right of self-defence and, more importantly, has established clear criterion for its invocation and that of anticipatory self-defence.

“Legality of Use of Force Against Iraq,” Legal Opinion by Public Interest Lawyers on Behalf of Peacerights¹⁴⁵

Introduction and Summary of Advice

1. We are instructed by Peacerights to give an opinion on the legality of the use of force by the United Kingdom against Iraq. In particular, we are asked to consider whether:

- (1) the right of self-defence would justify the use of force against Iraq by the United Kingdom;
- (2) Iraq's alleged failure to comply with all or any of the existing 23 UN Security Council resolutions would justify the use of force by the United Kingdom; and
- (3) a further UN Security Council resolution would be required.

¹⁴⁵ Rabinder Singh QC and Alison Macdonald, Matrix Chambers, Gray's Inn London. WC1R 5LN. 10 September, 2002. [Reprinted with permission of the author].

2. In summary, our opinion is that:

- (1) The use of force against Iraq would not be justified under international law unless:
 - (a) Iraq mounted a direct attack on the United Kingdom or one of its allies and that ally requested the United Kingdom's assistance; or
 - (b) an attack by Iraq on the United Kingdom or one of its allies was imminent and could be averted in no way other than by the use of force; or
 - (c) the United Nations Security Council authorised the use of force in clear terms.
- (2) Iraq has not attacked the United Kingdom, and no evidence is currently available to the public that any attack is imminent.
- (3) Our view is that current Security Council resolutions do not authorise the use of force against Iraq. Such force would require further authorisation from the Security Council.
- (4) At present the United Kingdom is therefore not entitled, in international law, to use force against Iraq.

Factual Background

3. The factual background can be outlined briefly. The United States is publicly considering the use of force against Iraq. This use of force would appear to have the aims of:

- (1) destroying such stores of nuclear, chemical, biological and other weapons of mass destruction as Iraq may have; and
- (2) bringing about a change of leadership. The United States appears to consider such action to be justified on the basis of the right to carry out a pre-emptive strike in self-defence, the right to respond in self-defence against an armed attack, (in this case the attacks on 11 September 2001), and/or on the basis of current resolutions of the United Nations Security Council.

4. The United Kingdom Government is currently considering whether to support any such action by itself joining in the use of force against Iraq but, according to Government statements, no decision has yet been taken. The Prime Minister, speaking on 3 September 2002, stated that he plans to publish a dossier in the next few weeks. This would set out the evidence against Iraq and the arguments in favour of intervention. The Prime Minister relies

strongly on the fact that Iraq has breached resolutions of the UN Security Council, which he appears to consider justifies military action.

5. The factual background to these decisions is unclear to the public. Such information as the United Kingdom has about Iraq's military capabilities and Saddam Hussein's intentions is not available to the public....

The Use of Force in International Law

6. The United Nations Charter provides the framework for the use of force in international law. Almost all States are parties to this Charter, including Iraq, the United Kingdom and the United States. The Charter emphasises that peace is the fundamental aim of the Charter, and is to be preserved if at all possible. The preamble expresses a determination 'to save succeeding generations from the scourge of war', 'to practise tolerance and live together in peace with one another as good neighbours', 'to unite our strength to maintain international peace and security', and to ensure 'that armed force shall not be used, save in the common interest.'

7. Article 1 of the Charter sets out the United Nations' purposes, the first of which is: 'To maintain international peace and security; and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.'

8. The other provisions of the Charter must be interpreted in accordance with this aim: see the 1969 Vienna Convention on the Law of Treaties, Article 31, which provides that a (Johannesburg, that they consider that the return of weapons inspectors to Iraq is 'still possible'.) treaty must be interpreted in accordance with its objects and purposes, including its preamble.

9. The Charter goes on to set out two fundamental principles:

'2(3) All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

2(4) All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or any other manner inconsistent with the Purposes of the United Nations.'

10. Article 2(4) has been described by the International Court of Justice (I.C.J.) as a peremptory norm of international law, from which States cannot

derogate (*Nicaragua v United States*, [1986] I.C.J. Reports 14, at para 190). The effect of Articles 2(3) and 2(4) is that the use of force can only be justified as expressly provided under the Charter, and only in situations where it is consistent with the UN's purposes.

11. The Charter authorises the use of force in the situations set out in Chapter VII. Article 42 states that, if peaceful means have not succeeded in obtaining adherence to Security Council decisions, it 'may take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security.' In effect, this means that States require a UN Security Council resolution in order to use force against another State (subject to Article 51: see below). Force is only justified where there are no peaceful means available for resolving the dispute. We stress that, in our view, where Members believe that another State has breached a resolution of the Security Council, they do not have a unilateral right under Article 42 to use force to secure adherence to it or to punish that State: what action should be taken is a matter for the Security Council.

12. Article 51 of the Charter reserves States' rights to self-defence. This right is additional to the provisions of Article 42. A State does not require a Security Council resolution in order to defend itself by force but even the right of self-defence is subject to action by the Security Council, as is clear from the terms of Article 51: 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.'

13. As exceptions to the fundamental principle of the prohibition on the use of force, Articles 42 and 51 must be interpreted narrowly.

14. According to the UN Charter, there are only two situations in which one State can lawfully use force against another:

- (1) In individual or collective self-defence (a right under customary international law, which is expressly preserved by Article 51 of the Charter).
- (2) Pursuant to a UN Security Council resolution.

15. In this Opinion, we do not review any of the arguments about the

legality of the use of force by the United States. We consider only the arguments directly relating to the United Kingdom.

16. We take it to be uncontroversial that the United Kingdom has not been the subject of any direct attack which could even arguably be linked with Iraq. It is clear that the right of self-defence in response to an armed attack does not arise. The only possible justification is as an anticipatory form of self-defence against a future threat. We turn to consider whether such a right is known to international law. Is there a right of anticipatory self-defence in international law?

17. Article 51 of the Charter is silent about whether 'self-defence' includes the pre-emptive use of force, in addition to the use of force in response to an attack. In order to answer the question, other conventional sources of international law must be used, including state practice and the works of learned writers on international law...

18. State practice is ambiguous, but tends to suggest that the anticipatory use of force is not generally considered lawful, or only in very pressing circumstances. There are numerous examples of States claiming to have used force in anticipatory self-defence, and being condemned by the international community. Examples of state practice are given by Professor Antonio Cassese, former President of the International Criminal Tribunal for the Former Yugoslavia, in *International Law*, (Oxford, 2001) at 309-31. One particularly relevant example is the international reaction to an Israeli bombing attack on an Iraqi nuclear reactor:

"When the Israeli attack on the Iraqi nuclear reactor was discussed in the [Security Council], the USA was the only State which (implicitly) indicated that it shared the Israeli concept of self-defence. In addition, although it voted for the SC resolution condemning Israel (resolution 487/1991), it pointed out after the vote that its attitude was only motivated by other considerations, namely Israel's failure to exhaust peaceful means for the resolution of the dispute. All other members of the SC expressed their disagreement with the Israeli view, by unreservedly voting in favour of operative paragraph 1 of the resolution, whereby '[the SC] strongly condemns the military attack by Israel in clear violation of the Charter of the UN and the norms of international conduct.' Egypt and Mexico expressly refuted the doctrine of anticipatory self-defence. It is apparent from the statements of these States that they were deeply concerned that the interpretation they opposed might lead to abuse. In contrast, Britain, while condemning 'without equivocation' the Israeli attack as 'a grave breach of international law', noted that the attack was not an act of self-defence. Nor [could] it be justified as a forcible measure of self protection." (p310).

19. Cassese concludes that, '[i]f one undertakes a perusal of State practice in the light of Article 31 of the Vienna Convention on the Law of Treaties, it becomes apparent that such practice does not evince agreement among States regarding the interpretation or the application of Article 51 with regard to anticipatory self-defence.' (International Law (Oxford, 2001) at p309).

20. Oppenheim states that:

'while anticipatory action in self-defence is normally unlawful, it is not necessarily unlawful in all circumstances, the matter depending on the facts of the situation including in particular the seriousness of the threat and the degree to which pre-emptive action is really necessary and is the only way of avoiding that serious threat; the requirements of necessity and proportionality are probably even more pressing in relation to anticipatory self-defence than they are in other circumstances.' (R Jennings QC and A Watts QC (eds), *Oppenheim's International Law: Ninth Edition* 1991 pp41-42).¹⁴⁶

21. Dettner states that, 'it must be emphasised that anticipatory force falls under the prohibition of force in Article 2(4) of the Charter entailing a presumption that it is illegal. A mere threat of attack thus does not warrant military action...' (*The Law of War, Second Edition*, (Cambridge, 2000), p86)...

23. In conclusion, we are of the view that States may have the right to defend themselves by using force to pre-empt an imminent and serious attack. However, such use of force would have to be in accordance with the general rules and principles governing self-defence. These are well summarised by Oppenheim:

'The development of the law, particularly in the light of more recent state practice, in the 150 years since the Caroline incident suggests that action, even if it involves the use of armed force and the violation of another state's territory, can be justified as self-defence under international law where:

- (a) an armed attack is launched, or is immediately threatened, against a state's territory or forces (and probably its nationals);
- (b) there is an urgent necessity for defensive action against that attack;
- (c) there is no practicable alternative to action in self-defence, and in particular another state or other authority which has the legal powers to stop or prevent the infringement does not, or cannot, use them to that effect;

¹⁴⁶ It should be noted that Sir Robert Jennings was the British Judge on the I.C.J. and was its President.

(d) the action taken by way of self-defence is limited to what is necessary to stop or prevent the infringement, i.e. to the needs of defence...' (p412, emphasis added)

24. These principles would apply to the anticipatory use of force just as to any other use of force in self-defence.

Is anticipatory self-defence justified in this case?

25. Although it is not clear that international law recognises the right to use anticipatory force in self-defence, we have concluded above that, if there is such a right, it only exists in situations of great emergency, as set out by Oppenheim.

26. The evidence about the level and nature of threat presented by Iraq to other countries is not clear. There may well be evidence which is not in the public domain. The United Kingdom Government has not so far made clear the extent of the risk posed by Iraq, making it difficult for the public to engage in informed debate on the issue. The burden of proof is on the Government to demonstrate the existence of a pressing and direct threat. It would also need to show that there is no effective alternative to the use of force. The lack of any effective alternative to force is difficult to demonstrate while Iraq offers to negotiate with the weapons inspectorate.

27. It is clear from the above discussion of the law of self-defence that the capacity to attack, combined with an unspecified intention to do so in the future, is not sufficiently pressing to justify the pre-emptive use of force. The threat must at least be imminent. However, the degree of proximity required must also, we consider, be proportionate to the severity of the threat. A threat to use very serious weapons – nuclear weapons being the obvious example – could justify an earlier use of defensive force than might be justified in the case of a less serious threat. However, the existence of the threat, regardless of how serious that threat may be, must still be supported by credible evidence. Such evidence has not so far been made available, although some evidence may be provided when the United Kingdom government publishes its dossier.

“The Consequences for the World Legal Order of The War on Iraq,” Noel Cox¹⁴⁷

Pre-emptive self-defence?

The US-led coalition finally took action in March 2003, acting partly in reliance on article 51 of the UN Charter. The international legal standard

¹⁴⁷ New Zealand Armed Forces Law Review. p.11-17, 2003. [Citations omitted].

for whether a particular use of force is justified in self-defence comes from an 1837 incident where British subjects destroyed an American ship, the *Caroline*, in a US port, because the *Caroline* had been used in American raids into Canadian territory. The British claimed the attack was in self-defence. Through an exchange of diplomatic notes, the dispute was resolved in favour of the Americans. US Secretary of State Daniel Webster urged the following definition of self-defence, which the British accepted:

There must be a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation. [The means of self-defence must involve] nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.

Clearly the US action against Iraq in 2003 could not satisfy this test, unless there was evidence that Iraq intended using weapons of mass destruction on its neighbours or the US itself. If that was the case, the UN arms inspectors did not uncover clear evidence of it. Nor have subsequent US investigations disclosed clear evidence of the presence of these weapons in Iraq at the relevant time.

Until the *Caroline* case, self-defence was a political justification for what, from a legal perspective, were ordinary acts of war. The positivist international law of the 19th century rejected natural law distinctions between just and unjust wars. Military aggression was unregulated and conquest gave good title to territory.⁽⁴³⁾ The *Caroline* case did nothing to prevent aggression, but it did draw a legal distinction between aggressive war and military action in self-defence. As long as the act being defended against was not itself an act of war, peace would be maintained – a matter of considerable importance to relatively weak states, as the United States then was – and Iraq was in 2003.

However, the Bush doctrine makes no attempt to satisfy the criteria of the *Caroline* case; there is no suggestion of waiting for a ‘necessity of self-defence’ that is ‘instant, overwhelming, leaving no choice of means, and no moment of deliberation’. The US President is not ‘reserving a right’ to respond to imminent threats; he is seeking an extension of the right of self-defence to include action against potential future dangers. The distinction between a state of war, and a state of peace, is thereby blurred.

It has been argued that the right of self-defence should not be seen as having been restricted by the UN Charter:

The history of Article 51 suggests ... that the article should safeguard the right of self-defence, not restrict it ... furthermore, it is a restriction [no right

of anticipation] which bears no relation to the realities of a situation which may arise prior to an actual attack and call for self-defence immediately if it is to be of any avail at all. No state can be expected to await an initial attack which, in the present state of armaments, may well destroy the state's capacity for further resistance and so jeopardise its very existence.

However, it would seem that there must still be the elements of urgency, immediacy and the absence of credible alternatives to war. A modern version of the Caroline approach is described in Oppenheim's International Law.

The development of the law, particularly in the light of more recent state practice, in the 150 years since the Caroline incident suggests that action, even if it involves the use of armed force and the violation of another state's territory, can be justified as self-defence under international law where:

an armed attack is launched, or is immediately threatened, against a state's territory or forces (and probably its nationals);

there is an urgent necessity for defensive action against that attack;

there is no practicable alternative to action in self-defence, and in particular another state or other authority which has the legal powers to stop or prevent the infringement does not, or cannot, use them to that effect;

the action taken by way of self-defence is limited to what is necessary to stop or prevent the infringement, i.e. to the needs of defence ...(emphasis added)

Iraq had not attacked any state, nor is there any evidence whatever that an attack by Iraq was imminent. Therefore self-defence did not justify the use of force against Iraq by the United States or any state. Potential capacity to attack the US, real or imagined, is an insufficient basis for action. Furthermore, article 51 requires that any exercise of self-defence is subject to the Security Council taking measures to maintain international peace and security, and indeed requires that any action in self-defence be reported to the Security Council.

Even if one puts article 51 aside, self-defence would appear to require, as a bare minimum, credible evidence of not merely capacity to strike, but also of an intention to do so, on the part of the government of the state to be attacked in pre-emptive self-defence.

CHAPTER 2 HUMAN RIGHTS

Introduction

What are Human Rights?

Overview of Office of the High Commissioner for Human Rights (OHCHR)¹⁴⁸

Human rights are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible.

Universal human rights are often expressed and guaranteed by law, in the forms of treaties, customary international law, general principles and other sources of international law. International human rights law lays down obligations of Governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups.

Universal and inalienable

The principle of universality of human rights is the cornerstone of international human rights law. This principle, as first emphasized in the Universal Declaration on Human Rights in 1948, has been reiterated in numerous international human rights conventions, declarations, and resolutions. The 1993 Vienna World Conference on Human Rights, for example, noted that it is the duty of States to promote and protect all human rights and fundamental freedoms, regardless of their political, economic and cultural systems.

All States have ratified at least one, and 80% of States have ratified four or more, of the core human rights treaties, reflecting consent of States which

¹⁴⁸ Office of the High Commissioner for Human Rights (OHCHR), <http://www.ohchr.org/en/issues/Pages/WhatareHumanRights.aspx>.

creates legal obligations for them and giving concrete expression to universality. Some fundamental human rights norms enjoy universal protection by customary international law across all boundaries and civilizations.

Human rights are inalienable. They should not be taken away, except in specific situations and according to due process. For example, the right to liberty may be restricted if a person is found guilty of a crime by a court of law.

Interdependent and indivisible

All human rights are indivisible, whether they are civil and political rights, such as the right to life, equality before the law and freedom of expression; economic, social and cultural rights, such as the rights to work, social security and education, or collective rights, such as the rights to development and self-determination, are indivisible, interrelated and interdependent. The improvement of one right facilitates advancement of the others. Likewise, the deprivation of one right adversely affects the others.

Equal and non-discriminatory

Non-discrimination is a cross-cutting principle in international human rights law. The principle is present in all the major human rights treaties and provides the central theme of some of international human rights conventions such as the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women.

The principle applies to everyone in relation to all human rights and freedoms and it prohibits discrimination on the basis of a list of non-exhaustive categories such as sex, race, colour and so on. The principle of non-discrimination is complemented by the principle of equality, as stated in Article 1 of the Universal Declaration of Human Rights: "All human beings are born free and equal in dignity and rights."

Both Rights and Obligations

Human rights entail both rights and obligations. States assume obligations and duties under international law to respect, to protect and to fulfill human rights. The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfill means that States must take positive action to facilitate the enjoyment of basic human rights. At the individual level, while we are entitled our human rights, we should also respect the human rights of others.

Development of International Human Rights Law¹⁴⁹

The international human rights movement was strengthened when the United Nations General Assembly adopted the Universal Declaration of Human Rights (UDHR) on 10 December 1948. Drafted as ‘a common standard of achievement for all peoples and nations’, the Declaration for the first time in human history spell out basic civil, political, economic, social and cultural rights that all human beings should enjoy. It has over time been widely accepted as the fundamental norms of human rights that everyone should respect and protect. The UDHR, together with the International Covenant on Civil and Political Rights and its two Optional Protocols, and the International Covenant on Economic, Social and Cultural Rights, form the so - called International Bill of Human Rights.

A series of international human rights treaties and other instruments adopted since 1945 have conferred legal form on inherent human rights and developed the body of international human rights. Other instruments have been adopted at the regional level reflecting the particular human rights concerns of the region and providing for specific mechanisms of protection. Most States have also adopted constitutions and other laws which formally protect basic human rights. While international treaties and customary law form the backbone of international human rights law other instruments, such as declarations, guidelines and principles adopted at the international level contribute to its understanding, implementation and development. Respect for human rights requires the establishment of the rule of law at the national and international levels.

International human rights law lays down obligations which States are bound to respect. By becoming parties to international treaties, States assume obligations and duties under international law to respect, to protect and to fulfill human rights. The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfill means that States must take positive action to facilitate the enjoyment of basic human rights.

Through ratification of international human rights treaties, governments undertake to put into place domestic measures and legislation compatible with their treaty obligations and duties. Where domestic legal proceedings fail to address human rights abuses, mechanisms and procedures for individual

¹⁴⁹ Office of the High Commissioner for Human Rights, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx>.

complaints or communications are available at the regional and international levels to help ensure that international human rights standards are indeed respected, implemented, and enforced at the local level.

***The International Bill of Human Rights
Fact Sheet No. 2 (Rev. 1)***¹⁵⁰

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

UNIVERSAL DECLARATION OF HUMAN RIGHTS

Adopted by General Assembly resolution 217 A (III) of 10 December 1948.

Background

The International Bill of Human Rights consists of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and its two Optional Protocols.

Human rights had already found expression in the Covenant of the League of Nations, which led, inter alia, to the creation of the International Labour Organisation. At the 1945 San Francisco Conference, held to draft the Charter of the United Nations, a proposal to embody a “Declaration on the Essential Rights of Man” was put forward but was not examined because it required more detailed consideration than was possible at the time. The Charter clearly speaks of “promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion” (Art. 1, para. 3). The idea of promulgating an “international bill of rights” was also considered by many as basically implicit in the Charter.

The Preparatory Commission of the United Nations, which met immediately after the closing session of the San Francisco Conference, recommended that the Economic and Social Council should, at its first session, establish a commission for the promotion of human rights as envisaged in Article 68 of the Charter.

Accordingly, the Council established the Commission on Human Rights early in 1946. At its first session, in 1946, the General Assembly considered a draft Declaration on Fundamental Human Rights and Freedoms and transmit-

¹⁵⁰ OHCHR available at: <http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf>.

ted it to the Economic and Social Council “for reference to the Commission on Human Rights for consideration . . . in its preparation of an international bill of rights” (resolution 43 (I)). The Commission, at its first session early in 1947, authorized its officers to formulate what it termed “a preliminary draft International Bill of Human Rights.” Later the work was taken over by a formal drafting committee, consisting of members of the Commission from eight States, selected with due regard for geographical distribution.

Towards the Universal Declaration

In the beginning, different views were expressed about the form the bill of rights should take. The Drafting Committee decided to prepare two documents: one in the form of a declaration, which would set forth general principles or standards of human rights; the other in the form of a convention, which would define specific rights and their limitations. Accordingly, the Committee transmitted to the Commission on Human Rights draft articles of an international declaration and an international convention on human rights. At its second session, in December 1947, the Commission decided to apply the term “International Bill of Human Rights” to the series of documents in preparation and established three working groups: one on the declaration, one on the convention (which it renamed “covenant”) and one on implementation. The Commission revised the draft declaration at its third session, in May/June 1948, taking into consideration comments received from Governments. It did not have time, however, to consider the covenant or the question of implementation. The declaration was therefore submitted through the Economic and Social Council to the General Assembly, meeting in Paris. By its resolution 217 A (III) of 10 December 1948, the General Assembly adopted the Universal Declaration of Human Rights as the first of these projected instruments.

Towards the International Covenants

On the same day that it adopted the Universal Declaration, the General Assembly requested the Commission on Human Rights to prepare, as a matter of priority, a draft covenant on human rights and draft measures of implementation. The Commission examined the text of the draft covenant in 1949 and the following year it revised the first 18 articles, on the basis of comments received from Governments. In 1950, the General Assembly declared that “the enjoyment of civic and political freedoms and of economic, social and cultural rights are interconnected and interdependent” (resolution 421 (V), sect. E). The Assembly thus decided to include in the covenant on human rights economic, social and cultural rights and an explicit recognition of the equality of men and women in related rights, as set forth in the Charter. In 1951, the Commis-

sion drafted 14 articles on economic, social and cultural rights on the basis of proposals made by Governments and suggestions by specialized agencies. It also formulated 10 articles on measures for implementation of those rights under which States parties to the covenant would submit periodic reports. After a long debate at its sixth session, in 1951/1952, the General Assembly requested the Commission “to draft two Covenants on Human Rights, . . . one to contain civil and political rights and the other to contain economic, social and cultural rights” (resolution 543 (VI), para. 1). The Assembly specified that the two covenants should contain as many similar provisions as possible. It also decided to include an article providing that “all peoples shall have the right of self-determination” (resolution 545 (VI)). The Commission completed preparation of the two drafts at its ninth and tenth sessions, in 1953 and 1954. The General Assembly reviewed those texts at its ninth session, in 1954, and decided to give the drafts the widest possible publicity in order that Governments might study them thoroughly and that public opinion might express itself freely. It recommended that its Third Committee start an article-by-article discussion of the texts at its tenth session, in 1955. Although the article-by-article discussion began as scheduled, it was not until 1966 that the preparation of the two covenants was completed.

The International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights were adopted by the General Assembly by its resolution 2200 A (XXI) of 16 December 1966. The first Optional Protocol to the International Covenant on Civil and Political Rights, adopted by the same resolution, provided international machinery for dealing with communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant.

Worldwide influence of the International Bill of Human Rights

From 1948, when the Universal Declaration of Human Rights was adopted and proclaimed, until 1976, when the International Covenants on Human Rights entered into force, the Declaration was the only completed portion of the International Bill of Human Rights. The Declaration, and at a later stage the Covenants, exercised a profound influence on the thoughts and actions of individuals and their Governments in all parts of the world.

The International Conference on Human Rights, which met at Teheran from 22 April to 13 May 1968 to review the progress made in the 20 years since the adoption of the Universal Declaration and to formulate a programme for the future, solemnly declared in the Proclamation of Teheran:

1. It is imperative that the members of the international community fulfill their solemn obligations to promote and encourage respect for human rights

and fundamental freedoms for all without distinctions of any kind such as race, colour, sex, language, religion, political or other opinions;

2. The Universal Declaration of Human Rights states a common understanding, of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and constitutes an obligation for the members of the international community;

3. The International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Declaration on the Granting of Independence to Colonial Countries and Peoples, the International Convention on the Elimination of All Forms of Racial Discrimination as well as other conventions and declarations in the field of human rights adopted under the auspices of the United Nations, the specialized agencies and the regional intergovernmental organizations, have created new standards and obligations to which States should conform;...

Thus, for more than 25 years, the Universal Declaration on Human Rights stood alone as an international “standard of achievement for all peoples and all nations.” It became known and was accepted as authoritative both in States which became parties to one or both of the Covenants and in those which did not ratify or accede to either. Its provisions were cited as the basis and justification for many important decisions taken by United Nations bodies; they inspired the preparation of a number of international human rights instruments, both within and outside the United Nations system; they exercised a significant influence on a number of multilateral and bilateral treaties; and they had a strong impact as the basis for the preparation of many new national constitutions and national laws.

Treaty Bodies

Human Rights Treaty Bodies: Monitoring the Core International Human Rights Treaties¹⁵¹

What are the treaty bodies?

The human rights treaty bodies are committees of independent experts that monitor implementation of the core international human rights treaties. They are created in accordance with the provisions of the treaty that they monitor.

¹⁵¹ Office of the High Commissioner for Human Rights, <http://www2.ohchr.org/english/bodies/treaty/index.htm>.

There are nine human rights treaty bodies and the Subcommittee on Prevention of Torture (SPT):

The Human Rights Committee (CCPR) monitors implementation of the International Covenant on Civil and Political Rights (1966) and its optional protocols;

The Committee on Economic, Social and Cultural Rights (CESCR) monitors implementation of the International Covenant on Economic, Social and Cultural Rights (1966);

The Committee on the Elimination of Racial Discrimination (CERD) monitors implementation of the International Convention on the Elimination of All Forms of Racial Discrimination (1965);

The Committee on the Elimination of Discrimination Against Women (CEDAW) monitors implementation of the Convention on the Elimination of All Forms of Discrimination against Women (1979) and its optional protocol (1999);

The Committee Against Torture (CAT) monitors implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (1984);

The Committee on the Rights of the Child (CRC) monitors implementation of the Convention on the Rights of the Child (1989) and its optional protocols (2000); and

The Committee on Migrant Workers (CMW) monitors implementation of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990).

The Committee on the Right of Persons with Disabilities (CRPD) monitors implementation of the International Convention on the Rights of Persons with Disabilities (2006).

The Committee on Enforced Disappearance (CED) monitors implementation of the International Convention for the Protection of All Persons from Enforced Disappearance (2006)

Each treaty body receives secretariat support from the Human Rights Treaties Branch of OHCHR in Geneva. CEDAW, which was supported until 31 December 2007 by the Division for the Advancement of Women (DAW), meets once a year in New York at United Nations Headquarters. Similarly, the Human

Rights Committee usually holds its session in March/April in New York. The other treaty bodies meet in Geneva, either at Palais Wilson or Palais des Nations.

What do the treaty bodies do?

The treaty bodies perform a number of functions in accordance with the provisions of the treaties that created them. These include:

- Consideration of State parties' reports
- Consideration of individual complaints or communications

They also publish general comments on the treaties and organize discussions on related themes.

Consideration of State parties' reports

When a country ratifies one of these treaties, it assumes a legal obligation to implement the rights recognized in that treaty. But signing up is only the first step, because recognition of rights on paper is not sufficient to guarantee that they will be enjoyed in practice. So the country incurs an additional obligation to submit regular reports to the monitoring committee set up under that treaty on how the rights are being implemented. This system of human rights monitoring is common to most of the UN human rights treaties.

To meet their reporting obligation, States must report submit an initial report usually one year after joining (two years in the case of the CRC) and then periodically in accordance with the provisions of the treaty (usually every four or five years). In addition to the government report, the treaty bodies may receive information on a country's human rights situation from other sources, including non-governmental organizations, UN agencies, other intergovernmental organizations, academic institutions and the press. In the light of all the information available, the Committee examines the report together with government representatives. Based on this dialogue, the Committee publishes its concerns and recommendations, referred to as "concluding observations."

Consideration of individual complaints or communications

In addition to the reporting procedure, some of the treaty bodies may perform additional monitoring functions through three other mechanisms: the inquiry procedure, the examination of inter-state complaints and the examination of individual complaints.

Four of the Committees (CCPR, CERD, CAT and CEDAW) can, under certain conditions, receive petitions from individuals who claim that their rights under the treaties have been violated.

General Comments

The Committees also publish their interpretation of the content of human rights provisions, known as general comments on thematic issues or methods of work.

Meeting of chairpersons and inter-committee meeting

The treaty bodies coordinate their activities through the annual meeting of chairpersons of human rights treaty bodies and through the inter-committee meeting. The treaty bodies are continually seeking ways to enhance their effectiveness through streamlining and harmonization of working methods and practices.

***Constitution of the Kyrgyz Republic: Human Rights Provisions*¹⁵²**

Article 6

1. The Constitution shall have supreme legal force and direct application in the Kyrgyz Republic.

2. The Constitution shall serve the basis for the adoption of constitutional laws, laws as well as other regulatory legal acts.

3. International treaties to which the Kyrgyz Republic is a party that have entered into force under the established legal procedure and also the universally recognized principles and norms of international law shall be the constituent part of the legal system of the Kyrgyz Republic.

The provisions of international treaties on human rights shall have direct action and be of priority in respect of provisions of other international treaties.

[The Kyrgyz Constitution has been redrafted several times. Consider the Opinion on the following page of the Venice Commission.]

¹⁵² Adopted by popular referendum June 10, 2010 and entered into force July 10, 2010.

Opinion on the Draft Constitution of the Kyrgyz Republic¹⁵³

4. Section II: Fundamental rights

16. The Venice Commission welcomes the provision of Article 6, which provides that International treaties on human rights have a direct effect. But, it is not clear whether these treaties have a higher hierarchical status than Kyrgyz laws. Furthermore, the effect of other treaties on the Kyrgyz legal system in cases of conflict remains unclear. It would be advisable to point out that international treaties ratified by the Kyrgyz Republic have precedence over Kyrgyz laws. It would also be helpful to accept as a general rule that all norms have to be interpreted in the light of international human rights treaties ratified by Kyrgyzstan.

17. The section on human rights and freedoms deserves praise for its far-reaching promises. In relation to the 2007 version, this version is edited more clearly, since the various rights are set out in different articles instead of being paragraphs or sub-paragraphs in one in two simple articles. This part of the Constitution includes a catalogue of guarantees the protection of human rights, which seems to fully correspond to international standards.

International Human Rights Norms

International Covenant on Civil and Political Rights (ICCPR)¹⁵⁴

Principle of Non-Discrimination

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any

¹⁵³ Adopted by the Venice Commission of the Council of Europe at its 83rd Plenary Session (Venice, 4 June 2010), <http://www.venice.coe.int/CDL-AD>.

¹⁵⁴ International Covenant on Civil and Political Rights, General Assembly resolution 2200A (XXI), GAOR (Supp. (No. 16) at 52), U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976.

kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant....

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Shirin Aumeeruddy-Cziffra, et. al. v. Mauritius, Decision of the Human Rights Committee, 1981¹⁵⁵

1.1. The authors [Shirin Aumeeruddy-Cziffra and 19 other Mauritian women] ... claim that the enactment of the Immigration (Amendment) Act, 1977, and the Deportation (Amendment) Act, 1977, by Mauritius constitutes discrimination based on sex against Mauritian women, violation of the right to found a family and home, and removal of the protection of the courts of law, in breach of articles 2, 3, 4, 17, 23, 25 and 26 of the International Covenant on Civil and Political Rights. The authors claim to be victims of the alleged violations. They submit that all domestic remedies have been exhausted....

7.1. The Human Rights Committee bases its view on the following facts, which are not in dispute:

7.2 Up to 1977, spouses (husbands and wives) of Mauritian citizens had the right of free access to Mauritius and enjoyed immunity from deportation. They had the right to be considered *de facto* as residents of Mauritius. The coming into force of the Immigration (Amendment) Act, 1977, and of the Deportation (Amendment) Act, 1977, limited these rights to the wives of Mauritius citizens only. Foreign husbands must apply to the Minister of the Interior for a residence permit and in case of refusal of the permit they have no possibility to seek redress before a court of law.

¹⁵⁵ Shirin Aumeeruddy-Cziffra and 19 other Mauritian women v. Mauritius, Communication No. 35/1978, Human Rights Committee, U.N. Doc. CCPR/C/OP/1 at 67 (1984).

7.3 Seventeen of the co-authors are unmarried. Three of the co-authors were married to foreign husbands when, owing to the coming into force of the Immigration (Amendment) Act, 1977, their husbands lost the residence status in Mauritius which they had enjoyed before. Their further residence together with their spouses in Mauritius is based under the statute on a limited, temporary residence permit to be issued in accordance with section 9 of the Immigration (Amendment) Act, 1977. This residence permit is subject to specified conditions which might at any time be varied or cancelled by a decision of the Minister of the Interior, against which no remedy is available. In addition, the Deportation (Amendment) Act, 1977, subjects foreign husbands to a permanent risk of being deported from Mauritius. [The Committee finds that only these three of the co-authors have a valid claim of discrimination].

7.4. In the case of Mrs. Aumeeruddy-Cziffra, one of the three married co-authors, more than three years have elapsed since her husband applied to the Mauritian authorities for a residence permit, but so far no formal decision has been taken. If her husband's application were to receive a negative decision, she would be obliged to choose between either living with her husband abroad and giving up her political career, or living separated from her husband in Mauritius and there continuing to participate in the conduct of public affairs of that country....

8.1 The Committee has to consider, in the light of these facts, whether any of the rights set forth in the Covenant on Civil and Political Rights have been violated with respect to the authors by Mauritius when enacting and applying the two statutes in question. The Committee has to decide whether these two statutes, by subjecting only the foreign husband of a Mauritian woman—but not the foreign wife of a Mauritian man—to the obligation to apply for a residence permit in order to enjoy the same rights as before the enactment of the statutes, and by subjecting only the foreign husband to the possibility of deportation, violate any of the rights set forth under the Covenant, and whether the authors of the communication may claim to be victims of such a violation....

9.2 (b) 1 The Committee will next examine that part of the communication which relates to the effect of the laws of 1977 on the family life of the three married women.

9.2 (b) 2 The Committee notes that several provisions of the Covenant are applicable in this respect. For reasons which will appear below, there is no doubt that they are actually affected by these laws, even in the absence of any individual measure of implementation (for instance, by way of a denial of residence, or an order of deportation, concerning one of the husbands).

Their claim to be “victims” within the meaning of the Optional Protocol has to be examined.

9.2 (b) 2 (i) 1 First, their relationships to their husbands clearly belong to the area of “family” as used in article 17 (1) of the Covenant. They are therefore protected against what that article calls “arbitrary or unlawful interference” in this area.

9.2 (b) 2 (i) 2 The Committee takes the view that the common residence of husband and wife has to be considered as the normal behaviour of a family. Hence, and as the State party has admitted, the exclusion of a person from a country where close members of his family are living can amount to an interference within the meaning of article 17. In principle, article 17 (1) applies also when one of the spouses is an alien. Whether the existence and application of immigration laws affecting the residence of a family member is compatible with the Covenant depends on whether such interference is either “arbitrary or unlawful” as stated in article 17 (1), or conflicts in any other way with the State party’s obligations under the Covenant.

9.2 (b) 2 (i) 3 In the present cases, not only the future possibility of deportation, but the existing precarious residence situation of foreign husbands in Mauritius represents, in the opinion of the Committee, an interference by the authorities of the State party with the family life of the Mauritian wives and their husbands. The statutes in question have rendered it uncertain for the families concerned whether and for how long it will be possible for them to continue their family life by residing together in Mauritius. Moreover, as described above (para. 7.4) in one of the cases, even the delay for years, and the absence of a positive decision granting a residence permit, must be seen as a considerable inconvenience, among other reasons because the granting of a work permit, and hence the possibility of the husband to contribute to supporting the family, depends on the residence permit, and because deportation without judicial review is possible at any time.

9.2 (b) 2 (i) 4 Since, however, this situation results from the legislation itself, there can be no question of regarding this interference as “unlawful” within the meaning of article 17 (1) in the present cases. It remains to be considered whether it is “arbitrary” or conflicts in any other way with the Covenant.

9.2 (b) 2 (i) 5 The protection owed to individuals in this respect is subject to the principle of equal treatment of the sexes which follows from several provisions of the Covenant. It is an obligation of the State parties under article 2 (1) generally to respect and ensure the rights of the Covenant “without distinction of any kind, such as ... (inter alia) sex,” and more particularly under

article 3 “to ensure the equal right of men and women to the enjoyment” of all these rights, as well as under article 26 to provide “without any discrimination” for “the equal protection of the law.”

9.2 (b) 2 (i) 6 The authors who are married to foreign nationals are suffering from the adverse consequences of the statutes discussed above only because they are women. The precarious residence status of their husbands, affecting their family life as described, results from the 1977 laws which do not apply the same measures of control to foreign wives. In this connection the Committee has noted that under section 16 of the Constitution of Mauritius sex is not one of the grounds on which discrimination is prohibited...

10.1 Accordingly, the Human Rights Committee acting under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts...disclose violations of the Covenant, in particular of articles 2 (1), 3 and 26 in relation to articles 17 (1) and 23 (1)..., because the coming into force of the Immigration (Amendment) Act, 1977, and the Deportation (Amendment) Act, 1977, resulted in discrimination against [the three married women] on the ground of sex...

11. The Committee, accordingly, is of the view that the State party should adjust the provisions of the Immigration (Amendment) Act, 1977 and of the Deportation (Amendment) Act, 1977 in order to implement its obligations under the Covenant, and should provide immediate remedies for the victims of the violations found above.

Human Rights Committee, General Comment 18¹⁵⁶

Non-discrimination

(Thirty-seventh session, 1989)

1. Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights. Thus, article 2, paragraph 1, of the International Covenant on Civil and Political Rights obligates each State party to respect and ensure to all persons within its territory and subject to its jurisdiction the rights recognized in the Covenant without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Article 26 not only entitles all persons to equality before the law as

¹⁵⁶ U.N. Doc. HRI/GEN/1/Rev.6 at 146 (2003).

well as equal protection of the law but also prohibits any discrimination under the law and guarantees to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Indeed, the principle of non-discrimination is so basic that article 3 obligates each State party to ensure the equal right of men and women to the enjoyment of the rights set forth in the Covenant. While article 4, paragraph 1, allows States parties to take measures derogating from certain obligations under the Covenant in time of public emergency, the same article requires, *inter alia*, that those measures should not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. Furthermore, article 20, paragraph 2, obligates States parties to prohibit, by law, any advocacy of national, racial or religious hatred which constitutes incitement to discrimination.

3. Because of their basic and general character, the principle of non-discrimination as well as that of equality before the law and equal protection of the law are sometimes expressly referred to in articles relating to particular categories of human rights. Article 14, paragraph 1, provides that all persons shall be equal before the courts and tribunals, and paragraph 3 of the same article provides that, in the determination of any criminal charge against him, everyone shall be entitled, in full equality, to the minimum guarantees enumerated in subparagraphs (a) to (g) of paragraph 3. Similarly, article 25 provides for the equal participation in public life of all citizens, without any of the distinctions mentioned in article 2.

4. It is for the States parties to determine appropriate measures to implement the relevant provisions. However, the Committee is to be informed about the nature of such measures and their conformity with the principles of non-discrimination and equality before the law and equal protection of the law.

5. The Committee wishes to draw the attention of States parties to the fact that the Covenant sometimes expressly requires them to take measures to guarantee the equality of rights of the persons concerned. For example, article 23, paragraph 4, stipulates that States parties shall take appropriate steps to ensure equality of rights as well as responsibilities of spouses as to marriage, during marriage and at its dissolution. Such steps may take the form of legislative, administrative or other measures, but it is a positive duty of States parties to make certain that spouses have equal rights as required by the Covenant. In relation to children, article 24 provides that all children, without any discrimination as to race, colour, sex, language, religion, national

or social origin, property or birth, have the right to such measures of protection as are required by their status as minors, on the part of their family, society and the State.

6. The Committee notes that the Covenant neither defines the term “discrimination” nor indicates what constitutes discrimination....

7. While these conventions deal only with cases of discrimination on specific grounds, the Committee believes that the term “discrimination” as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

8. The enjoyment of rights and freedoms on an equal footing, however, does not mean identical treatment in every instance. In this connection, the provisions of the Covenant are explicit. For example, article 6, paragraph 5, prohibits the death sentence from being imposed on persons below 18 years of age. The same paragraph prohibits that sentence from being carried out on pregnant women. Similarly, article 10, paragraph 3, requires the segregation of juvenile offenders from adults. Furthermore, article 25 guarantees certain political rights, differentiating on grounds of citizenship....

10. The Committee also wishes to point out that the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant....

Right to Life

Yekaterina Pavlovna Lantsova v. Russia, Decision of the Human Rights Committee, 2002¹⁵⁷

1. The author of the communication is Yekaterina Pavlovna Lantsova, mother of Vladimir Albertovich Lantsov, deceased. Mrs. Lantsova claims that her son, who was born on 27 June 1969, was a victim of violations by Russia of article 6, paragraph 1, article 7 and article 10, paragraph 1 of the International Covenant on Civil and Political Rights. She is represented by counsel...

The facts as presented by the author

2.1 In August 1994, Mr. Lantsov, during an argument, inflicted injuries on another person, as a consequence of which both criminal and civil charges were pressed against him. On 1 March 1995, he made full reparation to the plaintiff for damages determined in the civil case. Awaiting his criminal trial, set for 13 April 1995, Mr. Lantsov was initially released. However, on 5 March 1995, after failing to appear for a meeting with the investigator, he was placed pre-trial detention at Moscow's pre-trial detention centre, 'Matrosskaya Tishina', where he died on 6 April 1995, at the age of 25.

2.2 Mrs. Lantsova submits that her son was healthy when he first entered Matrosskaya Tishina, but that he fell ill due to the very poor conditions at the prison. She complains that her son was given no medical treatment despite repeated requests. Finally, she complains that the Russian Federation has failed to bring those responsible to justice.¹⁵⁸

2.3 The author submits that the conditions at Moscow's pre-trial detention centres are inhuman, in particular because of extreme overcrowding, poor ventilation, inadequate food and appalling hygiene. She refers to the 1994 report of the Special Rapporteur against torture to the Commission on Human Rights [UN doc. E/CN.4/1995/34/Add.I], Regarding access to health care, the report states that overcrowding exacerbates the inability of the staff to provide food and health care, and notes the high incidence of disease in the centres. Matrosskaya Tishina is held out for particular

¹⁵⁷ Yekaterina Pavlovna Lantsova v. Russia, Communication No. 763/1997, 26 March 2002, Human Rights Committee, U.N. Doc. A/57/40 (26 March 2002). [Citations omitted].

¹⁵⁸ The communication also indicates that notification of Mr. Lantsov's death was not given to the family or to the local registry office until 11 April 1995, after Mr. Lantsov's lawyer had discovered the fact of his death while at the detention centre to meet with him.

criticism in the report: 'The conditions are cruel, inhuman and degrading; they are torturous' [para. 71].

2.4 According to Mrs. Lantsova, based on statements from other detainees in the cell with her son, shortly after he was brought to Matrosskaya Tishina his physical and mental state began to deteriorate. He began to lose weight and developed a temperature. He was coughing and gasping for breath. Several days before his death he stopped eating and drank only cold water. He became delirious at some point and eventually lost consciousness.

2.5 It appears that other detainees requested medical assistance for Mr. Lantsov some time after the first week of his detention, that a medical doctor attended to him once or twice in the cell and that he was given aspirin for his temperature. However, between 3 and 6 April, during what was a rapid and obvious deterioration in his condition, he received no medical attention, despite repeated requests for assistance by the other detainees. On 6 April, after the other detainees cried out for assistance, medical personnel arrived with a stretcher. Mr. Lantsov died later that day in the prison clinic. His death certificate identifies the cause of death as 'acute cardiac/circulatory insufficiency, intoxication, cachexia of unknown etiology'.

2.6 ...Mrs. Lantsov has made timely and repeated applications for a criminal investigation to be opened, but these were consistently denied. She therefore concludes that she has exhausted domestic remedies.

2.7 The procurator's decisions refusing to open a criminal investigation are based on the conclusion that the death in this case resulted from a combination of pneumonia and the stressful conditions of confinement, and that under these circumstances it would be impossible to find the detention centre personnel liable...

The complaint

3. Mrs. Lantsova claims that the Russian Federation violated her son's fundamental human rights by causing his death as a result of confinement under conditions unfit for human survival, and that it also failed in its obligation to provide any meaningful legal protection against such violations. In her opinion, this constitutes violations of articles 6, paragraph 1, article 7 and article 10, paragraph 1 of the Covenant...

The State party's observations on the merits of the communication

6.1 In its observations on the merits of the communication, dated 28 December 1998, the State party states that Mr. Lantsov was arrested on 5 March 1995 and that on 7 March 1995 he was moved to a pre-trial detention

centre and placed in a communal cell. On being admitted to the detention centre he underwent medical examinations, in accordance with the established procedure. At that time he expressed no complaints about his health, no physical anomaly was noted and a fluoroscopic examination of the chest showed no pathological condition. On 6 April 1995, at about 9 a.m., Mr. Lantsov's fellow detainees informed the guards that he was not feeling well. After an examination by the duty doctor, Mr. Lantsov was urgently admitted to the hospital attached to the detention centre, but despite these measures he died at 9.15 a.m. A commission composed of doctors from the preventive medicine institutions attached to the Ministry of the Interior and the Moscow Department of Health carried out an investigation into Mr. Lantsov's death. Its conclusions were that the cause of death had been bilateral ulcerative pneumococcal pneumonia, bilateral pleurisy and focal atelectasis leading to respiratory-cardiovascular failure. The general inflammation of the lungs and the pleural cavity, the patient's failure to seek medical assistance and conditions in the prison had, in the State party's opinion, contributed to the rapid fatal outcome.

6.2 The State party admits that at the time when Mr. Lantsov was detained, the detention centres [...] held more than twice as many detainees as their design capacity, with the result that conditions of detention were not consistent with the regulations in force. The commission of inquiry concluded that there had been no medical error. The diagnosis of the causes of death had been confirmed in the post-mortem report prepared on 13 May 1995.

6.3 In the absence of an offence, the Office of the Interregional Procurator for Moscow-Preobrajenskaya, the public prosecution department, did not initiate criminal proceedings. This decision was subsequently confirmed by the Moscow Procurator's Office. During the review of the case it was established that the family had not been notified of the death promptly and that the officer concerned had been held accountable.

6.4 The State party admits that, generally speaking, conditions in detention centres constitute a serious problem for Russia and that there is no prospect of an immediate solution. A set of measures to reform the prison system has been established, with a view to improving conditions in the detention centres and bringing them into line with international standards for the treatment of prisoners. The State party cites two presidential edicts and a government decree as examples of recent steps towards the transfer of responsibility for prison establishments from the Ministry of the Interior to the Ministry of Justice. An increase in the number of places in detention centres and prisons was under way, but was being impeded by financial difficulties...

Issues and proceedings before the Committee

8.2 The Committee must determine whether the State party violated articles 6, paragraph 1, article 7 and 10, paragraph 1 of the Covenant in connection with the death of the author's son....

9.1 Regarding the conditions of detention, the Committee notes that the State party concedes that prison conditions were bad and that detention centre at the time of the events held twice the intended number of inmates. The Committee also notes the specific information received from the author, in particular that the prison population was, in fact, five times the allowed capacity and that the conditions in Matrosskaya Tishina prison were inhuman, because of poor ventilation, inadequate food and hygiene. The Committee finds that holding the author's son in the conditions prevailing at this prison during that time entailed a violation of his rights under article 10, paragraph 1 of the Covenant.

9.2 Concerning the death of Mr. Lantsov, the Committee notes the author's allegations, on the strength of testimony by several fellow detainees, that after the deterioration of the health of the author's son, he received medical care only during the last few minutes of his life, that the prison authorities had refused such care during the preceding days and that this situation caused his death. It also takes note of the information provided by the State party, namely that several inquiries were carried out into the causes of the death, i.e. acute pneumonia leading to cardiac insufficiency, and that Mr. Lantsov had not requested medical assistance. The Committee affirms that it is incumbent on States to ensure the right of life of detainees, and not incumbent on the latter to request protection. The stated intention of the State party to improve conditions has no impact in the assessment of this case. The Committee notes that the State party has not refuted the causal link between the conditions of the detention of Mr. Lantsov and the fatal deterioration of his state of health. Further, even if the Committee starts from the assertion of the State party that neither Mr. Lantsov himself nor his co-detainees had requested medical help in time, the essential fact remains that the State party by arresting and detaining individuals takes the responsibility to care for their life. It is up to the State party by organizing its detention facilities to know about the state of health of the detainees as far as may be reasonably expected. Lack of financial means cannot reduce this responsibility. The Committee considers that a properly functioning medical service within the detention centre could and should have known about the dangerous change in the state of health of Mr. Lantsov. It considers that the State party failed to take appropriate measures to protect Mr. Lantsov's life during the period he spent in the detention

centre. Consequently, the Human Rights Committee concludes that, in this case, there has been a violation of paragraph 1 of article 6 of the Covenant.

9.3 In the light of the above findings of violations of article 6 and article 10 of the Covenant. The Committee does not consider it necessary to pronounce itself on a violation of article 7....

10. The Human Rights Committee, acting under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the State party failed in its obligation to ensure the protection of Mr. Lantsov, who lost his life as a direct result of the existing prison conditions. The Committee finds that articles 6, paragraph 1, and article 10, paragraph 1 of the Covenant were violated.

11. The Committee is of the view that Mrs. Lantsova is entitled, under article 2, paragraph 3 (a) of the Covenant, to an effective remedy. The State party should take effective measures: (a) to grant appropriate compensation (b) to order an official inquiry into the death of Mr. Lantsov; and (c) to ensure that similar violations do not recur in the future, especially by taking immediate steps to ensure that conditions of detention are compatible with the State party's obligation under articles 6 and 10 of the Covenant.

Human Trafficking

Modern-Day Slavery

*Human Trafficking, OSCE Fact Sheet*¹⁵⁹

According to recent minimum estimates by the International Labour Organization, 2.5 million people are trafficked worldwide, of which approximately 500,000 are within the OSCE region. Globally, children represent between 40 per cent and 50 per cent of victims.

The essential element of trafficking is the exploitation of people in conditions amounting to slavery. Trafficked persons are held in unfamiliar and isolated environments where they are forced to work under violence, threat or subtle means of coercion, often to pay back an insurmountable debt.

These people often do not speak the language, are unaware of their rights, are deprived of their documents, and depend heavily on their exploiters for

¹⁵⁹ Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, OSCE, public doc. available at: <http://www.osce.org/cthb/74755>.

food and lodging, as well as for making contact with the outside world. They are not free to leave, as they have no real and acceptable alternative but to submit to exploitation.

People are trafficked for:

- Sexual exploitation;
- Labour exploitation, including domestic servitude;
- Other purposes, including forced begging, forced criminality and the removal of organs.

Trafficking in human beings still remains greatly misunderstood and is insufficiently addressed in both policy and practice. Although significant progress has been made during the past ten years, there is still much work to be done in the areas of prevention, prosecution and protection of victims' rights.

The number of arrests, prosecutions and convictions of traffickers remains low, in stark contrast to the estimated number of victims. Too often, such victims remain unidentified, and many are deported or even prosecuted for criminal activities in which they have been involved as a direct result of having been trafficked. Trafficking in human beings is a gross violation of human rights, fundamental freedoms and human dignity, and is often a form of violence against women.

Trafficking in human beings is also largely a business of organized crime, which has reached a massive scale and generates huge profits. Trafficking therefore thrives upon and feeds corruption, and undermines the rule of law and economic stability. It constitutes a real threat to the lives and well-being of citizens and society at large.

As a consequence, trafficking is nowadays a serious transnational threat to security in the OSCE region and beyond...

*What is the smuggling of migrants?*¹⁶⁰

Awareness of the constituent elements of the smuggling of migrants and related conduct is a prerequisite for identifying, investigating and prosecuting the crime. Article 3 of the Smuggling of Migrants Protocol defines smuggling of migrants as:

¹⁶⁰ UNDOC Basic training manual on investigating and prosecuting the smuggling of migrants, Module 1: Concepts and categories of the smuggling of migrants and related conduct (2010).

“The procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national.”

Article 6 of the Protocol requires the criminalization of this conduct.

In addition, article 6 requires States to criminalize the following conduct:

“Enabling a person who is not a national or a permanent resident to remain in the State concerned without complying with the necessary requirements for legally remaining in the State” by illegal means.

What is not smuggling of migrants?

It is important to underline that the criminalization only covers those who profit from the smuggling of migrants and related conduct through financial or other material gain. The interpretative notes for the official records of the negotiations of the Smuggling of Migrants Protocol highlight that the criminalization should not cover persons such as family members or nongovernmental or religious groups that facilitate the illegal entry of migrants for humanitarian or non-profit reasons.

The Smuggling of Migrants Protocol does not intend to criminalize migration as such. In this regard, article 5 states that the migrants themselves must not be held responsible for the crime of smuggling only because of having been smuggled:

“Migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of conduct set forth in article 6 of this Protocol.”

This article was included to make it explicit that no one should be penalized with reference to this Protocol for having been smuggled.

It should also be noted that refugees often have to rely on smugglers to flee persecution, serious human rights violations or conflict. They should not be criminalized for making use of smugglers or for their illegal entry (article 31 of the 1951 Convention relating to the Status of Refugees¹ and article 19 of the Smuggling of Migrants Protocol, United Nations, Treaty Series, vol. 189, No. 2545).

Self-Determination

***General Comment 12, Human Rights Committee, Treaty Body for the International Covenant on Civil and Political Rights*¹⁶¹**

The right to self-determination of peoples

1. In accordance with the purposes and principles of the Charter of the United Nations, article 1 of the International Covenant on Civil and Political Rights recognizes that all peoples have the right of self-determination. The right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. It is for that reason that States set forth the right of self-determination in a provision of positive law in both Covenants and placed this provision as article 1 apart from and before all of the other rights in the two Covenants.

2. Article 1 enshrines an inalienable right of all peoples as described in its paragraphs 1 and 2. By virtue of that right they freely “determine their political status and freely pursue their economic, social and cultural development.” The article imposes on all States parties corresponding obligations. This right and the corresponding obligations concerning its implementation are inter-related with other provisions of the Covenant and rules of international law.

3. Although the reporting obligations of all States parties include article 1, only some reports give detailed explanations regarding each of its paragraphs. The Committee has noted that many of them completely ignore article 1, provide inadequate information in regard to it or confine themselves to a reference to election laws. The Committee considers it highly desirable that States parties’ reports should contain information on each paragraph of article 1.

4. With regard to paragraph 1 of article 1, States parties should describe the constitutional and political processes which in practice allow the exercise of this right.

5. Paragraph 2 affirms a particular aspect of the economic content of the right of self-determination, namely the right of peoples, for their own ends, freely to “dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon

¹⁶¹ Article 1 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 134 (2003).

the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.” This right entails corresponding duties for all States and the international community. States should indicate any factors or difficulties which prevent the free disposal of their natural wealth and resources contrary to the provisions of this paragraph and to what extent that affects the enjoyment of other rights set forth in the Covenant.

6. Paragraph 3, in the Committee’s opinion, is particularly important in that it imposes specific obligations on States parties, not only in relation to their own peoples but vis-a-vis all peoples which have not been able to exercise or have been deprived of the possibility of exercising their right to self-determination. ...

United Nations General Assembly Resolution 2649 on Self-Determination¹⁶²

The General Assembly

Emphasizing the importance of the universal realization of the right of peoples to self-determination and of the speedy granting of independence to colonial countries and peoples for the effective guarantee and observance of human rights,

Concerned that many peoples are still denied the right to self-determination and are still subject to colonial and alien domination,

Regretting that the obligations undertaken by States under the Charter of the United Nations and the decisions adopted by United Nations bodies have not proved sufficient to attain respect for the right of peoples to self-determination in all cases,...

1. Affirms the legitimacy of the struggle of peoples under colonial and alien domination recognized as being entitled to the right of self-determination to restore to themselves that right by any means at their disposal;

2. Recognizes the right of peoples under colonial and alien domination in the legitimate exercise of their right to self-determination to seek and receive all kinds of moral and material assistance, in accordance with the resolutions of the United Nations and the spirit of the Charter of the United Nations;

3. Calls upon all Governments that deny the right to self-determination of peoples under colonial and alien domination to recognize and observe

¹⁶² General Assembly resolution 2649, of 30 November 1970, GAOR (25th Sess., Supp. No. 27), UN Doc. A/RES/2649.

that right in accordance with the relevant international instruments and the principles and spirit of the Charter;

4. Considers that the acquisition and retention of territory in contravention of the right of the people of that territory to self-determination is inadmissible and a gross violation of the Charter;

5. Condemns those Governments that deny the right to self-determination of peoples recognized as being entitled to it, especially of the peoples of southern Africa and Palestine;

6. Requests the Commission on Human Rights to study, at its twenty-seventh session, the implementation of the United Nations resolutions relating to the right of peoples under colonial and alien domination to self-determination, and to submit its conclusions and recommendations to the General Assembly, through the Economic and Social Council, as soon as possible.

1915th plenary meeting,

30 November 1970.

“Self-Determination and Conflict Resolution: From Kosovo to Sudan,” The Honorable Louise Arbour¹⁶³

Introduction

...Crisis Group has dealt with a variety of situations in the last several years where conflict, including armed conflict, was triggered either by the purported exercise of the right to self-determination, or by efforts to resist it. In many cases secession claims are rooted in a history of repression, exclusionary visions of governance, or the denial of rights to minority groups. I mentioned Kosovo, Sri Lanka and Sudan, but I could just as easily have included Montenegro – where we have supported independence; Northern Iraq – we have defended the unity and territorial integrity of Iraq; or Abkhazia, South Ossetia, Nagorno-Karabakh, Somaliland, Aceh or Kashmir – where we have avoided taking explicit positions either for or against secession.

The international legal framework

The thrust of my argument starts from the basis that neither the right to self-determination nor the principle of territorial integrity can a priori

¹⁶³ President and CEO of the International Crisis Group, Excerpt of speech to the Carnegie Council for Ethics in International Affairs, 22 September 2010. The Honorable Ms. Arbour is the former United Nations High Commissioner for Human Rights and before that served as a Justice on the Supreme Court of Canada.

trump each other. Only by understanding when – and how – the right to self-determination applies can we effectively put in place processes which stand some chance of averting – or rapidly ending – secessionist-based conflicts.

So let's start with the legal framework. And in that regard, the recent opinion by the International Court of Justice on the legality of Kosovo's unilateral declaration of independence provides a useful, but not a dispositive, backdrop. On 22 July 2010, The I.C.J. rendered its non-binding opinion on the question posed to it by the General Assembly, which was: 'Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?'

...It concluded that, in the circumstances, the Kosovo unilateral declaration was not in violation of international law. The court, however, went no further. It explicitly refrained from ruling on the legality of secession itself. As such it did not address the efficacy of Kosovo's unilateral declaration of independence, or of the level of international recognition that it attracted, in creating an independent, sovereign Kosovo state.

The I.C.J.'s opinion in the Kosovo case may or may not lead to a wave of additional recognition for Kosovo's independence – these will be political reactions to the court's opinion. As the court points out, some unilateral declarations of independence have in the past been specifically repudiated by the international community – those of Southern Rhodesia in 1965, Northern Cyprus in 1983 and of the Republika Srpska in Bosnia in 1992. But in all these instances, the Security Council made a determination based on the concrete situation existing at the time those declarations were made. The illegality of those declarations of independence stemmed not from their unilateral character but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of international law. The exceptional character of the resolutions regarding Southern Rhodesia, Northern Cyprus and of the Republika Srpska confirmed, in the view of the I.C.J., that no general prohibition against unilateral declarations of independence could be inferred from previous Security Council decisions.

So while secessionists elsewhere would be wise to take limited comfort from the court's opinion in the Kosovo case; equally would those authorities who currently assert the sanctity of their existing borders as an absolute bar to any secessionist demands. The I.C.J.'s Kosovo judgement leaves unanswered the important legal question of whether a right to secession can be found in the right to self-determination and if so, in what circumstances...

On its face, the right of peoples to freely determine their political status does not address how and when this right is to be exercised. Whether the exercise of

the right to self-determination includes an entitlement to full state sovereignty therefore requires an examination of the principle of the territorial integrity of states. That principle is most often advanced to block any secessionist claim. The I.C.J. in its consideration of the Kosovo case made an important observation – namely that the scope of the principle of territorial integrity is confined to the sphere of relations between States. By contrast, however, the right to self-determination deals with relations between states and “peoples.” It is an important distinction – and when competing principles clash, they should be interpreted in a way that maximizes the fullest effect of both. We must therefore seek to reconcile these apparently competing principles.

International law has developed a framework to render these otherwise competing principles compatible by asserting that self-determination is a right that must initially be fulfilled internally. This imposes on sovereign states serious obligations regarding both democracy – participation, as the method for a people to freely determine its political status – and protection of minority rights, to ensure the free pursuit of a people’s economic, social and cultural development.

But when a state is unable or unwilling to provide for the internal fulfillment of the right to self-determination, that right may become an external right, and at that point overrides the principle of territorial integrity by providing to “a people” a right to secede from a parent state....

***Frontier Dispute (Burkina Faso v. Mali), 1986*¹⁶⁴**

25. However, it may be wondered how the time-hallowed principle has been able to withstand the new approaches to international law as expressed in Africa, where the successive attainment of independence and the emergence of new States have been accompanied by a certain questioning of traditional international law. At first sight this principle conflicts outright with another one, the right of peoples to self-determination. In fact, however, the maintenance of the territorial status quo in Africa is often seen as the wisest course, to preserve what has been achieved by peoples who have struggled for their independence, and to avoid a disruption which would deprive the continent of the gains achieved by much sacrifice. The essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields, has induced African States judiciously to consent

¹⁶⁴ Frontier Dispute (Burkina Faso v. Mali), Judgment, I.C.J. Reports 1986, p. 554, and Separate Opinion by Judge Luchaire, p. 652.

to the respecting of colonial frontiers, and to take account of it in the interpretation of the principle of self-determination of peoples.

Separate Opinion of Judge Luchaire

[S.O. Luchaire] ...it is the right of peoples to determine their own future which has received the blessing of international law: a right which is expressly enshrined in the French constitution of 1958 in regard to what were then the French overseas territories, including French Sudan (now the Republic of Mali) and Upper Volta (now Burkina Faso). What the Declaration made by the General Assembly of the United Nations on 14 December 1960 (1514 (XV)) specifies, in recognizing the right of self-determination possessed by all peoples, is that they “freely determine their political status”; but the exercise of that right does not necessarily lead to the independence of a State with the same frontiers as a former colony. It may lead (see the list of factors annexed to General Assembly resolution 648 (VII) of 10 December 1952) either to:

- independence within the aforesaid geographical framework or
- integration into the territory of the administering power with strict equality of rights as between individuals, irrespective of whether their origins lie in the former colony or the former metropolitan state, or merger with a neighbouring State on the same conditions of equality, or
- the voluntary association of the ex-colony with the former metropolis on terms including unqualified respect for the former's personality.

Torture and Fair Trial

International Covenant on Civil and Political Rights¹⁶⁵

Article 7

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

¹⁶⁵ International Covenant on Civil and Political Rights, General Assembly resolution 2200A (XXI), GAOR (Supp. (No. 16) at 52), U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976.

Article 10

1. All persons deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person.

Otabek Akhadov v. Kyrgyzstan, Decision of the Human Rights Committee, 2011¹⁶⁶

1. The author of the communication is Mr. Otabek Akhadov, a national of Uzbekistan, born in 1979. He claims to be a victim of violations by Kyrgyzstan of his rights under article 6, article 7, article 9, article 10, paragraph 1, article 14, paragraph 1, article 2, paragraph 3 together with article 14, paragraph 3 (b), article 14, paragraph 3 (g), and article 15, paragraph 1 of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for the State party on 7 January 1995. The author is represented by counsel...

The facts as presented by the author

2.1 On 28 March 2000, Mr. Nigmat Bazakov, president of the Uigur society “Ittipak,” was shot and killed in the street near his home on Musa Dzhahilil Street in Bishkek. On 29 March 2000, the investigative bodies initiated a criminal case relating to his murder. On 25 May 2000, an act of terrorism occurred in Bishkek, which resulted in the death of the Chinese citizen Mr. Abdukadir Gulam and injuries to several members of a Chinese delegation as well as to some Kyrgyz citizens. The author was arrested on 6 July 2000, on suspicion of having committed the above crimes.

2.2 The arrest of the author was not formally recorded until 7 July 2000. In the period between his apprehension and 21 July 2000, the author was kept in the Investigation Detention Center (SIZO) of the Department of Internal Affairs of the city of Bishkek. During that period the author was subjected to torture and cruel treatment by the criminal investigation officers. He was tortured at different times of the day, sometimes between 9 and 12 in the morning, other times in the afternoons or between 17 and 23 hours in the evenings. The author’s hand were tied and police officers beat him with fists and kicked him in the sensitive parts of his body (such as his head, his back, and in the areas of his kidneys, lungs and liver); they also beat him on the soles of his feet and on the head with weights, pressed his chest against the table, hit the back of his head with objects filled with water, and burned his arms with cigarettes. He bled often and still has scars from the beatings. The

¹⁶⁶ Otabek Akhadov v. Kyrgyzstan, Communication No. 1503/2006, Human Rights Committee, U.N. Doc. CCPR/C/101/D/1503/2006, (29 April 2011).

author was also forced to take psychotropic substances. The author also provides the names of two high-ranked officials, who, according to him were aware of the fact that he has been tortured.

2.3 On 7 July 2000, after the papers regarding the author's arrest were formalized, the investigators assigned him a lawyer whom he did not choose. The latter did not take any steps to protect him. On 9 July 2000, unable to support the beatings and threatened with further ill-treatment, the author signed a confession admitting the commission of the crimes he was accused of by the investigators. On 10 July 2000, acquaintances of the author commissioned another lawyer, Ms Golisheva, to represent the author. On the same date the lawyer filed a complaint regarding the ill-treatment of the author and requested a medical examination of the author in order to establish that he had been tortured. The Senior Investigator based on that lawyer's request, issued an order for a medical examination to be conducted, but the examination did not take place until 10 August 2000. The medical expert provided an expertise, concluding that the traces on the author's body were consistent with the type of injuries he described and the timing of those injuries. The lawyer did not make any further complaints and did not submit any motions, because, according to the author, she was afraid of reprisals...

2.6 Throughout the court proceedings the author denied his guilt. In his written testimony, submitted to the Bishkek City court on 22 July 2002, he complained that the confession he made during the investigation was extracted under torture and proclaimed his innocence. On an unspecified date in July 2002, the author also complained to the President of the Republic that he had been subjected to torture. Neither complaint was investigated...

The complaint

3.1 The author claims to be a victim of violations by Kyrgyzstan of his rights under article 6, article 7, article 9, article 10, paragraph 1, article 14, paragraph 1, article 2, paragraph 3, together with article 14, paragraph 3 (b), article 14, paragraph 3 (g), and article 15, paragraph 1, of the Covenant.

3.2 The author submits that his rights under article 2, paragraph 3, together with article 14, paragraph 3 (b) were violated by the State party since he was not informed of his rights to refuse to testify and not to testify against himself. He was not represented by a lawyer from the moment of his arrest; he was not informed of his right to have legal assistance assigned to him despite the fact that he requested to be provided with such assistance from the moment of his detention....

State party's observations on admissibility and merits

...4.2 The State party submits that author's allegations on the unlawful methods used by the law enforcement authorities, resulting in a forced confession and that he has been "deprived the right to appeal against the decision of the court and, that his right to protection has not been provided, mismatch the validity." The State party maintains that the complaint submitted by the author's lawyer had been considered on appeal by the Bishkek City Court, which confirmed the verdict of the first instance court without amendments. The State party also submits that according to the current legislation a revision of the guilty verdict upon a request of the convicted person, "not deteriorating the position of the convicted, is not limited by the time frame." Therefore the author has the right to appeal against his verdict in the order of supervision to the Supreme Court six years from the issuance of the judgment....

Consideration of the merits

...7.3 The Committee recalls that once a complaint about ill-treatment contrary to article 7 has been filed, a State party must investigate it promptly and impartially⁴. Although the decision of the Bishkek City court of 30 July 2002 mentions Mr. Akhadov's torture allegations, the latter rejects these with a blanket statement that the evidence in the case confirms the guilt of the accused. The Committee considers that in the circumstances of the present case, the State party has failed to demonstrate that its authorities did address the torture allegations advanced by the author expeditiously and adequately, in the context of both domestic criminal proceedings and the present communication. Accordingly, due weight must be given to the author's allegations. The Committee therefore concludes that the facts before it disclose a violation of the rights of Mr. Akhadov under articles 7 and 14, paragraph 3 (g), of the Covenant. In the light of this conclusion, it is not necessary to examine separately the author's claim under article 10 of the Covenant....

7.5 The Committee considers that in the present case, the courts, and this was uncontested by the State party, failed to address properly the victim's complaints related to his ill-treatment by the police. The Committee considers that as a consequence, the criminal procedures in Mr. Akhadov's case were vitiated by irregularities, which casts doubts on the fairness of the criminal trial as a whole. In the absence of any pertinent observations from the State party in this respect, and without having to examine separately each of the author's allegations in this connection, the Committee considers that in the circumstances of the case, the facts as presented reveal a separate violation of the author's rights under article 14, paragraph 1, of the Covenant. In light of this conclusion, and given that the author has been sentenced to death

following a trial held in violation of the fair trial guarantees, the Committee concludes that the author is also a victim of a violation of his rights under article 6, read in conjunction with article 14, of the Covenant....

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the State party has violated article 6, read in conjunction with article 14; article 7 and article 14, paragraph 3 (g); article 9; and article 14, paragraph 1, of the International Covenant on Civil and Political Rights.

9. Pursuant to article 2, paragraph 3(a), of the Covenant, the Committee considers that the State party is under an obligation to provide the author with an effective remedy including: conducting full and thorough investigation into the allegations of torture and ill-treatment and initiating criminal proceedings against those responsible for the treatment to which the author was subjected; considering his retrial in conformity with all guarantees enshrined in the Covenant or his release; and providing the author with appropriate reparation, including compensation. The State party is also under an obligation to take steps to prevent similar violations occurring in the future....

Dimitry Gridin v. Russia, Decision of the Human Rights Committee, 2000¹⁶⁷

1. The author of the communication is Mr. Dimitry Leonodovich Gridin, a Russian student, born on 4 March 1968. He claims to be a victim of a violation by Russia of articles 14, paragraphs 1, 2, 3(b),(e) and (g). The case also appears to raise issues under articles 9 and 10 of the Covenant. He is represented by Mr. A. Manov of the Centre for Assistance to the International Protection.

The facts as submitted by the author

2. The author was arrested on 25 November 1989 on charges of attempted rape and murder of one Ms. Zykina. Once in detention, he was also charged with six other assaults. On 3 October 1990, the Chelyabinsk Regional Court found him guilty of the charges and sentenced him to death. His appeal to the Supreme Court was rejected on 21 June 1991....

The complaint

3.1 The author alleges that a warrant for his arrest was only issued on 29 November 1989, over three days after he was detained. He further states that he was denied access to a lawyer, despite his requests, until 6 December 1989.

¹⁶⁷ Dimitry L. Gridin v. Russian Federation, Communication No. 770, Human Rights Committee, U.N. Doc. CCPR/C/69/D/770/1997 (2000).

3.2 He claims that he was interrogated during 48 hours, without being given any food and without being allowed to sleep. His glasses had also been taken away from him and he could not see much because of his shortsightedness. During the interrogation, he was beaten. He states that he was told that his family was letting him down and that the only way to avoid the death penalty would be to confess. He then confessed to the six charges as well as to three other charges.

3.3 It is alleged that the author's lawyer was not informed by the investigator of scheduled court actions. In particular, in January 1990 the author was sent for a medical expertise and his lawyer was not informed.

3.4 The author claims that the handling of the evidence violated the Russian Code of Criminal Procedure...

3.5 The author claims that his right to presumption of innocence was violated. Between 26 and 30 November 1989 radio stations and newspapers announced that the author was the feared "lift-boy" murderer, who had raped several girls and murdered three of them. Also, on 9 December 1989, the head of the police announced that he was sure that the author was the murderer, and this was broadcasted on television. Furthermore, the author alleges that the investigator pronounced the author guilty in public meetings before the court hearing and called upon the public to send prosecutors. As a consequence, the author states that at his trial ten social prosecutors were present whereas he was defended by one social defender who was later forced to leave the court room. According to the author, the court room was crowded with people who were screaming that the author should be sentenced to death. He also states that the social prosecutors and the victims were threatening the witnesses and the defense and that the judge did not do anything to stop this. Because of this, there was no proper opportunity to examine the main witnesses in court....

The State party's submission and the author's comments thereon

...4.3 The State party contends that neither the author nor his lawyer ever raised the issue of police coercion before the courts. It further contends that the author was represented by a lawyer throughout the preliminary investigation, during which the author provided detailed information in respect of the crimes. According to the State party the author only retracted from these statements in court due to pressure placed on him by members of his family.

Issues and proceedings before the Committee

...6.4 With respect to the allegations of ill-treatment and police coercion during the investigation period including denying the author the use of read-

ing glasses, it appears from the material before it that most of these allegations were not raised before the trial court. All the arguments were raised on appeal but the Supreme Court found them to be unsubstantiated. In these circumstances, the Committee finds that the author has not substantiated a claim within the meaning of article 2 of the Optional Protocol.

6.5 With regard to the allegation that his lawyer was not informed of the dates of the court actions which dealt with medical issues the Committee notes that this matter was reviewed by the Supreme Court which found it to be in accordance with law and consequently considers that this claim remains unsubstantiated for purposes of admissibility...

8.1 With respect to the allegation that the author was arrested without a warrant and that this was only issued more than three days after the arrest, in contravention of national legislation which stipulates that a warrant must be issued within 72 hours of arrest, the Committee notes that this matter has not been addressed by the State party. In this regard, the Committee considers that in the circumstances of the present case the author was deprived of his liberty in violation of a procedure as established by law and consequently it finds that the facts before it disclose a violation of article 9, paragraph 1.

8.2 With regard to the author's claim that he was denied a fair trial in violation of article 14, paragraph 1, in particular because of the failure by the trial court to control the hostile atmosphere and pressure created by the public in the court room, which made it impossible for defence counsel to properly cross-examine the witnesses and present his defence, the Committee notes that the Supreme Court referred to this issue, but failed to specifically address it when it heard the author's appeal. The Committee considers that the conduct of the trial, as described above, violated the author's right to a fair trial within the meaning of article 14, paragraph 1.

8.3 With regard to the allegation of a violation of the presumption of innocence, including public statements made by high ranking law enforcement officials portraying the author as guilty which were given wide media coverage, the Committee notes that the Supreme Court referred to the issue, but failed to specifically deal with it when it heard the author's appeal. The Committee refers to its General Comment No 13 on article 14, where it has stated that: "It is, therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial." In the present case the Committee considers that the authorities failed to exercise the restraint that article 14, paragraph 2, requires of them and that the author's rights were thus violated...

8.5 With respect to the allegation that the author did not have a lawyer available to him for the first 5 days after he was arrested...[t]he

Committee finds that denying the author access to legal counsel after he had requested such access and interrogating him during that time constitutes a violation of the author's rights under article 14, paragraph 3 (b). Furthermore, the Committee considers that the fact that the author was unable to consult with his lawyer in private, allegation which has not been refuted by the State party, also constitutes a violation of article 14, paragraph 3 (b) of the Covenant.

Felix Kulov v. Kyrgyzstan, Decision of the Human Rights Committee, 2010¹⁶⁸

1. The author of the communication is Mr. Felix Kulov, a Kyrgyz national born in 1948, who at the time of submission was serving a prison sentence in Kyrgyzstan. The author claims to be the victim of violations by Kyrgyzstan of his rights under articles 2; 7; 9, paragraphs 1, 3 and 4; 14, paragraphs 1, 2, 3 (a)- (e), and 5; 15; 19; and 25 (a), of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for Kyrgyzstan on 7 January 1995....

The complaint

3.2 [Among other articles] Article 9, paragraph 1, is said to have been violated as the author was arrested on 22 March 2000 while he was under treatment in hospital, as it was suspected he would obstruct the investigation or escape. The author affirms that the decision to detain him was unlawful, as the investigators had absolutely no evidence that he wanted to escape or to obstruct the inquiries. He affirms that his preliminary detention in 2000 and in 2001-2002 was unreasonable and unnecessary in his case....

Consideration of the merits

...8.2 The Committee notes the author's claim under article 7 that during the time of his detention in the buildings of State NSS from 22 March to 7 August 2000, and again from 22 January 2001 to April 2003, he was not allowed any correspondence and communication, and was kept without any contact with the outside world. The State party did not comment on this allegation. The Committee recalls its general comment 20 (1992) on the prohibition of torture or cruel, inhuman or degrading treatment or punishment,... In view of the above, the Committee finds that the author has been subjected to cruel, inhuman and degrading treatment, in violation of article 7 of the Covenant.

¹⁶⁸ Felix Kulov v. Kyrgyzstan, Communication No. 1369/2005, Human Rights Committee, U.N. Doc. CCPR/C/99/D/1369/2005 (26 July 2010).

8.3 The Committee notes the author's allegations under article 9, paragraph 1, that the decision to detain him was unlawful, as the investigators had no evidence that he wanted to escape or to obstruct the inquiries.... remand in custody must be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime. The State party has not shown that these factors were present in the instant case.¹⁶⁹ In the absence of any further information, the Committee concludes that there has been a violation of article 9, paragraph 1, of the Covenant.

8.4 As for the author's claims under articles 9, paragraph 3, read together with article 2, paragraphs 1 and 2, that the decision to place him in pretrial detention was made by a prosecutor, i.e. a representative of the executive branch, under the national legislation, in his absence, and that he was not brought before a judge or other officer authorized by law to exercise judicial power. The Committee notes that the State party has not provided any information, showing that the prosecutor had the institutional objectivity and impartiality necessary to be considered an "officer authorized to exercise judicial power" within the meaning of article 9, paragraph 3, of the Covenant.... The Committee concludes that the facts as submitted reveal a violation of the author's rights under article 9, paragraph 3, of the Covenant.

8.5 The author also claimed violation of article 9, paragraph 4, as he was allegedly kept in an investigation detention centre since 6 February 2001, due to the opening of a third case against him. His detention was allegedly prolonged on several occasions between 2001 and 2003 by the investigators, and with the prosecutor's authorization, but in absence of any judicial control. The author allegedly appealed with the General Prosecutor's Office, but all his appeals were rejected. According to him, the appeal to courts was not necessary because of their ineffectiveness. The State party did not comment on these allegations. In the absence of any further information, the Committee concludes that there has been a violation of article 9, paragraph 4, of the Covenant....

8.7 The Committee notes the author's allegations of violation of presumption of innocence, as the authorities allegedly used national media to portray him as a criminal; his lawyers were given only limited time to study the evidence, and "obstacles" were added to examine the additional evidence presented by the prosecution; he had been judged already two times for malpractice in office but a third set of criminal proceedings was still pending at the time of submission of the present communication, on the same grounds;

¹⁶⁹ Communication No. 305/1988, *Alphen v Netherlands*. Views adopted on 23 July 1990.

his request to be represented by a lawyer from Russia was ignored, though allowed under the legislation; [...] In the absence of any information from the State party, the Committee considers that due weight must be given to the author's allegations and concludes that there has been a violation of article 14, paragraphs 2, 3 (b), (c), (d) and (e), of the Covenant.

8.8 Regarding the claims that the examination of the author's case under the supervisory (nadzor) procedure by the Supreme Court took place in his and in his lawyers' absence, although with the participation of a prosecutor, the Committee notes that despite the fact that under the Criminal Procedure Code of the State party, the participation of the accused at the hearing of the supervisory review procedure is decided by the court itself, the State party failed to explain the reasons why it did not allow the participation of the author and his lawyers at the proceedings at the Supreme Court. In the absence of any other information, the Committee considers that there has been a violation of article 14, paragraph 5, of the Covenant....

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the State party has violated articles 7; 9, paragraphs 1, 3, and 4; and 14, paragraphs 1, 2, 3 (b), (c), (d), (e), and 5, of the International Covenant on Civil and Political Rights.

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy including the payment of adequate compensation and initiation of criminal proceedings to establish responsibility for the author's ill-treatment under article 7 of the Covenant. The State party is also under an obligation to prevent similar violations in the future.

Zhakhongir Maksudov, et al. v. Kyrgyzstan, Decision of the Human Rights Committee, 2008¹⁷⁰

1.1 The authors of the communications are Zhakhongir Maksudov, Adil Rakhimov, Yakub Tashbaev and Rasuldzhon Pirmatov, all Uzbek nationals born in 1975, 1974, 1956 and 1959, respectively. At the time of submission of their cases, all authors were granted refugee status by the Office of the United Nations High Commissioner for Refugees (UNHCR) and were detained in a detention

¹⁷⁰ Zhakhongir Maksudov and Adil Rakhimov, Yakub Tashbaev and Rasuldzhon Pirmatov v. Kyrgyzstan, Communication Nos. 1461,1462,1476& 1477/2006, Human Rights Committee, U.N. Doc. CCPR/C/93/D/1461,1462,1476& 1477/2006 (31 July 2008).

centre (SIZO) of Osh, Kyrgyzstan, awaiting removal to Uzbekistan on the basis of an extradition request from the Uzbek General Prosecutor's Office....

1.2 On 6 March 2006 (for Maksudov/Rakhimov), 8 June 2006 (for Tashbaev) and 13 June 2006 (for Pirmatov), in accordance with Rule 92 of its Rules of Procedure, the Human Rights Committee, acting through its Special Rapporteur for New Communications, requested the State party not to forcibly remove the authors while their communications are under consideration by the Committee. No reply was received from the State party on the request for interim measures of protection. On 11 August 2006, counsel informed the Committee that all authors had been handed over to the Uzbek law enforcement authorities on 9 August 2006 on the basis of the decision issued by the Kyrgyz General Prosecutor's Office....

Case of Zhakhongir Maksudov

2.1 At around 5-6 a.m. on 13 May 2005, on his way to work in Andijan, Uzbekistan, Maksudov learnt that a demonstration was taking place in the city's main square. He approached the square at around 7-8 a.m. and observed other people expressing their grievances related to poverty, government repression and widespread corruption. He did not address the gathering. After some time, the demonstrators were fired on; soldiers were indiscriminately shooting into the crowd. In panic and fearing persecution by Uzbek authorities, Maksudov crossed the border into Kyrgyzstan on 14 May 2005.

2.2 [Authors], together with 524 other individuals who fled Andijan on 13 May 2005, was installed in a tent camp set up along the Uzbek-Kyrgyz border in the Suzak region near Jalalabad (Kyrgyzstan) by UNHCR and administered by the Department of Migration Services under the Kyrgyz Ministry of Foreign Affairs (DMS).¹⁷¹

2.3 On 28 May 2005, the Uzbek General Prosecutor's Office issued an authorisation for Maksudov's placement in custody, and his transportation to the detention facility of the Uzbek Ministry of Internal Affairs in the Andijan region. On 28 May 2005, he was charged in absentia with terrorism (article 155, part 3, of the Uzbek Criminal Code), violent attempt to overthrow the Uzbek constitutional order (article 159, part 3), sabotage (article 161), organization of criminal community (article 242, part 2), mass disturbances (article 244), illegal acquisition of firearms, ammunition,

¹⁷¹ On 22 September 2005, the Department of Migration Services under the Kyrgyz Ministry of Foreign Affairs was transformed by the Resolution of the Zhogorku Kenesh (Parliament) into the State Committee on Migration and Employment of the Kyrgyz Republic.

explosives and explosive devices (article 247, part 3) and premeditated murder (article 97, part 2)....

2.5 In early June 2005, the Uzbek authorities requested Kyrgyzstan to extradite 33 individuals, including Maksudov; all were charged with having committed crimes under various articles of the Uzbek Criminal Code (see paragraph 2.3). The extradition request was based on the 1993 Minsk Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (1993 Minsk Convention) and the 1996 Agreement between Kyrgyzstan and Uzbekistan on the provision of mutual legal assistance in civil, family and criminal matters (1996 Agreement).

2.6 On 9 June 2005, Mr. Maksudov applied for asylum in Kyrgyzstan. On the same day, he was issued a certificate confirming that his application had been registered by the DMS.

2.7 On 16 June 2005, Maksudov, together with 16 other individuals, was taken into custody by Kyrgyz law enforcement officers and placed into the temporary confinement ward (IVS) of the Jalalabad Regional Department of Internal Affairs (Kyrgyzstan) on the basis of the decision of the Uzbek General Prosecutor's Office of 28 May 2005, where the individuals concerned were designated as "terrorists." Maksudov's arrest warrant was issued by the Andijan Regional Prosecutor (Uzbekistan) on 29 May 2005. In violation of the Kyrgyz Criminal Procedure Code (Kyrgyz CPC),¹⁷² the legality of his placement into custody was not examined either by a supervising prosecutor or a court....

2.10 The DMS examined Maksudov's asylum application from 9 June to 26 July 2005. On 19 July 2005, it established that Maksudov's asylum request was well founded, as he could be persecuted in Uzbekistan, as a participant in and eyewitness of the Andijan events. The DMS recognised that his case fell within the definition of "refugee," within the meaning of article 1 A- 2 of the 1951 Convention on the Status of Refugees and article 1 of the Kyrgyz Refugee Law. The DMS then examined information received from the Jalalabad Regional Department of Internal Affairs and the Jalalabad Regional Prosecutor's Office (Kyrgyzstan) about individuals accused of having committed serious crimes on Uzbek territory, including Maksudov. Despite being presented with a photograph where he was shown with three other individuals accompanying the Andijan City Prosecutor on his way to and from the besieged building of the Andijan Regional Administration, Maksudov claimed that he did not know the Andijan City Prosecutor and was unaware of the circumstances of his participation in

¹⁷² [FN3] The author refers to Article 104 of the Kyrgyz CPC (correctly: article 110, read together with article 435 of the same Code).

the demonstration. He added that he did not notice that armed individuals in civilian clothes were present during the demonstration, although this fact was corroborated by numerous witness accounts collected by the international non-governmental organizations (NGOs).¹⁷³ These circumstances were interpreted by DMS as an attempt by Maksudov to hide some facts about the demonstration and his participation in it. It concluded, therefore, that Maksudov fell under the exclusion clause of article 1 F-b of the Refugee Convention.... On 26 July 2005, the DMS issued a decision rejecting Maksudov's asylum application....

2.11 On 3 August 2005, the DMS decision was appealed to the Interregional City Court of Bishkek by Maksudov's counsel...

b) Neither DMS nor the Prosecutor's Office provided evidence that Maksudov had personally participated in the attack on the police station or the siege of the Andijan Regional Administration building.

On 14 October 2005, the DMS appealed the decision of the Interregional City Court of Bishkek on cassation to the Judicial Chamber for Economic and Administrative Cases of the Bishkek City Court (Bishkek City Court).

2.13 On 28 October 2005, Maksudov was granted refugee status by UNHCR. According to a UNHCR note verbale of 28 October 2005 addressed to the Permanent Mission of Kyrgyzstan to the United Nations Office at Geneva, the decision had been made after a thorough review of all circumstances surrounding Maksudov's case, including the assessment of the extradition materials and other elements related to the consideration of the exclusion clauses which UNHCR found not to be applicable. In the same note, UNHCR informed the Kyrgyz authorities that it was prepared to provide a durable solution for Maksudov's case through resettlement to a third country, should he be released from detention.

2.14 On 31 October 2005, Maksudov's counsel filed objections to the cassation appeal lodged by the DMS with the Bishkek City Court.

2.15 ...[T]he Bishkek City Court of 13 December 2005. Under article 359, paragraph 1, of the Kyrgyz Civil Procedure Code, the 'resolution of a review instance court becomes executory after its adoption, it is final and cannot be appealed'...

Committee's considerations:

12.2 ...The first issue before the Committee [was] whether the authors' deprivation of liberty [had been] in accordance with the State party's relevant laws. The

¹⁷³ [FN5] Reference is made to the Human Rights Watch Publication "Bullets Were Falling Like Rain," the Andijan Massacre, May 13, 2005.

authors claimed that contrary to article 110 of the Kyrgyz CPC their placement in custody was not authorised by the Kyrgyz prosecutor and was done in the absence of their counsel and therefore violated relevant domestic provisions. In the absence of a reply from the State party, due weight must be given to the authors' allegations, to the extent that they are substantiated, and it must be assumed that the events occurred as described by the authors. Consequently, the Committee [found] a violation of article 9, paragraphs 1, of the Covenant.

12.3 Under the above circumstances and in the light of the finding of a violation of article 9, paragraph 1, the Committee [did] not deem it necessary to separately examine the authors' claims under article 9, paragraph 3.

12.4 As to whether the authors' extradition from Kyrgyzstan to Uzbekistan exposed them to a real risk of torture or other ill-treatment in the receiving State, in breach of the prohibition of refoulement contained in article 7 of the Covenant, the Committee observe[d] that the existence of such a real risk must be decided in the light of the information that was known, or ought to [had] been known, to the State party's authorities at the time of the extradition, and [did] not require proof of actual torture having subsequently occurred although information as to subsequent events is relevant to the assessment of initial risk. In determining the risk of such treatment in the present cases, the Committee must consider all relevant elements. The existence of assurances, their content and the existence and implementation of enforcement mechanisms are all elements which are relevant to the overall determination of whether, in fact, a real risk of proscribed ill-treatment existed. In this regard, the Committee reiterate[d] that States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.¹⁷⁴ This principle should not be subject to any balancing with considerations of national security or the type of criminal conduct an individual is accused or suspected of.

12.5 The Committee consider[ed] at the outset that it was known, or should have been known, to the State party's authorities at the time of the authors' extradition that there were widely noted and credible public reports that Uzbekistan resorted to consistent and widespread use of torture against detainees¹⁷⁵ and that the risk of such treatment was usually high in the case of detainees held for

¹⁷⁴ Human Rights Committee, General Comment No. 20: Prohibition of torture and cruel treatment or punishment (article 7), 10 March 1992 (HRI/GEN/1/Rev.8), para.9.

¹⁷⁵ Report of the Special Rapporteur on the question of torture, Theo van Boven, on the mission to Uzbekistan (E/CN.4/2003/68/Add.2); and the OHCHR Report on the Mission to Kyrgyzstan concerning the events in Andijan, Uzbekistan,[citation omitted].

political and security reasons. In the Committee's view, these elements in their combination show[ed] that the authors faced a real risk of torture in Uzbekistan if extradited. Moreover, the offences for which the authors were sought by Uzbekistan were punishable by death in that country. Given the risk of a conviction and death sentence being procured by treatment incompatible with article 7, there was also a similar risk of a violation of article 6, paragraph 2, of the Covenant. The procurement of assurances from the Uzbek General Prosecutor's Office, which, moreover, contained no concrete mechanism for their enforcement, was insufficient to protect against such risk. The Committee reiterate[d] that at the very minimum, the assurances procured should contain such a monitoring mechanism and be safeguarded by arrangements made outside the text of the assurances themselves which would provide for their effective implementation.¹⁷⁶

12.6 The Committee recall[ed]¹⁷⁷ that if a State party remove[d] a person within its jurisdiction to another jurisdiction and there are substantial grounds for believing that there is a real risk of irreparable harm in the other jurisdiction, such as that contemplated by articles 6 and 7 of the Covenant, the State party itself may be in violation of the Covenant. Since the State party [had] not shown that the assurances procured from Uzbekistan were sufficient to eliminate the risk of torture and of imposition of the death penalty consistent with the requirements of article 6, paragraph 2, and article 7, the Committee conclude[d] that the authors' extradition thus amounted to a violation of article 6, paragraph 2, and article 7 of the Covenant.

12.7 As to the claim that no effective remedies were available to challenge the Kyrgyz General Prosecutor's extradition decision of 8 August 2006, the Committee note[d] that given the presence of a real risk of torture and of imposition of the death penalty, article 2 of the Covenant, read together with article 6, paragraph 2, and article 7, require[d] that an effective remedy be available for violations of the latter provisions. In this regard, the Committee note[d] that all of the authors' proceedings in the State party's courts were related to asylum, and not to extradition proceedings. It further note[d] that Kyrgyz laws [did] not allow for judicial review of the General Prosecutor's extradition decisions before the extradition takes place and that in the case of the authors these decisions were implemented the following day. The

¹⁷⁶ See, Communication No. 1416/2005, *Alzery v. Sweden*, Views adopted on 25 October 2006, para.11.5.

¹⁷⁷ Communication No.469/1991, *Ng v. Canada*, Views adopted on 5 November 1993, para. 6.2; Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 29 March 2004 (HRI/GEN/1/Rev.8), para. 12.

Committee recall[ed] that by the nature of refoulement, effective review of an extradition decision must have an opportunity to take place prior to extradition, in order to avoid irreparable harm to the individual and rendering the review otiose and devoid of meaning.¹⁷⁸ The absence of any opportunity for effective, independent review of the decision to extradite in the authors' cases accordingly amounted to a breach of article 6, paragraph 2, and article 7, read together with article 2, of the Covenant.

Committee's holding

13. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, [was] of the view that the facts before it disclose[d] a violation by Kyrgyzstan of the authors' rights under article 9, paragraph 1; article 6, paragraph 2, and article 7, read alone and together with article 2, of the Covenant. The Committee reiterate[d] its conclusion that the State party also breached its obligations under article 1 of the Optional Protocol.

Remedies

14. In accordance with article 2, paragraph 3(a), of the Covenant, the State party [was] under an obligation to provide the authors with an effective remedy, including adequate compensation. The State [was] requested to put in place effective measures for the monitoring of the situation of the authors of the communication. The State party [was] urged to provide the Committee with updated information, on a regular basis, of the authors' current situation. The State party is also under an obligation to prevent similar violations in the future.

Freedom of Association and Assembly

Ismayilov v. Azerbaijan, Decision of the European Court of Human Rights, 2008¹⁷⁹

Main facts

The applicant alleged that the significant delays in the state registration of the public association of which he was a founder amounted to a violation of his right to freedom of association, that the domestic courts were

¹⁷⁸ See, *Alzery v. Sweden*, [citation omitted].

¹⁷⁹ *Ismayilov v. Azerbaijan*, Application no. 4439/04, § 38, European Court of Human Rights, 17 January 2008.

not independent and impartial, and that the domestic remedies were not effective in lawsuits filed by public associations against the Ministry of Justice of Azerbaijan.

The Law

I. Alleged Violation of Article 11 of the Convention

B. Merits

1. The parties' submissions.

43. The Government argued that there had been no interference with the applicant's freedom of association,...

44. Moreover, the Government argued that the lack of the status of a legal entity did not prevent the association from continuing its activities. In this connection, they noted that the association had published a book as a part of its actual activity even without a status of a legal entity.

45. The Government further submitted that the founders "did not comply with the duty of diligence" during the registration process, as the public association's constituent documents had not been prepared in accordance with the requirements of the law. Even if the Ministry had committed procedural errors, they had not amounted to a violation of the applicant's rights under Article 11.

46. The applicant argued that the delay in responding to the founders' registration requests,... had constituted ... a violation of, his right to freedom of association, Article 11....

47. The applicant also noted that, without acquiring the status of a legal entity through state registration, the association had been unable to function properly and to engage in its primary activities. As for the book to which the Government referred, the applicant noted that the book had not been published by the Public Association "Humanity and Environment." He stated that he was one of the co-authors of the book, and the name of the unregistered association was mentioned next to his name simply to show his occupation and activities in the field of non-governmental organisations.

2. The Court's assessment

48. The Court has found previously that the failure by the Ministry of Justice to reply, within the statutory time-limits, to requests for state registration of a public association, amounted to a de facto refusal to register the association. Lacking the status of a legal entity, the association's legal capacity

was not identical to that of state-registered non-governmental organisations, even assuming that it could engage in certain limited activities. The significant delays in the registration procedure, if attributable to the Ministry of Justice, amounted to an interference with the exercise of the right of the association's founders to freedom of association (see *Ramazanov and Others*, cited above, §§ 54-60, with further references). [...]

49. Such interference will not be justified under the terms of Article 11 of the Convention unless it was “prescribed by law,” pursued one or more of the legitimate aims set out in paragraph 2 of that Article and was “necessary in a democratic society” for the achievement of that aim or aims (see, for example, *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, § 104, ECHR 1999-III)....

51. The Court observes that Article 9 of the Law on State Registration of Legal Entities of 6 February 1996 set a ten-day time-limit for the Ministry to issue a decision on the state registration of a legal entity or refusal to register it. Where the legal entity's foundation documents contained rectifiable deficiencies, the Ministry could return the documents to the founders within the same ten-day time-limit with instructions for their rectification....

52. In the present case, the Ministry delayed its response to each of the three registration requests by several months. In particular, in the period falling within the Court's temporal jurisdiction, the response to the applicant's third registration request of 28 August 2002 was delayed by more than three months, whereas the law clearly required it to be issued within five days. Therefore, the Ministry violated the procedural time-limits. There was no basis in the domestic law for such delays (see *Ramazanov and Others*, cited above, § 65).

53. The Court also reiterates its finding that the Law on State Registration of Legal Entities of 6 February 1996 did not afford sufficient protection against delays in the state registration procedure caused by the Ministry's failure to respond to registration requests within the statutory time-limits....

54. Having found that the Ministry of Justice breached the statutory time-limit for issuing the formal response to the state registration requests and that the domestic law did not afford sufficient protection against such delays, the Court concludes that the interference was not “prescribed by law” within the meaning of Article 11 § 2 of the Convention....

56. There has accordingly been a violation of Article 11 of the Convention.

Tolekan Ismailova v. Kyrgyzstan, Decision of the Kyrgyz Constitutional Court, 2 March 2010

“The Constitutional Court on December 14, 2009 received a petition of the citizen Ismailova T. requesting to recognize Article 3(1) of the Law “On the right of citizens to peaceful assembly, without weapons, to freely hold rallies and demonstrations,” Bishkek city Mayor administration Decree on “The determination of venue for the citizens of public events in Bishkek,” dated July 24, 2009 N 401, was unconstitutional and contrary to Article 2(3), Article 12, Article 13(1), Article 14(6), Article 17(1), Article 18, Article 21(3), Article 25 of the Constitution of the Kyrgyz Republic.

In support of the application the following was provided. Bishkek Mayor’s Decree “On the determination of venue for the citizens of public events in Bishkek,” dated July 24, 2009 N 401 identified the place for public events without notification of local authorities to be in the territory of the Hipodrome, which is restricted by Tolstoy, Termechikova, Repin and Alybaeva Streets of Bishkek city.”...

“In accordance with paragraph 2 of Article 85(4) of the Constitution of the Kyrgyz Republic, in case if Constitutional Court declares laws or its provisions to be unconstitutional, other normative legal acts based on those laws are annulled/cancelled. The Decree of the Mayor of Bishkek city, “On the determination of venue for the citizens of public events in Bishkek,” dated July 24, 2009 N 401 is based on such norm of the Act, therefore, its action is subject to cancellation.

In such circumstances, the Constitutional Court of the Kyrgyz Republic considers that Article 3 of the Law “On the right of citizens to peaceful assembly without arms, freely hold rallies and demonstrations,” is contrary to the requirements of Articles 18 and 25 of the Constitution of the Kyrgyz Republic, on inadmissibility of restrictions on freedom and human rights, except for in accordance with the aims provided in Constitution and the laws, regarding the fulfillment of citizens’ right, including citizen Ismailova T., to peacefully and without weapons conduct political meetings, rallies, marches, demonstrations and pickets....

“The Constitutional Court of the Republic: in the – Presiding judge Sydykova SK, Vice-President Sutalinov AA, judges Abdugaparova AA, Demin SN, Kurbanova CH.ZH., Mamyrova O.ZH., Musabekov Ch.A. and Esenkanova KE,

Clerk of the court Dubanaeva KS,...

Decided to:

1. Recognize article 3 of the Law “On the right of citizens to assemble peacefully without arms, freely hold rallies and demonstrations” of July 23, 2002 as unconstitutional and contrary to articles 18 and 25 of the Constitution of the Kyrgyz Republic and cancel the law.

Cancel the Decree of Mayor of Bishkek city on “Determination of locations for public events in Bishkek,” dated July 24, 2009 N 401.

To grant the motion to citizen Ismailova Tolekan Asanalievna.

Freedom of Expression and Religion

Raihon Hudoyberganova v. Uzbekistan, Decision of the Human Rights Committee, 2004¹⁸⁰

1. The author of the communication is Raihon Hudoyberganova, an Uzbek national born in 1978. She claims to be a victim of violations by Uzbekistan of her rights under articles 18 and 19 of the International Covenant on Civil and Political Rights...

The facts as presented by the author

2.1 Ms. Hudoyberganova was a student at the Farsi Department at the Faculty of languages of the Tashkent State Institute for Eastern Languages since 1995 and in 1996 she joined the newly created Islamic Affairs Department of the Institute. She explains that as a practicing Muslim, she dressed appropriately, in accordance with the tenets of her religion, and in her second year of studies started to wear a headscarf (“hijab”). According to her, since September 1997, the Institute administration began to seriously limit the right to freedom of belief of practicing Muslims. The existing prayer room was closed and when the students complained to the Institute’s direction, the administration began to harass them. All students wearing the hijab were “invited” to leave the courses of the Institute and to study at the Tashkent Islamic Institute instead.

2.2 The author and the concerned students continued to attend the courses, but the teachers put more and more pressure on them. On 5 November 1997, following a new complaint to the Rector of the Institute alleging the infringement of their rights, the students’ parents were convoked in Tashkent. Upon arrival, the author’s father was told that Ms. Hudoyberganova was in

¹⁸⁰ Raihon Hudoyberganova v. Uzbekistan, Communication No. 931/2000, Decision of the Human Rights Committee, UN Doc CCPR/C/82/D/931/2000 (5 November 2004).

touch with a dangerous religious group which could damage her and that she wore the hijab in the Institute and refused to leave her courses. The father, due to her mother serious illness, took his daughter home. She returned to the Institute on 1 December 1997 and the Deputy Dean on Ideological and Educational matters called her parents and complained about her attire; allegedly, following this she was threatened and there were attempts to prevent her from attending the lectures.

2.3 On 17 January 1998, she was informed that new regulations of the Institute have been adopted, under which students had no right to wear religious dress and she was requested to sign them. She signed them but wrote that she disagreed with the provisions which prohibited students from covering their faces. The next day, the Deputy Dean on Ideological and Educational matters called her to his office during a lecture and showed her the new regulations again and asked her to take off her headscarf. On 29 January the Deputy Dean called the author's parents and convoked them, allegedly because Ms. Hudoyberganova was excluded from the students' residence. On 20 February 1998, she was transferred from the Islamic Affairs Department to the Faculty of languages. She was told that the Islamic Department was closed, and that it was possible to re-open it only if the students concerned ceased wearing the hijab.

2.4 On 25 March 1998, the Dean of the Farsi Department informed the author of an Order by which the Rector had excluded her from the Institute. The decision was based on the author's alleged negative attitude towards the professors and on a violation of the provisions of the regulations of the Institute. She was told that if she changed her mind about the hijab, the order would be annulled.

2.5 [The Author filed court challenges]. On 15 July 1998, the author filed an appeal against the District's court decision (of 30 June 1998) in the Tashkent City Court and on 10 September, the City Court upheld the decision. At the end of 1998 and in January 1999, she complained to the Parliament, to the President of the Republic, and to the Supreme Court; the Parliament and the President's administration transmitted her letters to the Supreme Court. On 3 February 1999 and on 23 March 1999, the Supreme Court informed her that it could find no reasons to challenge the courts' decisions in her case.

2.6 On 23 February 1999, she complained to the Ombudsman, and on 26 March 1999 received a copy of the reply to the Ombudsman of the Institute's Rector, where the Rector reiterated that Ms. Hudoyberganova constantly violated the Institute's regulations and behaved inappropriately with her professors, that her acts showed that she belonged to an extremist organisa-

tion of Wahabits, and that he had no reason to readmit her as student. [She exhausted all appeals].

State party's observations

...4.2 The State party explains that according to the Court's civil case, it transpired that the author was admitted in the Faculty of Languages in the Institute in 1995, and in 1996 she continued her studies in the Faculty of History (Islamic Department). According to paragraph 2 (d) of the Internal Regulations (regulating the rights and obligations of the Institute's students), in the Institute, students are forbidden to wear clothes "attracting undue attention," and forbidden to circulate with the face covered (with a hijab). This regulation was discussed at a general meeting of all students on 15 January 1998. The author was presented the text and she made a note that she disagrees with the requirements of paragraph 2 (d). On 26 January 1998, the Dean of the Faculty of History warned her that she violated the provisions of paragraph 2 (d), of the Institute's regulations. The author refused to sign the warning and a record in this respect was made on 27 January 1998.

4.3 On 10 February 1998, by order of the Dean of the Faculty of History, the author was reprimanded for infringement of the Internal Regulations. By order of the Rector of the Institute of 16 March 1998, Ms. Hudayberganova was excluded from the Institute. The order was grounded on the "rough immoral attitude toward a teacher and infringement of the internal regulations of the Institute, after numerous warnings." According to the State party, no cassation appeal was introduced against this decision. Her claim under the supervisory procedure (*nadzornaya zhaloba*) gave no result....

Examination of the merits

6.2 The Committee has noted the author's claim that her right to freedom of thought, conscience and religion was violated as she was excluded from University because she refused to remove the headscarf that she wore in accordance with her beliefs. The Committee considers that the freedom to manifest one's religion encompasses the right to wear clothes or attire in public which is in conformity with the individual's faith or religion. Furthermore, it considers that to prevent a person from wearing religious clothing in public or private may constitute a violation of article 18, paragraph 2, which prohibits any coercion that would impair the individual's freedom to have or adopt a religion. As reflected in the Committee's General Comment No. 22 (para.5), policies or practices that have the same intention or effect as direct coercion, such as those restricting access to education, are inconsistent with article 18, paragraph 2. It recalls, however, that the freedom to manifest one's religion or beliefs is not absolute and may be subject to limitations, which are

prescribed by law and are necessary to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others (article 18, paragraph 3, of the Covenant). In the present case, the author's exclusion took place on 15 March 1998, and was based on the provisions of the Institute's new regulations. The Committee notes that the State party has not invoked any specific ground for which the restriction imposed on the author would in its view be necessary in the meaning of article 18, paragraph 3. Instead, the State party has sought to justify the expulsion of the author from University because of her refusal to comply with the ban. Neither the author nor the State party have specified what precise kind of attire the author wore and which was referred to as "hijab" by both parties. In the particular circumstances of the present case, and without either prejudging the right of a State party to limit expressions of religion and belief in the context of article 18 of the Covenant and duly taking into account the specifics of the context, or prejudging the right of academic institutions to adopt specific regulations relating to their own functioning, the Committee is led to conclude, in the absence of any justification provided by the State party, that there has been a violation of article 18, paragraph 2.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the Covenant, is of the view that the facts before it disclose a violation of article 18, paragraph 2, of the Covenant.

Individual opinion (dissenting) by Committee member Mr. Hipolito Solari-Yrigoyen

My dissenting opinion regarding this communication is based on the following grounds:

In order to comply with the provisions of article 5, paragraph 1, of the Optional Protocol, the communication should be studied in the light of all the information supplied by the parties. In the present case, it is the author who has provided most of the information, although her statements fail to underpin her own allegations, and even contradict them.

According to the author (para. 2.4), she was excluded from the Tashkent State Institute for Eastern Languages by the Rector, after numerous warnings, on the following grounds:

1. Her negative attitude towards the teaching staff;
2. Her infringement of the regulations of the Institute.

Regarding her negative attitude towards the teachers, the decision of Mirabad district court revealed that the author had accused one of the teach-

ers of bribery, claiming that he was offering pass marks in examinations in return for money. According to the State party (para. 4.3), she was excluded because of her “rough immoral attitude toward a teacher.” The author has not supplied any information to justify her serious accusation against the teacher which would nullify the initial ground given for her expulsion. Nor has she explained any link between this ground for exclusion and the alleged violation of article 18 of the Covenant.

Regarding the infringement of the regulations of the Institute, which did not permit the wearing of religious clothing on Institute premises, the author states that she disagreed with the provisions because they “prohibited students from covering their faces” (para. 2.3). The State party points out that the internal regulations forbid students to wear clothes “attracting undue attention,” and to circulate with the face covered (para. 4.2). Although the author and the State party do not specify which type of clothing the author was wearing, she states that she dressed “in accordance with the tenets of her religion.” However, the author herself states that she complained to the Chairman of the Committee of Religious Affairs (Cabinet of Ministers), who “informed [her] that Islam does not prescribe a specific cult dress” (para. 2.8). The author has not rebutted this assertion, which she herself passed on.

Regarding the regulations of the university institute, it is necessary to bear in mind that academic institutions have the right to adopt specific rules to govern their own premises. It should also be added that these regulations applied to all students without exception, since the institution involved was a State institute of education, not a place of worship, and one in which the freedom to exercise one’s own religion is subject to the need to protect the fundamental rights and freedoms of others, that is, religious freedom for all, safeguarded by the guarantee of equality before the law, whatever the religious convictions or beliefs of each individual student. It is not appropriate to request the State party to provide specific grounds for the restriction complained of by the author, since the regulations applied impose general rules on all students, and there is no restriction imposed on her alone or on the adherents of one religion in particular. Furthermore, the exclusion of the author, according to her own statements, arose from more complex causes, and not only the religious clothing she wore or her demand to cover her face within the Institute.

For the reasons set out and in the light of the information supplied, I conclude that the author has not substantiated any of her allegations that she was victim of a violation of article 18 of the Covenant.

Individual opinion by Committee member Sir Nigel Rodley

I agree with the finding of the Committee and with most of the reasoning in paragraph 6.2. I feel obliged, however, to dissociate myself from one assertion in the final sentence of that paragraph, in which the Committee describes itself as ‘duly taking into account the specifics of the context’.

The Committee is right in the implication that, in cases involving such ‘clawback’ clauses as those contained in articles 12, 18, 19, 21 and 22, it is necessary to take into account the context in which the restrictions contemplated by those clauses are applied. Unfortunately, in this case, the State party did not explain on what basis it was seeking to justify the restriction imposed on the author. Accordingly, the Committee was not in a position to take any context into account. To assert that it has done so, when it did not have the information on the basis of which it might have done so, enhances neither the quality nor the authority of its reasoning.

Freedom of Expression and Right to Information

Nurbek Toktakunov v. Kyrgyzstan, Decision of the Human Rights Committee, 2011¹⁸¹

2.1 On 3 March 2004, the Youth Human Rights Group (YHRG), a public association for which the author works as a legal consultant, requested the Central Directorate of Corrections (CDC) of the Ministry of Justice (MoJ) to provide it with information on the number of individuals sentenced to death in Kyrgyzstan as of 31 December 2003, as well as on the number of individuals sentenced to death and currently detained in the penitentiary system.... On 5 April 2004, the CDC refused to provide this information, due to its classification as ‘confidential’ and ‘top secret’ by the by-laws of the Kyrgyzstan.

2.3 The author argued that the information on individuals sentenced to death had to do with human rights and fundamental freedoms and that its disclosure could not have had any negative impact on defence capability, safety, or economic and political interests of the State. Therefore, it did not fulfil the criteria in article 5 of the Law ‘On protection of state secrets’ for it

¹⁸¹ Nurbek Toktakunov v. Kyrgyzstan, Communication No. 1470/2006, Decision of the Human Rights Committee, U.N. Doc. CCPR/C/101/D/1470/2006 (28 March 2011).

to be classified as the state secret. The author further referred to Resolutions Nos. 2003/67 and 2004/60 of the Commission on Human Rights on the question of the death penalty, which call upon all States that maintain the death penalty to make available to the public information on the imposition of the death penalty and any scheduled execution.¹ He finally referred to article 17.8 of the Copenhagen Document (see, paragraph 2.1 above) and recalled that, pursuant to article 10.1 of this document, the participating States have agreed to respect the right of everyone, individually or in association with others, to seek, receive and impart freely views and information on human rights and fundamental freedoms. On an unspecified date, the author's complaint of 26 June 2004 was transmitted by the MoJ to the CDC, for action.

2.4 On 9 September 2004, the CDC reiterated its previous position. On 7 December 2004, the author filed a complaint about a violation of his right to seek and receive information to the Bishkek Inter-District Court, referring to article 19, paragraph 2, of the Covenant. In his complaint, the author argued that he requested the information on behalf of a public association and on his own behalf, as a Kyrgyz citizen....

2.5 On 17 December 2004, the Bishkek Inter-District Court dismissed the author's complaint on the grounds that the subject matter fell outside of its jurisdiction to adjudicate civil proceedings. On 25 December 2004, the author filed a privy motion in the Bishkek City Court, challenging the decision of the Bishkek Inter-District Court....

2.6 On 24 January 2005, the Bishkek City Court upheld the decision of the Bishkek Inter-District Court, on the grounds that the information on individuals sentenced to death was made secret by the Ministry of Interior and access to such information was restricted. Therefore, the actions of the MoJ in relation to the refusal to provide information could not be appealed within the framework of administrative and civil proceedings....

2.7 The author's repeated request of 7 June 2005 for information on the individuals under the sentence of death was again refused by the MoJ on 27 June 2005. 2.8 The MoJ further explained that, according to the above-mentioned confidential decree of the Ministry of Interior, any information on the number of individuals sentenced to capital punishment was classified as 'top secret'. According to the Resolution of the Government No. 391 of 20 June 2002, the penitentiary system was transferred from the Ministry of Interior to the MoJ. Therefore, the decree of the Ministry of Interior was in force for the MoJ for as long as there was no decree on this matter drafted and adopted by the MoJ. The MoJ further stated that at that time, the MoJ was drafting a number of new by-laws concerning the penitentiary system,

which included a list of data within the system of the CDC of the MoJ that would be subject to classification as secret. This new list was expected to be endorsed at a later stage by relevant state bodies. Thus, the MoJ concluded that the refusal to provide information on the number of individuals sentenced to death was justified and in compliance with the law in force.

The complaint

...3.2 The author further claims that, by failing to provide him with an effective judicial remedy for a violation of his right of access to information, the State party's authorities have also violated his rights under article 2, read together with article 14, paragraph 1, of the Covenant.

State party's observations on the merits

4.1 On 26 July 2006, the State party submits that, according to the information provided by the CDC of the MoJ, general data on the mortality rates in the penitentiary system, as well as data on individuals sentenced to death, has been declassified and pursuant to the by-laws it can now be used exclusively 'for service purposes'. This information remains confidential for the press...

Author's comments on the State party's observations

...5.2 The author argues that the data on individuals sentenced to death cannot be considered declassified as long as the general public's and press' access to such data is restricted by the by-laws.

Issues and proceedings before the Committee

Consideration of admissibility

...6.3 The Committee... notes that the reference to the right to 'seek' and 'receive' 'information' as contained in article 19, paragraph 2, of the Covenant, includes the right of individuals to receive State-held information, with the exceptions permitted by the restrictions established in the Covenant. It observes that the information should be provided without the need to prove direct interest or personal involvement in order to obtain it, except in cases in which a legitimate restriction is applied...

Consideration of the merits

7.2 The Committee notes that, in its submission on the author's allegations, the State party has not addressed any of the arguments raised by him in the communication to the Committee with regard to article 19, paragraph 2, of the Covenant. The State has merely stated that 'data on individuals sentenced to death had been declassified' and that 'pursuant to the by-laws it could be used exclusively for service purposes' but remained confidential for

the press. In the absence of any other pertinent information from the State party, due weight must be given to the author's allegations, to the extent that they have been properly substantiated....

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation by the State party of article 19, paragraph 2....

Individual opinion by Committee member, Mr. Gerald L. Neuman, (concurring)

I agree with the Committee that the State party has violated the author's rights under Article 19(2) with regard to the requested information....

The traditional right to receive information and ideas from a willing speaker should not be diluted by subsuming it in the newer right of access to information held by government. This modern form of "freedom of information" raises complexities and concerns that can justify limitations on the satisfaction of the right, based on considerations such as cost or the impairment of government functions, in circumstances where the suppression of a similar voluntary communication would not be justified. In explaining and applying the right of access, it is important to observe this distinction, and to be careful not to undermine more central aspects of freedom of expression.

Freedom of Elections

United Nations Universal Declaration on Human Rights (1948)

Article 21.

(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

(2) Everyone has the right of equal access to public service in his country.

(3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

***Protocol I of the European Convention on Human Rights
(1952)***

Article 3

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

***Mathieu-Mohin and Klerfeyt v. Belgium, Decision of the
European Court of Human Rights***¹⁸²

FACTS

The applicants - Ms. Lucienne Mathieu-Mohin and Mr. George Klerfeyt lived in the communes of the Al-Vilvord administrative district, which was part of the bilingual Brussels region and the electoral district of Brussels. On direct elections in the late 70's they were elected to the House of Representatives (Ms. Mathieu-Mohin) and Senate (Mr. Klerfeyt).

During that period of time, Belgium was divided on a linguistic basis into several regions, which governed by regional councils, which included members of both houses of parliament, elected in their respective districts (in the bilingual region of Brussels two councils were created). In the administrative county where the applicants were elected, most of the population was Flemish, and it was governed by Flemish Council. However, the applicants could not join it, since they took a parliamentary oath in French, thus belong to Francophone faction and not Flemish faction.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF PROTOCOL No. 1 (P1-3)
TAKEN ALONE

...B. Application of Article 3 of Protocol No. 1 (P1-3) in the instant case

55. The Court has to consider the applicants' complaints from the point of view of Article 3 (P1-3) thus interpreted.

56. The Government pointed out that nothing prevented the French-speaking electors in the district of Halle-Vilvoorde from knowingly voting for a candidate who was likewise French-speaking but willing to take his

¹⁸² Application no. 9267/81, 2 March 1987, available at: <http://www.math.uni-augsburg.de/stochastik/bazi/ECHR-Mathieu.pdf>.

parliamentary oath in Dutch; once elected, such a candidate would sit on the Flemish Council as of right and represent his constituents.

This argument is not decisive. Admittedly, electors cannot be defined wholly in terms of their language and culture; political, economic, social, religious and philosophical considerations also influence their votes. Linguistic preferences, however, are a major factor affecting the way citizens vote in a country like Belgium, especially in the case of the residents of a “sensitive” area, such as the municipalities on the outskirts of Brussels. An elected representative who took his parliamentary oath in Dutch would not belong to the French-language group in the House of Representatives or the Senate; and these groups, like the Dutch-language groups, play an important role in those areas in which the Constitution requires special majorities....

57. The 1980 Special Act, however, fits into a general institutional system of the Belgian State, based on the territoriality principle. The system covers the administrative and political institutions and the distribution of their powers. The reform, which is not yet complete, is designed to achieve an equilibrium between the Kingdom’s various regions and cultural communities by means of a complex pattern of checks and balances. The aim is to defuse the language disputes in the country by establishing more stable and decentralised organisational structures. This intention, which is legitimate in itself, clearly emerges from the debates in the democratic national Parliament and is borne out by the massive majorities achieved in favour - notably - of the Special Act, including section 29 (see paragraphs 22 and 31 above).

In any consideration of the electoral system in issue, its general context must not be forgotten. The system does not appear unreasonable if regard is had to the intentions it reflects and to the respondent State’s margin of appreciation within the Belgian parliamentary system - a margin that is all the greater as the system is incomplete and provisional. One of the consequences for the linguistic minorities is that they must vote for candidates willing and able to use the language of their region. A similar requirement is found in the organisation of elections in a good many States. Experience shows that such a situation does not necessarily threaten the interests of the minorities. This is particularly true, in respect of a system which makes concessions to the territoriality principle, where the political and legal order provides safeguards against inopportune or arbitrary changes - by requiring, for example, special majorities....

The French-speaking electors in the district of Halle-Vilvoorde enjoy the right to vote and the right to stand for election on the same legal footing as the Dutch-speaking electors. They are in no way deprived of these rights by the mere fact that they must vote either for candidates who will take the parlia-

mentary oath in French and will accordingly join the French-language group in the House of Representatives or the Senate and sit on the French Community Council, or else for candidates who will take the oath in Dutch and so belong to the Dutch-language group in the House of Representatives or the Senate and sit on the Flemish Council. This is not a disproportionate limitation such as would thwart “the free expression of the opinion of the people in the choice of the legislature” (see paragraphs 51, 52 and 53 in fine above).

The Court accordingly finds that there has been no breach of Article 3 of Protocol No. 1 (P1-3) taken alone...

Joint Dissenting Opinion Of Judges Cremona, Bindschedler-Robert, Bernhardt, Spielmann and Valticos

To our regret we are unable to share the opinion of the majority of the Court, since it appears to us that in law the position in which the French-speaking electorate and the French-speaking elected representatives of the administrative district of Halle-Vilvoorde are placed is not compatible with Belgium’s obligations under Article 3 of Protocol No. 1 (P1-3), whether taken by itself or together with Article 14 (art. 14+P1-3) of the Convention.

The system currently in force in respect of that district (which as an administrative district comes within the Flemish Region, while for electoral purposes - with different boundaries - it is part of the electoral district of Brussels) has the effect in substance, under the Special Act of 8 August 1980 (section 29(1)), that the members of the House of Representatives and the Senate elected in the district of Halle-Vilvoorde cannot, if they take the parliamentary oath in French, sit on the Flemish Council (a body which indisputably has legislative powers) and are therefore unable to defend their Region’s interests in a number of important fields (such as regional planning, environment, housing, economic policy, energy and employment), whereas elected representatives who take the oath in Dutch are automatically members of the Flemish Council. Halle-Vilvoorde has a population of more than 100,000 French-speakers out of a total population of more than 500,000, the average number of votes required to elect a member of the House of Representatives varying from 22,000 to 25,000.

The practical consequence is that unless they vote for Dutch-speaking candidates, the French-speaking voters in this district will not be represented on the Flemish Council.

In our opinion, such a situation, excluding, as it does in practice, representation of the French-speaking electorate of Halle-Vilvoorde at regional level, does not ensure “the free expression of the opinion of the people in the choice of

the legislature” as stipulated in Article 3 of Protocol No. 1 (P1-3), and it creates a language-based distinction contrary to Article 14 (art. 14) of the Convention.

None of the reasons put forward to justify this incompatibility appears to us to be convincing.

In the first place, it is true that the French-speakers elected in Halle-Vilvoorde could belong to the (Flemish) regional Council if they agreed to take the oath in Dutch. In that eventuality, however, the representatives concerned would lose their status as French-speakers in Parliament, and this - in addition to the psychological and moral aspect of the issue - would have important political consequences, given the role played by the parliamentary language groups.

The argument based on the fact that under the Belgian Constitution elected representatives are considered as representatives of the whole nation is irrelevant in the case of the regional Councils, which are vested under the Constitution itself with the responsibility of watching over the interests of the Regions concerned and to which the elected representatives of those Regions should therefore be entitled to belong.

Displacement, Migration, Internally Displaced People

Michelle Leighton, “Population Displacement, Relocation, and Migration”¹⁸³

IV. Internally Displaced Persons

Victims of natural disasters who are generally displaced inside their country of origin often seek to return to their community when safe, rather than engage in permanent migration or relocation. That is, people tend to move temporarily to nearby urban centers to cope with the disaster, seeking employment and aid until they are able to return.¹⁸⁴ The World Health

¹⁸³ Michelle Leighton, “Population displacement, relocation, and migration,” *The Law of Adaptation to Climate Change U.S. and International Aspects*, eds., Michael Gerrard and Katrina Kuh (June 2012, American Bar Association, Washington D.C.), [reprinted with permission of the author, editors and American Bar Association].

¹⁸⁴ Oliver-Smith, A. 2009. Climate change and population displacement: disasters and diasporas in the twenty first century. In *Crate, S. & Nuttall, M. eds., Anthropology and Climate Change: From Encounters to Actions*. Left Coast Press. Walnut Creek.

Organization reports that seventy-five percent of those displaced by disaster are women and children.¹⁸⁵ International migration statistics reveal that men and women tend to move equally, sometimes with their households if the disaster is severe enough.¹⁸⁶ While international migration occurs much less frequently than internal displacement in response to natural disasters, people may move to countries where social networks have already been established and/or they have cultural ties.¹⁸⁷ If aid is delivered quickly and effectively to disaster areas, migration may be avoided entirely.

Internal displacement implicates a number of human rights and humanitarian principles. International law generally is concerned with state-to-state relations, with the duties and obligations states owe to each other, but human rights doctrine comprises additional duties owed by states to individuals and groups. It prescribes special responsibility to protect vulnerable populations and minorities, including women, children, and indigenous groups. Displaced persons have also been the subject of special consideration as human rights doctrine has evolved.

Governments have a number of obligations related to protecting victims of disaster....The human rights of internally displaced persons (“IDPs”) due to disasters, and the corresponding obligations of states, are dynamic. They evolve as the international community gains more understanding and experience in addressing the needs of disaster victims. At present, the extent of government obligation and level of protection afforded victims depend on the context of the disaster and on whether victims are displaced temporarily, voluntarily move away from a disaster-affected area, are relocated, or move across borders in search of new livelihood opportunities. ... International law protects those internally displaced by conflict or disaster under the Guiding Principles on Internal Displacement (IDP). These Principles, developed by a special representative of the U.N. Secretary General and supported by the U.N. Commission on Human Rights, “address the specific needs of internally displaced persons worldwide.¹⁸⁸ They identify rights and guarantees relevant to the protection of persons from forced displacement and to their protection and assistance during displacement, as well as during return or resettlement and reintegration.”¹⁸⁹ Specifically,

¹⁸⁵ World Health Organization, Family, Health and Research, statistics published by WHO, see http://www.searo.who.int/en/Section13/Section390_8282.htm.

¹⁸⁶ Trends in World Migration, [citation omitted].

¹⁸⁷ See, e.g., Skeldon, [citation omitted].

¹⁸⁸ Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced persons, Francis Deng, on Guiding Principles on Internal Displacement, (“Guiding Principles on IDPs”), Feb. 11, 1998, U.N. Doc. E/CN.4/1998/53/Add.2.

¹⁸⁹ Id.

they apply to “persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized state border.”¹⁹⁰

The IDP principles codify the state’s human rights obligations towards those displaced in its territory, including the right to life, dignity and security of persons displaced. IDPs have the right to move to other parts of the country or to leave their country, to have their family members remain together or be reunited if separated. They have the right to an adequate standard of living, food, water, basic shelter and housing, property restitution, essential medical services and sanitation and they continue to enjoy the right to seek employment and participate in economic activities.¹⁹¹ The principles reiterate that governments are prohibited from discriminating against IDPs in the distribution of aid or other treatment and must adhere to human rights protections in the resettlement and reintegration of IDPs.¹⁹²

Studies suggest that there are gender differences in disaster impacts that raise issues of discrimination. Women suffer higher mortality rates than men during and after disasters. Earlier discrimination trends against women or other minorities tends to be exacerbated, and human trafficking may also increase in the wake of disasters.¹⁹³ The principles require governments to consider these issues in disaster management.

Most governments appear to accept these principles, evidenced by a number of recent confirmations as to their importance and adoption by the

¹⁹⁰ Id.

¹⁹¹ See also, Report of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, at 19, U.N. Doc. A/HRC/10/61 (15 Jan. 2009).

¹⁹² The Human Rights Committee and Committee on Elimination of Racial Discrimination have also commented on the key issues of concern related to a government’s discriminatory treatment of those displaced. See, e.g., Concluding Observations of these bodies relating to treatment of displaced persons after Hurricane Katrina in relation to the right of return, housing and other assistance by the United States (para 26, CCPR/C/USA/CO/3/Rev.1, Concluding Observations on United States, 2006) and Convention on Elimination of Racial Discrimination (para 31, CERD/C/USA/CO/6, Concluding Observations on United States, 2008).

¹⁹³ Neumayer, E. and Plumper, T., 2007. The gendered nature of natural disasters: the impact of catastrophic events on the gender gap in life expectancy 1981-2002. (available at: <http://ssrn.com/abstract=874965>).

OSCE...¹⁹⁴ Most recently, the IDP principles served as the foundation for the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (“Kampala Convention”) concluded in November, 2009. The Kampala Convention recognizes that climate change may cause internal displacement and provides detailed description of government obligations, including reparations for failure to act, and encourages non-governmental and other assistance in the region for IDPs when a state affected by disaster is unable to provide full assistance.

Under human rights doctrine, governments may violate their international treaty and customary law obligations if they fail to prevent disasters or impacts where such harm is foreseeable. International treaty bodies, including the Human Rights Committee (established to monitor implementation of the International Covenant on Civil and Political Rights), the Inter-American Commission and Court of Human Rights, and the European Court of Human Rights, have reinforced this principle through legal declarations and decisions that discuss the state’s positive obligation to take precautions against foreseeable harm.¹⁹⁵ In one prominent case, the European Court found a violation for foreseeable environmental harm. After several storms led to devastating mudslides in the Central Caucasus region, the local government’s failure to repair infrastructure, prepare the public, or take other public safety measures to prevent harm, led to extreme vulnerability of the community during the next storm. This resulted in more death and injury, as well as property destruction that left many in the community without homes. Russia was found in violation of its treaty obligations before the European Court of Human Rights because it knew the potential but failed to take measures that could have reduced the damage to human life and property caused by the natural disasters.¹⁹⁶ As a member of the Council of Europe and party to the European Convention on Human Rights, Russia is obligated to comply with decisions of the European Court of Human Rights. The Court found similarly against Turkey in a case involving foreseeable harm from a methane explosion.¹⁹⁷

¹⁹⁴ See, e.g., discussion of national adoption and OSCE incorporation in Neussl, P., Bridging the national and international response to IDPs, 20 *Forced Migration Review* 42 (2004).

¹⁹⁵ Report of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, at 24, U.N. Doc. A/HRC/10/61 (15 Jan. 2009).

¹⁹⁶ *Budayeva and others v. Russia*, Applications nos. 153339/02, 21166/02, 20058/02, European Court of Human Rights judgment of 20 March 2008.

¹⁹⁷ *Case of İnneryildiz v. Turkey*, European Court of Human Rights, (2002), available at: <http://eu.vlex.com/vid/case-of-v-turkey-26840475>.

The principle related to environmental harm, founded in government obligations to protect life from foreseeable disasters, has implications for all of the 47 members of the Council of Europe party to the European Convention on Human Rights and may affect adaptation planning. In 2003, the Council of Europe Parliamentary Assembly drafted Recommendation 1614 calling for a protocol to the European Convention on Human Rights on obligations to protect the environment.¹⁹⁸ The European Court's decisions are influential in global human rights doctrine, other regional and international human rights bodies are likely to follow this reasoning.

Walter Kalin, the U.N. Secretary General's Representative on IDPs has interpreted the European Court cases and other human rights obligation related to foreseeable environmental harm as follows:

In summary, the individual right to life and the corresponding state obligation to protect life require that, with regard to natural disasters, including those caused by climate change, the relevant authorities must: enact and implement laws dealing with all relevant aspects of disaster risk mitigation and set up the necessary mechanisms and procedures; take the necessary administrative measures, including supervising potentially dangerous situations; and inform the population about possible dangers and risks; evaluate potentially affected populations; conduct criminal investigations and prosecute those responsible for having neglected their duties in case of deaths caused by disaster; and compensate surviving relatives killed as a consequence of neglecting those duties.¹⁹⁹

¹⁹⁸ See Recommendation 1614, Council of Europe Parliamentary Assembly, available at: <http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc04/EDOC10041.htm>.

¹⁹⁹ Kalin, W. and Haenni Dale, C., "Disaster Risk Mitigation, Why Human Rights Matter," *Forced Migration Review* 31 at 39, 2008.

International Covenant on Economic, Social and Cultural Rights (ICESCR)

Paul Hunt, “State Obligations, Indicators, Benchmarks and the Right to Education”²⁰⁰

Excerpt of Background paper submitted by Paul Hunt, United Nations Special Rapporteur on Health on State obligations, indicators, benchmarks and the right to education (University of Waikato, New Zealand)(ICESCR Day of Discussion, Nov. 30, 1998).

1. Over the last 12 years or so, our understanding of the international legal obligations arising from the International Covenant on Economic, Social and Cultural Rights (ICESCR) has deepened. Several factors have contributed to this progress, not least the work of the United Nations Committee on Economic, Social and Cultural Rights and the increasing attention devoted to economic, social and cultural rights by non-governmental organizations (NGOs) and the academic literature. Among the especially useful NGO and academic initiatives have been the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (1986), the Bangalore (I.C.J.) Declaration and Plan of Action (1995), and the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997).

2. Despite these advances, however, there remains considerable uncertainty about the nature and extent of the legal obligations arising from ICESCR. These doubts persist for a number of reasons, one being the wording of article 2 (1) which sets out the general legal obligation of States parties under the Covenant:

“Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”

3. This statement of obligation includes some notoriously elusive phrases and concepts. Here I draw attention to two which have particular relevance

²⁰⁰ Paul Hunt, State obligations, indicators, benchmarks and the right to education, Background Paper submitted to the Office of the High Commission of Human Rights (University of Waikato, New Zealand)(ICESCR Day of Discussion, Nov. 30, 1998).

to indicators and benchmarks: States parties undertake to progressively realize the enumerated rights to the maximum of their available resources.... 4. Both phrases - progressive realization and resource availability - have two crucial implications. Firstly, they imply that some (but not necessarily all) States parties' obligations under the Covenant may vary from one State to another. Second, they imply that, in relation to the same State party, some (but not necessarily all) obligations under the Covenant may vary over time. These variable elements of States parties' obligations under ICESCR contribute to the sense of uncertainty which remain a feature of international economic, social and cultural rights...

5. Critically, human rights indicators and benchmarks can help all interested parties identify and monitor these variable or shifting State obligations. Before sketching a process by which indicators and benchmarks might be used in the context of the right to education, I want to make some additional general observations about the nature and extent of States parties' legal obligations under the Covenant.

6. Consideration of the Covenant and the jurisprudence of the Committee, discloses three interrelated and overlapping dimensions to States parties' legal obligations. Here, I deal only very briefly with the first two. My focus is the third dimension which, as we will see, has particular relevance to indicators and benchmarks.

(a) Obligations applying uniformly to all States parties. It must be emphasized that some obligations under ICESCR are not subject to notions of progressive realization and resource availability. These obligations apply uniformly around the world to all States parties whatever their stage of economic development. To take just one example: the principle of non-discrimination. According to article 2 (2) of the Covenant, States parties must not discriminate on the basis of sex, race and other prohibited grounds. Thus, if a State party excludes girls from any State school, it breaches the Covenant. The Covenant and Committee are clear: in this context, notions of progressive realization and resource availability are irrelevant. (See General Comment 3.)

(b) A minimum core content for each right. According to the Committee, it is incumbent upon every State party "to ensure the satisfaction of, at the very least, minimum essential levels" of each right set out in the Covenant. Without minimum core obligations, the Covenant "is largely deprived of its *raison d'être*. Much work still has to be done to define the minimum core content of each right. The Committee, for example, has yet to identify the minimum core content of the right to education. Once defined, however, it will apply to all States parties whatever their stage of economic development.

In other words, the minimum core content will not be subject to the notions of progressive realization and resource availability.

(c) The variable dimension. Given article 2 (1), it is difficult to resist the conclusion that States parties' obligations under the Covenant have a variable or shifting dimension. Because of the progressive realization and resource availability phrases, the precise content of at least some State obligations is likely to vary from one State to another - and over time in relation to the same State.

7. In these circumstances, it is important to establish effective techniques and processes which are able to identify and monitor this variable dimension of State obligations. Without such arrangements, article 2 (1) can provide "recalcitrant States" with the "escape hatch" which Leckie warns us about. In my view, indicators and benchmarks have a role to play in both identifying and monitoring the variable component of States parties' obligations under the Covenant. The usefulness of indicators and benchmarks is not necessarily confined to this third, variable dimension of States parties' obligations. They might also have a role, for example, in the definition of minimum core content.

8. This also seems to be the position of CESCR which has remarked: "it may be useful for States to identify specific benchmarks or goals against which their performance in a given area can be assessed ... global benchmarks are of limited use, whereas national or other more specific benchmarks can provide an extremely valuable indication of progress." (General Comment 1, para.6.)

Housing Rights

The Government of the Republic of South Africa, et al. v. Grootboom²⁰¹

Yacoob, J.

A. Introduction

The people of South Africa are committed to the attainment of social justice and the improvement of the quality of life for everyone...The Constitution declares the founding values of our society to be "[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms." This case grapples with the realisation of these aspirations for it concerns

²⁰¹ Constitutional Court of South Africa, Case CCT 11/00, Judgment of 4 October 2000.

the slate's constitutional obligations in relation to housing: a constitutional issue of fundamental importance to the development of South Africa's new constitutional order.

The issues here remind us of the intolerable conditions under which many of our people are still living. The respondents are but a fraction of them. It is also a reminder that unless the plight of these communities is alleviated, people may be tempted to take the law into their own hands in order to escape these conditions. The case brings home the harsh reality that the Constitution's promise of dignity and equality for all remains for many a distant dream. People should not be impelled by intolerable living conditions to resort to land invasions. Self-help of this kind cannot be tolerated, for the unavailability of land suitable for housing development is a key factor in the fight against the country's housing shortage.

The group of people with whom we are concerned in these proceedings lived in appalling conditions, decided to move out and illegally occupied someone else's land. They were evicted and left homeless. The root cause of their problems is the intolerable conditions under which they were living while waiting in the queue for their turn to be allocated low-cost housing. They are the people whose constitutional rights have to be determined in this case.

Mrs. Irene Grootboom and the other respondents¹³ were rendered homeless as a result of their eviction from their informal homes situated on private land earmarked for formal low-cost housing. They applied to the Cape of Good Hope High Court (the High Court) for an order requiring government to provide them with adequate basic shelter or housing until they obtained permanent accommodation and were granted certain relief. The appellants were ordered to provide the respondents who were children and their parents with shelter. The judgment provisionally concluded that "tents, portable latrines and a regular supply of water (albeit transported) would constitute the bare minimum." The appellants who represent all spheres of government responsible for housing challenge the correctness of that order.

The cause of the acute housing shortage lies in apartheid. A central feature of that policy was a system of influx control that sought to limit African occupation of urban areas. Influx control was rigorously enforced in the Western Cape, where government policy favoured the exclusion of African people in order to accord preference to the coloured community: a policy adopted in 1954 and referred to as the "coloured labour preference policy." In consequence, the provision of family housing for African people in the Cape Peninsula was frozen in 1962. This freeze was extended to other urban areas

in the Western Cape in 1968. Despite the harsh application of influx control in the Western Cape, African people continued to move to the area in search of jobs. Colonial dispossession and a rigidly enforced racial distribution of land in the rural areas had dislocated the rural economy and rendered sustainable and independent African farming increasingly precarious. Given the absence of formal housing, large numbers of people moved into informal settlements throughout the Cape peninsula. The cycle of the apartheid era, therefore, was one of untenable restrictions on the movement of African people into urban areas, the inexorable tide of the rural poor to the cities, inadequate housing, resultant overcrowding, mushrooming squatter settlements, constant harassment by officials and intermittent forced removals. Mrs. Grootboom and most of the other respondents previously lived in an informal squatter settlement called Wallacedene.... The conditions under which most of the residents of Wallacedene lived were lamentable. . . . About half the population were children; all lived in shacks. They had no water, sewage or refuse removal services and only 5% of the shacks had electricity. The area is partly waterlogged and lies dangerously close to a main thoroughfare.

Many had applied for subsidised low-cost housing from the municipality and had been on the waiting list for as long as seven years. Despite numerous enquiries from the municipality no definite answer was given. Clearly it was going to be a long wait. Faced with the prospect of remaining in intolerable conditions indefinitely, the respondents began to move out of Wallacedene at the end of September 1998. They put up their shacks and shelters on vacant land that was privately owned and had been earmarked for low-cost housing. They called the land "New Rust."

They did not have the consent of the owner and on 8 December 1998 he obtained an ejection order against them in the magistrates' court. The order was served on the occupants but they remained in occupation beyond the date by which they had been ordered to vacate. Mrs. Grootboom says they had nowhere else to go: their former sites in Wallacedene had been filled by others..

The validity of the eviction order has never been challenged and must be accepted as correct. However, no mediation took place and on 18 May 1999, at the beginning of the cold, windy and rainy Cape winter, the respondents were forcibly evicted at the municipality's expense. This was done prematurely and inhumanely: reminiscent of apartheid-style evictions. The respondents' homes were bulldozed and burnt and their possessions destroyed. Many of the residents who were not there could not even salvage their personal belongings... The respondents went and sheltered on the Wallacedene sports field under such temporary structures as they could muster.

[S]ection 26 of the Constitution . . . provides that everyone has the right of access to adequate housing. Section 26(2) imposes an obligation upon the slate to take reasonable legislative and other measures to ensure the progressive realisation of this right within its available resources....

The relevant international law and its impact

During argument, considerable weight was attached to the value of International law in interpreting section 26 of our Constitution. Section 39 of the Constitution obliges a court to consider international law as a tool to interpretation of the Bill of Rights...

The relevant international law can be a guide to interpretation but ... where the relevant principle of international law binds South Africa, it may be directly applicable.

[T]he International Covenant on Economic, Social and Cultural Rights is of significance in understanding the positive obligations created by the socio-economic rights in the Constitution....

...The amici relied on the relevant General Comments issued by the committee concerning the interpretation and application of the Covenant....

It is clear...that the committee considers that every state party is bound to fulfill a minimum core obligation ...Accordingly, a state in which a significant number of individuals is deprived of basic shelter and housing is regarded as prima facie in breach of its obligations....

The right delineated in section 26(10) is a right of 'access to adequate housing'...It recognizes that housing entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing for these, including building the house itself....

Subsection (2) speaks to the positive obligation imposed upon the state. It requires the state to devise a comprehensive and workable plan to meet its obligations....

This case shows the desperation of hundreds of thousands of people living in deplorable conditions throughout the country. The Constitution obliges the state to act positively to ameliorate these conditions. The obligation is to provide access to housing, health-care, sufficient food and water, and social security to those unable to support themselves and their dependents. Those in need have a corresponding right to demand that this be done....

There is...no dispute that the municipality funded the eviction of the respondents...The respondents were evicted a day early and to make matters

worse, their possessions and building materials were not merely removed, but destroyed and burnt....

In light of these conclusions...[t]he [court] order requires the state to act to meet the obligation imposed upon it...This includes the obligation to devise, fund, implement, and supervise measures to provide relief to those in desperate need.

Labor Rights

Elida Nogoibaeva, "The Application of International Labor Law in the Legal System of the Kyrgyz Republic"²⁰²

International law doctrine recognizes three basic theories of interrelation between international law and the national legislation.²⁰³ The first, known as the dualistic (pluralistic) theory according to which the international law and the national legislation, are two separate legal systems which exist independently from each other. This theory has been supported by works of such scientists, as Dionisio Antsilotti and N. Tripel.²⁰⁴ Today in the world it is very difficult to find examples of application dualistic or monistic approaches in the pure state irrespective of what legal system to take as an example.

Another approach concerning a parity of international law and the national legislation is known as monistic theory. This doctrine understands both international, and the internal law as a component of the same legal order. One of the leaders of monistic doctrine is Hans Kelsen who looks at the state as on the founder of international law, within the limits of fundamental laws and the privileges received by the state as the subject of international law. Examples of monistic theory are Holland or Switzerland as they consider the national legislation and international law as equal parts of one system. The international norms become a part of the Swiss legal system from the moment of their occurrence or the introduction into validity.²⁰⁵

²⁰² Nogoibaeva E.K., Dean of IBL Department, AUCA [reprinted with permission of the author].

²⁰³ P. Malanchuk, *Современное Введение в Международное Право. Дуалистическая и Монистическая теории*, 7-ая дополненное издание (T. J. International Ltd, Padstow, Cornwall, 1997), стр.63.

²⁰⁴ G. Gadja, *Позитивизм и Дуализм у Дионисио Анцелотти*, изд.3, *Европейский Журнал Международного Права*(1992), стр. 134.

²⁰⁵ M. Shaw, *Международное Право*, 4-ое издание. A Grotius Publication Cambridge University Press, Cambridge 1997, стр.100.

But very often it is difficult to define, what approach is required to be applied in this or that country. Therefore, as a rule, the majority of the countries, such as the USA, apply both approaches. In this connection, some scientists include the USA in the list of the countries applying monistic approach, and others in the list of the dualistic countries.²⁰⁶

Analyzing the domestic legislation, it is possible to draw a conclusion that the Kyrgyz Republic formally applies a monistic approach to a parity of international law and the national legislation as it considers the international contracts, main principles of international law and its norm as a component of its legal system.²⁰⁷ Article 6 of Constitution KP of 2010 says that:

“1. The constitution has the highest validity and direct action in the Kyrgyz Republic.

2. On the basis of the Constitution the constitutional laws, laws and other standard legal certificates are passed.

3. Entered the order established by the law in force the international contracts which participant is the Kyrgyz Republic, and also the conventional principles and norms of international law are a component of legal system of the Kyrgyz Republic.

Norms of the international contracts under human rights have direct action and a priority over norms of other international contracts.”

In spite of the fact that the Kyrgyz Republic officially applies a monistic approach to international law²⁰⁸, there are still problems with direct application of these positions.

Let's address the positions regulating parity in the field of the labor law, namely the Labor Code of the Kyrgyz Republic (it enacted by the Law of KR from August, 4th, 2004 N 107):

Article 3. The labor legislation and other standard legal certificates containing norms of the labor law. Norms of international law

²⁰⁶ Взаимодействие между международным и национальным правом, совместное мнение Федерального Офиса Правосудия и Директората по Международному и Национальному Relation between international and domestic law, Joint opinion of the Federal Office of Justice and the Directorate for International Law of 26 April 1989 in “Verwaltungspraxis der Bundesbehörden,” http://www.eda.admin.ch/sub_dipl/e/home/thema/intlaw/relat.html.

²⁰⁷ Art. 6, Constitution of the Kyrgyz Republic, June 27, 2010.

²⁰⁸ Law KR N 241 № 34 “О нормативно-правовых актах” от 20 июля 2009 года.

Interstate contracts and other norms of international law ratified by the Kyrgyz Republic are a compound and directly operating part of the legislation of the Kyrgyz Republic.

If the international contracts ratified by the Kyrgyz Republic, establish rules more favorable for the worker, than provided by laws and other standard legal certificates of the Kyrgyz Republic, agreements, collective agreements rules of the international contracts are applied.

In case of the contradiction between the present Code and other laws containing norms, worsening position of workers, norms of the present Code are applied²⁰⁹.

It would be desirable to pay special attention on that circumstance that in the previous Labor Code of the Kyrgyz Republic from October, 4th, 1997 N 70²¹⁰ we see that the given parity was more concretized:

Article 3. Laws and other legal certificates on labor.

2. Interstate contracts and other norms of international law ratified by the Kyrgyz Republic are compounds and directly operating part of the legislation of the Kyrgyz Republic.

3. If interstate contracts of the Kyrgyz Republic and pacts the United Nations Organization (United Nations) about human rights and conventions of the International Organization of Labor (IOL), ratified by the Kyrgyz Republic, are established norms and the rules improving position of workers in comparison with the present Labor code and other laws on work of the Kyrgyz Republic norms and rules of corresponding interstate contracts (United Nations pacts about human rights and conventions the ILO) are applied.

First, the Labor Code (as previous, and present), unlike the Constitution says that norms of the international labor law become an operating part of the legislation of the Kyrgyz Republic, instead of a part of legal system.

Secondly, the Labor Code of 1997 refers on priority of not an abstract international law or the contract, and speaks particularly about special contracts in the field of human rights and even more narrows them, naming conventions the ILO (International Labor Organization), accepted within the limits of the given specialized establishment of the United Nations.

In spite of the fact that the Kyrgyz Republic recognizes the international contracts as a component of the legal system and obliges their direct applica-

²⁰⁹ See, В редакции Закона КР от 30 марта 2009 года N 103.

²¹⁰ Note, this law is no longer in force. Утратил силу с 4 августа 2004 г.

tion; practice, however, follows the dualistic approach according to which norms of the international labor law should be included and reflected in the national legislation for their more effective application.

In what quality will the international rules of law operate in the national legal system and how will the coordination with norms of the internal right be provided?

Now (for December, 31st, 2009) the Kyrgyz Republic is a participant in 53 conventions accepted in the framework of the ILO.

Norms of the ILO Conventions in the legal system of the Kyrgyz Republic have direct action. In the case of ratification and official publication of the convention the ILO requires the Kyrgyz Republic to incorporate the law. After a certain time (which is expedient for fixing in the law), the international labor norms of conventions can be applied, if they are concrete enough, are addressed and are capable to legal regulation, i.e. concern to so-called “self realizable norms.” In their application it is necessary to use all possible measures for incorporation of norms of the international contract and conventions of the ILO in the labor legislation of the Kyrgyz Republic.

The ILO declaration “About basic principles and the rights in sphere of a labor” joins as a component of the legal system of the Kyrgyz Republic (system of branch of the labor law) 1998, and does not need ratification, but keeps the characteristic of a source of the international labor law.

In the KR all seven ILO conventions covered by the Declaration of the ILO (1998) are ratified and accordingly their many norms are already incorporated in LC KR, in some laws, etc.

Norms of the Charter of the ILO, including the Philadelphia Declaration (the appendix to the Charter), regarding aims and objectives of the International Labor Organization are general norms recognized by member states of the ILO, including the Kyrgyz Republic. Only those norms which are established fundamental (basic) principles in the area of the work sphere, are included in the legal system of the Kyrgyz Republic. The mechanism of their application is defined by the state and should be directed on performance of norms of the Constitution (p. 3 items 6), Law of KR “About the international contracts.”

The International Organization of Labor differs from other international specialized organizations of the United Nations by the tripartite structure based on so-called “a principle of tripartism” according to which member state of the ILO is presented by two delegates from the state (government) and on one delegate from businessmen and workers (workers). Each of

them has the right to make the decision and independently to vote, and all delegates possess equal rights.

The ILO convention is a multilateral international contract which after ratification and corresponding official publication joins in the legal system of the Kyrgyz Republic, but does not lose the qualities of the international labor norms. The convention, as well as the recommendation of the ILO acts as the form of international legal regulation of labor, and the ILO is developed and is accepted at the International Conference of Labor in an order established by the Charter of the ILO²¹¹. At ratification of the convention, the state incurs the obligation on its performance, and should accept the corresponding act or incorporate conventional labor norms in the operating labor legislation, LC of KR.

Right to Health

International Covenant on Civil and Political Rights, Articles 11 and 12

Article 11

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

- (a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

²¹¹ “What is international labour law for?” Brian Langille. International Labour Organization (International Institute for Labour Studies) 2005. C. 15.

- (b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

Article 12

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

- (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
- (b) The improvement of all aspects of environmental and industrial hygiene;
- (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
- (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

ICESCR General Comment 14

Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights

The right to the highest attainable standard of health

(Article 12 of the International Covenant on Economic, Social and Cultural Rights)

1. Health is a fundamental human right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity. The realization of the right to health may be pursued through numerous, complementary approaches, such as the formulation of health policies, or the implementation of health programmes developed by the World Health Organization (WHO), or the adoption of specific legal instruments. Moreover, the right to health includes certain components which are legally enforceable...

3. The right to health is closely related to and dependent upon the realization of other human rights, as contained in the International Bill of Rights, including the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement. These and other rights and freedoms address integral components of the right to health...

5. The Committee is aware that, for millions of people throughout the world, the full enjoyment of the right to health still remains a distant goal. Moreover, in many cases, especially for those living in poverty, this goal is becoming increasingly remote. The Committee recognizes the formidable structural and other obstacles resulting from international and other factors beyond the control of States that impede the full realization of article 12 in many States parties...

I. NORMATIVE CONTENT OF ARTICLE 12

...9. The notion of “the highest attainable standard of health” in article 12.1 takes into account both the individual’s biological and socio-economic preconditions and a State’s available resources. There are a number of aspects which cannot be addressed solely within the relationship between States and individuals; in particular, good health cannot be ensured by a State, nor can States provide protection against every possible cause of human ill health. Thus, genetic factors, individual susceptibility to ill health and the adoption of unhealthy or risky lifestyles may play an important role with respect to an individual’s health. Consequently, the right to health must be understood as a right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health...

11. The Committee interprets the right to health, as defined in article 12.1, as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health. A further important aspect is the participation of the population in all health-related decision-making at the community, national and international levels...

II. STATES PARTIES’ OBLIGATIONS

General legal obligations

30. While the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes

on States parties various obligations which are of immediate effect. States parties have immediate obligations in relation to the right to health, such as the guarantee that the right will be exercised without discrimination of any kind (art. 2.2) and the obligation to take steps (art. 2.1) towards the full realization of article 12. Such steps must be deliberate, concrete and targeted towards the full realization of the right to health...

Core obligations

43. In General Comment No. 3, the Committee confirms that States parties have a core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights enunciated in the Covenant, including essential primary health care. Read in conjunction with more contemporary instruments, such as the Programme of Action of the International Conference on Population and Development, (28) the Alma-Ata Declaration provides compelling guidance on the core obligations arising from article 12. Accordingly, in the Committee's view, these core obligations include at least the following obligations:

- (a) To ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups;
- (b) To ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone;
- (c) To ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water;
- (d) To provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs;
- (e) To ensure equitable distribution of all health facilities, goods and services;
- (f) To adopt and implement a national public health strategy and plan of action, on the basis of epidemiological evidence, addressing the health concerns of the whole population; the strategy and plan of action shall be devised, and periodically reviewed, on the basis of a participatory and transparent process; they shall include methods, such as right to health indicators and benchmarks, by which progress can be closely monitored; the process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all vulnerable or marginalized groups.

ICESCR General Comment 15, The Right to Water²¹²

The legal bases of the right to water

2. The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements.

**UN Office of the High Commissioner for Human Rights,
Fact Sheet No. 35, The Right to Water**²¹³

About 2.5 billion people still do not have access to safe sanitation. This has a profound negative impact on numerous human rights. For instance, without sanitation facilities, one does not enjoy the right to adequate housing. The health impact of the lack of sanitation is well documented. It accounts for as many as a quarter of all under-five deaths and is a serious threat to the right to health. Poor sanitation also has a severe effect on water quality and jeopardizes the enjoyment of this right, too.

While sanitation is not yet recognized as a self-standing right, an increasing number of international, regional and national declarations and national legislations seem to be moving in this direction. The Independent Expert on the issue of human rights obligations related to access to safe drinking water and sanitation has expressed her support for the recognition of sanitation as a distinct right (see A/HRC/12/24).

HIV/AIDS and specific water needs²¹⁴

Living with HIV/AIDS requires washing frequently and paying close attention to personal hygiene.... Wounds and lesions need cleaning, and clothes and bedding must be washed often. Fever, accompanied by sweating, is common and so many may drink more water.... Clean, well-aired houses are important if tuberculosis—the most common opportunistic infection—is to

²¹² Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights.

²¹³ OHCHR Fact Sheet available at: <http://www.unhcr.org/refworld/docid/4ca45fed2.html>.

²¹⁴ WaterAid Ethiopia and Prognist, "Making the links: Mapping the relationship between water, hygiene and sanitation and HIV/AIDS—a joint think piece" (2004). Available from www.wateraid.org.

be avoided. All these things require extra water, yet this is something that is not always readily available.

Right to Food

United Nations Food and Agriculture Organization, Fact Sheet No. 34

The right to food in international law

The right to food is a human right recognized by international human rights law. The Universal Declaration of Human Rights recognizes, in the context of an adequate standard of living, that: “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, ...” (art. 25).

The International Covenant on Economic, Social and Cultural Rights, which is part of the International Bill of Human Rights, recognizes the right to adequate food as an essential part of the right to an adequate standard of living (art. 11 (1)). It also explicitly recognizes “the fundamental right of everyone to be free from hunger” (art. 11 (2))....

The right to food is also recognized in other international conventions protecting specific groups, such as the Convention on the Elimination of All Forms of Discrimination against Women (1979),¹⁰ the Convention on the Rights of the Child (1989)¹¹ and the Convention on the Rights of Persons with Disabilities (2006).¹² The right to food is also recognized in some regional instruments, such as the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, known as the Protocol of San Salvador (1988),¹³ the African Charter on the Rights and Welfare of the Child (1990)¹⁴ and the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (2003).

The right to food is also recognized implicitly through other rights. The African Commission on Human and Peoples’ Rights has interpreted the right to food as being implicitly protected under the African Charter on Human and Peoples’ Rights (1981) through the right to life, the right to health, and the right to economic, social and cultural development.

Group Rights

Ethnic Minorities

International Covenant on Civil and Political Rights Articles 2 and 27

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

UN Office of the High Commissioner for Human Rights, Fact Sheet No. 18, Minority Rights

Provisions for the Promotion and Protection of the Rights of Persons Belonging to Minorities

Prohibition of discrimination

Discrimination which affects minorities in a negative manner - politically, socially, culturally or economically - persists and is a major source of tension in many parts of the world. Discrimination has been interpreted to “imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, ..., language, religion, ..., national or social origin, ..., birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.” The prevention of discrimination has been defined as the “... prevention of any action which denies to individuals or groups of people equality of treatment which they may wish.”

Discrimination has been prohibited in a number of international instruments that deal with most, if not all, situations in which minority groups and their individual members may be denied equality of treatment. Discrimination is prohibited on the grounds of, inter alia, race, language, religion, national

or social origin, and birth or other status. Important safeguards from which individual members of minorities stand to benefit include recognition as a person before the law, equality before the courts, equality before the law, and equal protection of the law, in addition to the important rights of freedom of religion, expression and association.

Non-discrimination provisions are contained in the United Nations Charter of 1945 (arts. 1 and 55), the Universal Declaration of Human Rights of 1948 (art. 2) and the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights of 1966 (art. 2). Such provisions also appear in a number of specialized international instruments, including: ILO Convention concerning Discrimination in Respect of Employment and Occupation No. 111 of 1958 (art. 1); International Convention on the Elimination of All Forms of Racial Discrimination of 1965 (art. 1); UNESCO Convention against Discrimination in Education of 1960 (art. 1); UNESCO Declaration on Race and Racial Prejudice of 1978 (arts. 1, 2 and 3); Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief of 1981 (art. 2); and the Convention on the Rights of the Child of 1989 (art. 2).

Non-discrimination clauses are also included in all of the basic regional human rights documents, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Social Charter and the Framework Convention on National Minorities (Council of Europe), the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the OSCE (Organization for Security and Cooperation in Europe); the American Convention on Human Rights (Organization of American States); and the African Charter on Human and Peoples' Rights (Organization of African Unity).

Special rights for minorities

What are special rights?

Special rights are not privileges but they are granted to make it possible for minorities to preserve their identity, characteristics and traditions. Special rights are just as important in achieving equality of treatment as non-discrimination. Only when minorities are able to use their own languages, benefit from services they have themselves organized, as well as take part in the political and economic life of States can they begin to achieve the status which majorities take for granted. Differences in the treatment of such groups, or individuals belonging to them, is justified if it is exercised to promote effective equality and the welfare of the community as a whole. (4) This form of affirmative action may have to be sustained over a prolonged period in

order to enable minority groups to benefit from society on an equal footing with the majority.

Article 27 of the International Covenant on Civil and Political Rights

The most widely-accepted legally-binding provision on minorities is article 27 of the International Covenant on Civil and Political Rights, which states:

“In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”

Article 27 of the Covenant grants persons belonging to minorities the right to national, ethnic, religious or linguistic identity, or a combination thereof, and to preserve the characteristics which they wish to maintain and develop. Although article 27 refers to the rights of minorities in those States in which they exist, its applicability is not subject to official recognition of a minority by a State.

Article 27 does not call for special measures to be adopted by States, but States that have ratified the Covenant are obliged to ensure that all individuals under their jurisdiction enjoy their rights; this may require specific action to correct inequalities to which minorities are subjected.⁽⁵⁾

Alekseyev v. Russian, Decision of the European Court of Human Rights, 2010²¹⁵

Main facts

The applicant, Nikolay Alekseyev, was one of the organizers of several marches in 2006, 2007 and 2008, sought to draw public attention to discrimination against the gay and lesbian minority in Russia, to promote respect for human rights and freedoms and to call for tolerance.

Organizers several times sent notices to the mayor of Moscow of the intended march. The organisers undertook to cooperate with the law-enforcement authorities in ensuring safety and respect for public order by the participants and to comply with regulations on restriction of noise levels when using loudspeakers and sound equipment. None of the events were set. Government decisions to refuse permission to hold the march were justified

²¹⁵ Application 4916/07, 21 October 2010.

on grounds of public order, for the prevention of riots and the protection of health, morals and the rights and freedoms of others.

Along with official decisions, mass media repeatedly quoted the words of the mayor and his employees that no gay parade would be allowed in Moscow under any circumstances, “as long as he was the city mayor.” Additionally, the mayor called for an “active mass-media campaign and social commercials with the use of petitions brought by individuals and religious organizations” against the marches.

Having received the refusals, the organizers tried to picket the same date and time as the march. However, the picket was refused permission on the same grounds as those given for the refusal to hold the march. Alekseyev unsuccessfully challenged these decisions before a court.

Relying on Articles 11, 13 and 14 of ECHR, the applicant alleged a violation of his right to peaceful assembly on account of the repeated ban on public events. He also complained that he had not had an effective remedy against the alleged violation of his freedom of assembly and that the Moscow authorities’ treatment of his applications to hold the events had been discriminatory.

Decision

The court found a violation of article 11 of ECHR. It stated that this norm protects the right to hold peaceful demonstration that may annoy or cause offence to persons opposed to the ideas or claims that it is seeking to promote. The court also emphasized that the participants must be able to hold the demonstration without having to fear that they will be subjected to physical violence by their opponents. However, the mere existence of a risk is insufficient for banning the event.

Moscow authorities systematically during three years inadequately assessed the risks of security for the participants and public order. Though counter-protesters indeed could go on the street against the marches, the authorities of Moscow city could have made arrangements to ensure that both events proceeded peacefully and lawfully, allowing both sides to achieve the goal of expressing their views without clashing with each other.

The Court also noted that security risks played a secondary role in the authorities’ decision to impose the ban, they were in any event secondary to considerations of public morals. The Court further reiterates that it would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority. The purpose of the marches and picketing, as declared in the notices of the events, was to promote respect for human

rights and freedoms and to call for tolerance towards sexual minorities. The marches were not aimed to exhibit nudity, engage in sexually provocative behaviour or criticise public morals or religious views. There is no ambiguity about the other member States' recognition of the right of individuals to openly identify themselves as gay, lesbian or any other sexual minority, and to promote their rights and freedoms, in particular by exercising their freedom of peaceful assembly.

Consequently, that the ban on the events for marches on gays' rights and pickets was not necessary in a democratic society and is a violation of Article 11 of the Convention...

Concerning Article 14 of the Convention, it has been established that the main reason for the ban imposed on the events organised by the applicant was the authorities' disapproval of demonstrations which they considered to promote homosexuality. The Government did not provide any justification showing that the impugned distinction was compatible with the standards of the Convention, the Court also considers it established that the applicant suffered discrimination on the grounds of his sexual orientation. Therefore, there has been a violation of Article 14...

108. The Court reiterates that sexual orientation is a concept covered by Article 14 (see, among other cases, *Kozak v. Poland*, no. 13102/02, 2 March 2010). Furthermore, when the distinction in question operates in this intimate and vulnerable sphere of an individual's private life, particularly weighty reasons need to be advanced before the Court to justify the measure complained of. Where a difference of treatment is based on sex or sexual orientation the margin of appreciation afforded to the State is narrow, and in such situations the principle of proportionality does not merely require the measure chosen to be suitable in general for realising the aim sought; it must also be shown that it was necessary in the circumstances. Indeed, if the reasons advanced for a difference in treatment were based solely on the applicant's sexual orientation, this would amount to discrimination under the Convention (*ibid.*, § 92).

109. It has been established above that the main reason for the ban imposed on the events organised by the applicant was the authorities' disapproval of demonstrations which they considered to promote homosexuality (see paragraphs 77-78 and 82 above). In particular, the Court cannot disregard the strong personal opinions publicly expressed by the mayor of Moscow and the undeniable link between these statements and the ban. In the light of these findings the Court also considers it established that the applicant suffered discrimination on the grounds of his sexual orientation and that of other participants in the proposed events. It further considers that the

Government did not provide any justification showing that the impugned distinction was compatible with the standards of the Convention.

110. Accordingly, the Court considers that in the present case there has been a violation of Article 14 in conjunction with Article 11 of the Convention.

Rights of Children

***The Convention on the Rights of the Child*²¹⁶**

The Convention on the Rights of the Child is a universally agreed set of standards and obligations which place children center-stage in the quest for a just, respectful and peaceful society.

It spells out the basic human rights for all children, everywhere, all the time: the right to survival; to develop to the fullest; to protection from harmful influences, abuse and exploitation; and to participate fully in family, cultural and social life. The Convention protects these rights by setting standards in health care, education as well as legal, civil and social services. These standards are benchmarks against which progress can be assessed and States that ratify the Convention are obliged to keep the best interests of the child in mind in their actions and policies.

The Convention rests on four foundation principles:

1. non-discrimination (article 2);
2. best interests of the child (article 3);
3. the child's right to life, survival and development (article 6);
4. and respect for the views of the child (article 12).

Every child – regardless of where they are born, the race or ethnic group they belong to, whether they are a boy or girl, rich or poor – must have a full opportunity to become a productive member of society and must have the right to speak up and be heard.

The Convention defines a child as a boy or girl under the age of 18 and considers a child as both an individual as well as a member of a family and a community. A child is a human being with the full range of rights.

²¹⁶ Excerpt from UNICEF, <http://www.unicef.org/specialsession/rights/index.html>.

Committee on the Rights of the Child, Concluding Observations on Kyrgyzstan²¹⁷

COMMITTEE ON THE RIGHTS OF THE CHILD

Forty-fourth session

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 12 (1) OF THE OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE CHILD ON THE SALE OF CHILDREN, CHILD PROSTITUTION AND CHILD PORNOGRAPHY

Concluding observations: KYRGYZSTAN

1. The Committee considered the initial report of Kyrgyzstan (CRC/C/OPSC/KGZ/1) at its 1221st meeting (see CRC/C/SR.1221), held on 29 January 2007, and adopted at its 1228th meeting, held on 2 February 2007, the following concluding observations...

B. Positive aspects

[...]

National Plan of Action and Coordination

5. The Committee welcomes the establishment of the “New Generation” programme on trafficking in and commercial and sexual exploitation of children. However, the Committee is concerned at the absence of a specific plan of action in the area of Sale of Children, Child Prostitution and Child Pornography. Furthermore, the Committee is concerned that existing financial resources provided to the “New Generation” programme is insufficient and that the coordination and cooperation between the different bodies is not fully effective.

6. The Committee recommends that the State party strengthen its efforts, in consultation and cooperation with its relevant stakeholders, to improve its “New Generation” programme, by paying particular attention to implementation of all provisions of the Optional Protocol and taking into account the Declaration and Agenda for Action and the Global Commitment adopted at the First and Second World Congresses against Commercial Sexual Exploitation of Children (Stockholm 1996; Yokohama 2001). Furthermore, the Committee recommends that the State party provide the “New Generation” programme with an increased budget allocation and clearly define the com-

²¹⁷ 2 February 2007, CRC/C/OPSC/KGZ/CO/1.

petencies of the different bodies which are involved in the implementation of this programme in order to improve its cooperation and coordination.

Dissemination and training

7. The Committee appreciates the numerous training and dissemination activities, provided by the State party...with international organisations and NGOs... However, the Committee remains concerned that efforts to raise awareness among relevant professional categories and the public at large on the Protocol and to provide adequate training for judges, prosecutors and social workers who are working with and for children are scattered, fragmented and... insufficient and that they do not cover all areas of the Protocol.

8. The Committee recommends that the State party allocates adequate and earmarked resources for the development of training materials and courses for all relevant professionals including police officers, public prosecutors, judges, medical staff and other professionals involved in the implementation of the Optional Protocol...

Data collection

9. The Committee regrets the lack of statistical data on issues covered by the Protocol as well as the lack of research on the prevalence of national and cross-border trafficking, Sale of Children, Child Prostitution and Child Pornography.

10. The Committee recommends that the State party ensure that data disaggregated, inter alia, by age and sex are systematically collected and analysed...

12. The Committee recommends the State party to continue and strengthen its budget allocation in order to cover all areas of the Protocol.

Existing criminal or penal laws and regulations

13. The Committee welcomes that the Optional Protocol takes precedence over national legislation, that a provision on trafficking, including of children, is contained in the Criminal Code, and the recently adopted Code of the Kyrgyz Republic on Children. However, the Committee is concerned that the prohibition of the Sale of Children, Child Prostitution and Child Pornography has not been explicitly included in the national Criminal Code and/or the Code of the Kyrgyz Republic on Children in conformity with article 2 and article 3 of the Protocol.

14. The Committee urges the State party to implement the Protocol by taking immediate measures to amend the provisions with a view to fully

including all purposes and forms of the Sale of Children, Child Pornography and Child...[T]he Committee recommends that the State party undertake a legal study...to identify inconsistencies and gaps between the national legal system and the Protocol and to seek assistance from UNICEF and other relevant international organisations...

17. The Committee welcomes recent attempts to conduct investigations and prosecutions for incidents involving the Sale of Children and Child Prostitution. However, the Committee remains concerned that in a number of cases investigations and prosecutions have not been initiated.

18. The Committee recommends that the State party increase the number of investigations and prosecutions for incidents involving the Sale of Children and Child Prostitution and especially for Pornography and make the data available.

19. The Committee is concerned that the provisions of article 8 of the Optional Protocol have not been adequately integrated into the relevant laws of the State party, in particular that the status of the victim is not well defined in the Criminal Code and the Code of the Kyrgyz Republic on Children and that legislation fails to provide clear sanctions for physical and psychological pressure during interrogations. It is further concerned that measures undertaken, for the physical and psychological recovery of child victims of sale, child prostitution and child pornography are exclusively carried out by non-governmental organizations and...no funds are specifically allocated by the State party for the support of child victims.

20. The Committee recommends that the State party:

a) ...protect child victims and witnesses at all stages of the criminal justice process, by taking into account the UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime (ECOSOC Resolution No. 2005/20);

b) collaborate with non-governmental organizations and IOM to ensure that adequate services are available for child victims...;

c) ensure that all child victims of the offences described in the Protocol have access to adequate procedures to seek, without discrimination, compensation for damages from those legally responsible,...; and

d) allocate adequate funds to programmes and measures necessary for the rehabilitation of child victims.

21. The Committee is deeply concerned about the information that child victims of crimes...are often stigmatized and socially marginalized and may be held responsible, tried and placed in detention.

22. The Committee recommends that the State party ensure that child victims of exploitation and abuse are neither criminalized nor penalized....

23. The Committee recommends that the State party establish...a 24-hour, toll-free helpline number to assist child victims...[I]t recommends...the State party ensure...children are aware of and can access the helpline, and facilitate the collaboration of the helpline with child-focused NGOs, the police, health and social workers.

25. The Committee remains concerned about allegations of complicity by State officials in trafficking and that corruption impedes the effectiveness of prevention measures.

27. The Committee is especially concerned about the difficult situation of certain groups of children, such as street children and working children, who are particularly vulnerable to all forms of exploitation.

28. The Committee recommends that the State party pay particular attention to the situation of vulnerable groups of children who are at particular risk of being exploited and abused. In this respect it recommends that the State party allocate adequate human and financial resources for the implementation of programmes for the protection of the rights of vulnerable children, with special attention to their education and health care. More attention should also be devoted to raising awareness among these children of their rights.

Rights of Women

Overview of Convention on the Elimination of All Forms of Discrimination against Women²¹⁸

The Convention on the Elimination of All Forms of Discrimination against Women, adopted in 1979 by the UN General Assembly, is often described as an international bill of rights for women. Consisting of a preamble and 30 articles, it defines what constitutes discrimination against women and sets up an agenda for national action to end such discrimination.

The Convention defines discrimination against women as “...any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise

²¹⁸ U.N. Division for the Advancement of Women: <http://www.un.org/womenwatch/daw/cedaw/>.

by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

By accepting the Convention, States commit themselves to undertake a series of measures to end discrimination against women in all forms, including:

- to incorporate the principle of equality of men and women in their legal system, abolish all discriminatory laws and adopt appropriate ones prohibiting discrimination against women;
- to establish tribunals and other public institutions to ensure the effective protection of women against discrimination; and
- to ensure elimination of all acts of discrimination against women by persons, organizations or enterprises.

The Convention is the only human rights treaty which affirms the reproductive rights of women and targets culture and tradition as influential forces shaping gender roles and family relations. It affirms women’s rights to acquire, change or retain their nationality and the nationality of their children. States parties also agree to take appropriate measures against all forms of traffic in women and exploitation of women.

Countries that have ratified or acceded to the Convention are legally bound to put its provisions into practice. They are also committed to submit national reports, at least every four years, on measures they have taken to comply with their treaty obligations.

The United Nations Committee on the Elimination of Discrimination against Women (CEDAW), is an expert body established in 1982, is composed of 23 experts on women’s issues from around the world.

The Committee’s mandate is very specific: it watches over the progress for women made in those countries that are the States parties to the 1979 Convention on the Elimination of All Forms of Discrimination against Women. A country becomes a State party by ratifying or acceding to the Convention and thereby accepting a legal obligation to counteract discrimination against women. The Committee monitors the implementation of national measures to fulfill this obligation.

At each of its sessions, the Committee reviews national reports submitted by the States parties within one year of ratification or accession, and thereafter every four years.

A.S. v. Hungary, Decision of the Committee on Elimination of Discrimination Against Women, 2006²¹⁹

1.1 The author of the communication dated 12 February 2004, is Ms. A. S., a Hungarian Roma woman, born on 5 September 1973. She claims to have been subjected to coerced sterilization by medical staff at a Hungarian hospital...

2.4 The author states that the sterilization has had a profound impact on her life for which she and her partner have been treated medically for depression. She would never have agreed to the sterilization as she has strict Catholic religious beliefs that prohibit contraception of any kind, including sterilization. Furthermore, she and her partner live in accordance with traditional Roma customs — where having children is said to be a central element of the value system of Roma families...

On 22 November 2002, the Fehérgyarmat Town Court rejected the author's claim, despite a finding of some negligence on the part of the doctors, who had failed to comply with certain legal provisions, namely, the failure to inform the author's partner of the operation and its possible consequences as well as to obtain the birth certificates of the author's live children. The Court reasoned that the medical conditions for sterilization prevailed in the author's case and that she had been informed about her sterilization and given all relevant information in a way in which she could understand it...

3.1 The author claims that Hungary has violated articles 10 (h), 12 and 16, paragraph 1 (e) of the Convention.

3.2 She emphasizes that sterilization is never a life-saving intervention that needs to be performed on an emergency basis without the patient's full and informed consent. It is an operation that is generally intended to be irreversible and surgery to reverse sterilization is complex and has a low success rate. The author states that international and regional human rights organizations have repeatedly stressed that the practice of forced sterilization constitutes a serious violation of numerous human rights and she refers to general comment 28 of the Human Rights Committee on equality of rights between men and women by way of example. She also states that coercion presents itself in various forms — from physical force to pressure from and/or negligence on the part of medical personnel...

11.2 With respect to the claim that the State party violated article 10 (h) of the Convention by failing to provide information and advice on fam-

²¹⁹ A.S. v Hungary, Communication No. 4/2004, Decision of the Committee on Elimination of Discrimination Against Women, (14 August 2006).

ily planning, the Committee recalls its general recommendation No. 21 on equality in marriage and family relations, which recognizes in the context of “coercive practices which have serious consequences for women, such as forced ... sterilization” that informed decision-making about safe and reliable contraceptive measures depends upon a woman having “information about contraceptive measures and their use, and guaranteed access to sex education and family planning services”....

...The Committee considers in the present case that the State party has not ensured that the author gave her fully informed consent to be sterilized and that consequently the rights of the author under article 12 were violated...

11.5 Acting under article 7, paragraph 3 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, the Committee on the Elimination of Discrimination against Women is of the view that the facts before it reveal a violation of articles 10 (h), 12 and 16, paragraph 1 (e) of the Convention and makes the following recommendations to the State party:

I. Concerning the author of the communication: provide appropriate compensation to Ms. A. S. commensurate with the gravity of the violations of her rights.

II. General:

- Take further measures to ensure that the relevant provisions of the Convention and the pertinent paragraphs of the Committee’s general recommendations Nos. 19, 21 and 24 in relation to women’s reproductive health and rights are known and adhered to by all relevant personnel in public and private health centres, including hospitals and clinics.

- Review domestic legislation on the principle of informed consent in cases of sterilization and ensure its conformity with international human rights and medical standards, including the Convention of the Council of Europe on Human Rights and Biomedicine (“the Oviedo Convention”) and World Health Organization guidelines. In that connection, consider amending the provision in the Public Health Act whereby a physician is allowed “to deliver the sterilization without the information procedure generally specified when it seems to be appropriate in given circumstances.”

Monitor public and private health centres, including hospitals and clinics, which perform sterilization procedures so as to ensure that fully informed consent is being given by the patient before any sterilization procedure is carried out, with appropriate sanctions in place in the event of a breach.

Overview of International and Regional Systems of Enforcement

David Weissbrodt, Fionnuala Ni Aolain, “Development of Human Rights Law Within the U.N. Structure: Charter Base Human Rights Bodies”²²⁰

Human rights are implemented by various bodies under the authority of the United Nations Charter, and by expert committees created by specialized human rights treaties. These two kinds of U.N. human rights institutions—Charter-based bodies and expert treaty-based committees—are illustrated by the chart in the frontispiece of this book. Most of the Charter-based bodies are comprised of government representatives and will be discussed first.

Under the authority of the U.N. Charter, human rights activities are principally undertaken by the Security Council, General Assembly, Economic and Social Council, Human Rights Council, Human Rights Council Advisory Committee, the Commission on the Status of Women, and the Commission on Crime Prevention and Criminal Justice.

The Security Council is the organ of the U.N. on which the Charter confers primary responsibility for the maintenance of international peace and security. The Council is composed of fifteen members, including five permanent members (China, France, Russia, the United Kingdom, and the United States) and ten nonpermanent members elected for two-year terms by the General Assembly. Under Chapter VII of the Charter, the Security Council makes recommendations or decides what measures should be taken to maintain or restore international peace and security. Council measures may include humanitarian aid, economic sanctions, and military intervention. With the end of the Cold War, the Security Council's role has become more visible as the permanent members have more frequently agreed on action. There continues to be much debate over the composition of the Security Council and whether its membership constitutes a fair reflection of the current demographic and power alignment of states. Proposals for reform have emerged, but to date there is no political consensus to move them forward. (See the organogram at the frontispiece to this volume.)

The Security Council's new activism becomes apparent by contrasting the number of actions taken during and after the Cold War. During the Cold

²²⁰ David Weissbrodt, Fionnuala Ni Aolain, Joan Fitzpatrick, & Frank Newman, *International Human Rights: Law, Policy and Practice*, (LexisNexis, 4th ed., 2009) [excerpt reprinted with permission of the authors.].

War, the Security Council considered on five occasions whether human rights violations qualified as threats to the peace so as to justify measures under Chapter VII. Furthermore, during the forty-two year period from 1948 to 1987, the Security Council established only 13 peacekeeping operations. There were almost three times as many during the ten-year period between 1988 and 1998, when the Security Council sent 36 peacekeeping missions. In addition, based principally upon Security Council decisions since 1989, on-site U.N. activities with a significant human rights dimension have taken place in more than twenty countries, including Angola, Bosnia-Herzegovina, Burundi, Cambodia, Congo, East Timor, El Salvador, Guatemala, Haiti, Iraq, Kosovo, Mozambique, Namibia, Nicaragua, Rwanda, Sierra Leone, Somalia, South Africa, Sudan, Western Sahara, and the former Yugoslavia. The role of the Security Council as international legislator has been augmented by its actions following the events of September 11, 2001, as evidenced by the anti-terrorism mandate given to states under U.N. Security Council resolution 1373....

In 1993, the Security Council further contributed to the development of human rights law when it authorized an international tribunal to prosecute persons responsible for serious violations of international humanitarian law committed in the former Yugoslavia. See Security Council resolution 827 of 25 May 1993. The tribunal has publicly indicted 161 individuals.²²¹ On March 10, 1998, the Chief Prosecutor stated that the tribunal's jurisdiction covers violations of international law that occurred in Kosovo, for example, during the events of 1999 which led to the NATO bombing of Serbia and Kosovo. In addition, following widespread killings in Rwanda during April 1994, the Security Council established a second tribunal using the same basic approach as in the former Yugoslavia. This tribunal has focused on bringing perpetrators of the Rwandan genocide to justice. The Yugoslav Tribunal is located in The Hague, Netherlands, and the Rwanda Tribunal was established in Tanzania. Based upon the precedents of the Nuremberg and Tokyo Tribunals, the many trials in Germany held pursuant to Control Council Law No. 10 after World War II, and the establishment of ad hoc war crimes tribunals for the former Yugoslavia and Rwanda, a permanent International Criminal Court (ICC) was authorized by a Statute of July 17, 1998, which came into force July 1, 2002 when it was ratified by 60 nations. As of January 2009, 108 governments have ratified the Statute of the International Criminal Court.²²² The Statute would

²²¹ <http://www.un.org/icty/glance-e/index.htm>.

²²² See Rome Statute of the International Criminal Court, available at <http://untreaty.un.org/NGLISWbible/englishinternetbible/partVchapterXVIII/treatyIO.asp>.

permit the prosecution of war crimes, genocide, other crimes against humanity, and eventually aggression once a provision is adopted defining the term. The ICC has complementary jurisdiction over individuals whom governments have failed to prosecute in their national courts or when governments lack the capacity to prosecute nationally. The International Criminal Court sits in the Hague, Netherlands, with 18 judges who are elected for nine year terms (one third every three years) by the States parties.

The International Court of Justice (I.C.J.), having replaced the Permanent Court of International Justice,²²³ is the judicial organ of the United Nations. The court sits at the Peace Palace in The Hague, Netherlands, with 15 judges who are elected to nine year terms (one-third every three years) by the General Assembly and the Security Council. The Charter of the United Nations provides for both contentious (adversary) and advisory jurisdiction. Adversarial jurisdiction extends only to matters that States parties have referred to it and in instances where treaties and conventions provide for adjudication by the I.C.J.. Article 38(1) of the I.C.J. Statute specifies the sources of law which the court is to apply in rendering its decisions: international conventions, international custom, and general principles of law. Decisions of the I.C.J. are only binding between the immediate parties and only in respect to that particular case. In other words, *stare decisis* does not apply. The decisions, however, are widely relied upon as statements of international law.

During the period after World War I the Permanent Court of International Justice (PCIJ) rendered several advisory opinions under the Minority Treaties developed pursuant to the Treaty of Versailles that were relevant to human rights.²²⁴ For example, in the 1923 the Court concluded in an advisory opinion that the government of Poland had in a Minorities Treaty undertaken “to assure full and complete protection of life and liberty to all inhabitants of Poland without distinction of birth, nationality, language, race or religion.”²²⁵

²²³ The Permanent Court of International Justice (PCIJ) was authorized in the Covenant of the League of Nations. It held its inaugural sitting in 1922 and was dissolved in 1946. The PCIJ was the first permanent international tribunal with general jurisdiction; its jurisprudence made possible the clarification of a number of aspects of international law, and contributed to the development of international law. Between 1922 and 1940 the PCIJ dealt with 29 contentious cases between states, and delivered 27 advisory opinions.

²²⁴ Stephen M. Schwebel, *Human Rights in the World Court*, 24 *Vanderbilt J. Int'l L.* 945, 948 (1991).

²²⁵ Advisory Opinion No. 6, *Gennan Settlers in Poland*, 1923 P.C.U. (ser. B.) No.6, at 20 (Sept. 10); see also Advisory Opinion No. 44, *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, 1932 P.C.U. (ser.

The Court determined that the eviction of German settlers from Poland would violate the government's obligations under the Minorities Treaty -particularly the property rights of the German minority in Poland. In two advisory opinions relating to the City of Danzig, the PCIJ applied the principle of *Nullum crimen sine lege* (no crime without law) to find a violation of fundamental rights a decree that a person may be punished in "accordance with the fundamental idea of a law and in accordance with sound popular feeling."²²⁶ Similarly, in another advisory opinion the Court held in *Jurisdiction of the Courts of Danzig*²²⁷ that individuals -in this case, Danzig railway officials -have the capacity to assert their rights under international law, that is against the Polish Railways Administration under the relevant treaty.

Soon after its establishment, the International Court of Justice rendered its first advisory opinion with regard to a human rights issue in holding that a reservation to the Convention on Genocide could not be sustained unless it was consistent with the object and purpose of the treaty. The Court noted "the [human rights) principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation."²²⁸ In an advisory opinion of 1970, the I.C.J. found that South Africa's continued presence in Namibia was a violation of international law because the government of South Africa had "pledged itself to observe and respect, in a territory having an international status, human rights and fundamental freedoms for all without distinction as to race. To establish instead, and to enforce, distinctions ... based on grounds of race ... which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter"²²⁹ The International Court of Justice in its 1980 judgment in the *Case Concerning United States Diplomatic and Consular Staff in Tehran* said that "[w]rongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter

NB) No. 44, at 28 (Feb. 4); Advisory Opinion No. 64, *Minority Schools in Albania*, 1935 P.C.U. (ser. NB) No. 64, at 17 (Apr. 6).

²²⁶ Advisory Opinion No. 65, *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*, 1935 P.C.I.J. (ser. NB) No. 65, at 45 (Dec. 4).

²²⁷ Advisory Opinion No. 15, *Jurisdiction of the Courts of Danzig*, 1928 P.C.I.J. (ser. B) No. 15, at 4 (Mar. 3).

²²⁸ Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15 (May 28).

²²⁹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council resolution 276 (1970)*, 1971 I.C.J. 15 (June 21).

of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights.”²³⁰ In 1986 the I.C.J. found the United States responsible for violating customary international law by failing to give notice of its mining of Nicaraguan ports.²³¹ In the same case the Court found U.S. publication and dissemination of a manual on “Psychological Operations in Guerilla Warfare,” which advised the contras to “neutralize” certain judges, police officers, and State Security officials, to be “contrary to the publication of the prohibition in Article 3 of the Geneva Conventions, with respect to ... executions without . . . judicial guarantees...”

In 1998, the International Court of Justice unanimously indicated provisional measures by the United States so as to ensure that a Paraguayan prisoner Angel Francisco Breard would not be “executed pending the final decision in regard to the claim that Breard had not been notified of his right to contact his consular representatives promptly after he was arrested for murder in these proceedings.”²³² The United States government and the Supreme Court ignored that request and Breard was executed. Again in 1999, the I.C.J. decided to accept Germany’s application for provisional measures to request the United States to “take all measures at its disposal” to ensure that two German nationals are not executed in Arizona, while the Court considers the implications of the failure of Arizona authorities to comply with the consular notification requirements of the Vienna Convention on Consular Relations.²³³ The I.C.J. has reinforced the privileges and Rights Education and the U.N. Decade Against Racism, and adopting the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Human Rights Defenders). In 1993, the General Assembly voted to create the post of United Nations High Commissioner for Human Rights. The Office of the High Commissioner for Human Rights, operating under the authority of the Secretary-General, has principal responsibility for U.N. human rights

²³⁰ Case Concerning United States Diplomatic and Consular Staff in Tehran, 1980 I.C.J. 3, 42 (May 24). Case Concerning United States Diplomatic and Consular Staff in Tehran, 1980 I.C.J. 3, 42 (May 24).

²³¹ Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), 1986 I.C.J. 14, 129-30 (June 27).

²³² Vienna Convention on Consular Relations (Paraguay v. United States of America), 1998 I.C.J. 248 (Provisional Measures, Order of 9 Apr.) and 1998 I.C.J. 266 (Apr. 9); 1998 I.C.J. 426 (Nov. 10); 1998 J.C.J. 272 (June 8). The case was discontinued by the I.C.J. at Paraguay’s request on 10 Nov. 1998.

²³³ LaGrand Case (Germany v. United States of America), 1999 I.C.J. 9 (Provisional Measures, Order).

activities, including: overseeing most U.N. human rights bodies, promoting universal ratification and implementation of international standards, and maintaining U.N. human rights field operations. Additionally, the General Assembly has focused on issues such as racism, religious intolerance, the rights of the child, and the right to self-determination. Further, the General Assembly has examined human rights situations in Afghanistan, Bosnia and Herzegovina, Cambodia, Cuba, Haiti, Iraq, Islamic Republic of Iran, Kosovo, Myanmar, Nigeria, Rwanda, and Sudan.

Despite a longstanding tension between Charter Article 2(7) prohibition against invading states' domestic jurisdiction and human rights protections in Charter Articles 1, 55, and 56, the General Assembly has increasingly drawn attention to the protection of human rights in specific countries. The tension was broken in the mid-1970s when the General Assembly and the Commission on Human Rights developed a consensus that a Working Group must be established to investigate human rights violations in Chile.⁵⁰ Following that period, almost all governments have accepted the propositions that human rights constitute a matter of international concern, and that U.N. investigations and hortatory resolutions do not, in any case, invade a country's domestic jurisdiction. Domestic jurisdiction arguments under Article 2(7) are occasionally raised by specific governments accused of violations, but are not met with widespread approval. In fact, offending governments often undermine their arguments by supporting condemnatory resolutions with regard to other offending countries. Since the mid-1970s the General Assembly and other U.N. organs have more regularly expressed concern and taken other actions with regard to situations in particular countries or regions, including Afghanistan, Cambodia, Cuba, El Salvador, Estonia and Latvia, Haiti, Iraq, the Islamic Republic of Iran, Kosovo, Myanmar (Burma), Rwanda, Somalia, the Sudan, and the former Yugoslavia.

The Economic and Social Council (ECOSOC) is an intergovernmental body, which operates under the authority of the General Assembly. It consists of 54 members, elected for three-year terms by the General Assembly. The Council usually meets for a six-week session each year; its meetings alternate between Geneva and New York. ECOSOC receives and ordinarily approves recommendations from the Commission on Crime Prevention and Criminal Justice and the Commission on the Status of Women. The Council is also responsible for monitoring compliance with the Covenant on Economic, Social and Cultural Rights through the Committee on Economic, Social and Cultural Rights. Further, it has issued such human rights standards as the Standard Minimum Rules for the Treatment of Prisoners and the Principles on the Effective Prevention of Extra Legal, Arbitrary and Summary Executions.

The United Nations Human Rights Council was established by General Assembly resolution 60/251 in March 2006, and replaced the Commission on Human Rights. The resolution was adopted by a vote of 170 in favor and four against. The United States abstained. The Commission had been composed of 53 member states elected by the Economic and Social Council for three-year terms and met annually in Geneva for six weeks each spring. The Human Rights Council held its first meeting in Geneva in June 2006. The new body was promoted on the basis that it would meet more regularly and that its membership would be elected on the basis of their human rights performance, their human rights record would be subject to peer review, and they could be removed from the Council by a two thirds vote of the General Assembly. The new Council is comprised of 47 members elected by the General Assembly. The Council has continued, with somewhat diminished enthusiasm, to pursue the three principal approaches to serious and widespread violations of human rights: the establishment of country rapporteurs and working groups initially authorized by ECOSOC resolution 1235 and now authorized by Human Rights Council resolution 5/1, consideration of complaints relating to country situations under the confidential procedure initially authorized by ECOSOC resolution 1503, and review through thematic procedures relating to forced disappearances, summary or arbitrary executions, torture, religious intolerance, mercenaries, arbitrary detention, internally displaced persons, violence against women, etc. The Council has also established a universal periodic review mechanism whereby the human rights performance of 48 nations is reviewed each year, such that all U.N. members will be scrutinized every four years.²³⁴

The Sub-Commission on the Promotion and Protection Human Right.,; (from 1946-1999 known as the Sub-Commission on the Prevention of Discrimination and Protection of Minorities) was unusual because it was composed of 26 persons elected by the Commission, for four-year terms, in their individual capacities rather than as governmental representatives. The Sub-Commission was the source of many human rights standards and procedures that were considered and adopted by higher U.N. bodies. With the assistance of the U.N. Office of the High Commissioner for Human Rights, members of the Sub-Commission also prepared path breaking studies on human rights problems. In addition, representatives of NGOs actively participated in the Sub-Commission's sessions. In 2008 the Human Rights Council replaced the Sub-Commission by electing an 18-member Advisory Committee to "provide

²³⁴ See Menno T. Kamminga, *Interstate Accountability for Violations of Rights of Man 9 & 99* (1990).

expertise to the Council in the manner and form requested by the Council, focusing mainly on studies and research-based advice.”²³⁵

The Commission on the Status of Women (CSW) was established by the Economic and Social Council (ECOSOC) in 1946. When the Commission was first established, it was created as a sub-commission of the Commission on Human Rights. It only took one year, however, to realize the importance of this topic and thus to establish the full commission. The Commission on the Status of Women (CSW) is currently composed of representatives from 45 United Nations member states, elected by ECOSOC for four-year terms. Its functions are to prepare recommendations and reports to the ECOSOC on promoting women’s rights and equality in political, economic, civil, social, and educational fields. The CSW may also make recommendations to the ECOSOC on problems in the field of women’s rights that require immediate attention. The CSW has a procedure for receiving confidential communications on human rights violations, but that procedure has not been well-publicized, is not often invoked, and has not been particularly efficacious. The CSW’s objectives are to implement the principle that men and women shall have equal rights, to develop proposals that give effect to its recommendations, and to adopt its own resolutions and decisions. The Commission is located in New York. The Inter-American Commission of Women and the Commission on the Status of Arab Women submit reports to each session of the Commission on the Status of Women.

The U.N.’s crime prevention and criminal justice program was, until 1992, administered by the Committee on Crime Prevention and Control, a subsidiary organ of ECOSOC. The Committee, composed of twenty-seven experts, planned the quinquennial Congresses on the Prevention of Crime and the Treatment of Offenders, submitted proposals, and implemented the Congresses’ recommendations. The Committee’s primary roles were to foster the exchange of information concerning criminal justice and to generate standards against which state performance may be judged. The Committee was very successful in drafting important human rights standards such as the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Basic Principles on the Role of Lawyers, and Guidelines on the Role of Prosecutors.

In 1992 ECOSOC, pursuant to a request by the General Assembly, disbanded the Committee and replaced it with the Commission on Crime Prevention and Criminal Justice. The Commission is composed of 40 gov-

²³⁵ Human Rights Council, HRC 5/2007 (2007).

ernment representatives rather than the independent experts that served on the Committee. The Commission's functions are similar to those of the Committee, with the additional responsibility of mobilizing U.N. member states' support for the crime prevention and criminal justice program. The Commission, as a governmental rather than an expert body, has been less productive in norm setting.

The Peace building Commission was established in December 2005. The Commission's Organizational Committee consists of 31 government members elected to two-year terms. Seven members are from the Security Council and seven from the Economic and Social Council, selected in a manner determined by the respective Councils. Five members are chosen from among the top ten assessed financial contributors to the U.N. that were not previously selected. Five members are chosen from among the governments that contributed the most military and police personnel for U.N. activities that were not previously selected. The final seven members are selected by the General Assembly, giving due consideration to those countries that have experienced post-conflict recovery. When the Organizational Committee addresses a specific conflict situation, it may add members from the countries involved, surrounding nations, nations contributing to any ongoing peacekeeping effort, any regional institutions involved, and the senior U.N. official in the field. The Commission is to propose an integrated strategy for rebuilding and maintaining peace. The Commission is also expected to aid in procuring financial resources and promoting coordination among various organizations inside and outside the U.N.

Other U.N. organs that work to protect human rights include the International Labour Organization (ILO), the oldest intergovernmental organization, which has promulgated 199 recommendations and 188 conventions through January 2009, including several treaties relating to human rights (e.g., on freedom of association, forced labor, indigenous rights, and sex discrimination). The ILO's Committee on Freedom of Association adjudicates complaints by trade unions that their rights have been infringed, and its Committee of Experts reviews periodic state reports under the ILO standard-setting treaties. The ILO also contributes to the deliberations of the international human rights treaty bodies, such as the Human Rights Committee. The U.N. Educational, Scientific and Cultural Organization (UNESCO) has promulgated a few treaties related to human rights (e.g., as to discrimination in education). UNESCO has also established a Committee on Conventions and Recommendations, which examines allegations of human rights violations against artists, authors, scientists, and teachers. The U.N. High Commissioner for Refugees (UNHCR) protects refugees and asylum seekers and pursues durable solutions for

them, including repatriation, resettlement, and local settlement. The UNHCR has also become a major provider of humanitarian assistance to displaced persons, including refugees, persons forced to cross national frontiers by armed conflict, and internally displaced persons. The Food and Agriculture Organization (FAO), the United Nations Children's Fund (UNICEF), and the World Health Organization (WHO) also have programs and policies relating to human rights within their respective fields of activity. Even international financial institutions such as the International Monetary Fund and the World Bank make decisions with substantial human rights consequences; the World Bank has developed policies on some of its activities which may have human rights consequences, e.g., involuntary resettlement and indigenous people. The human rights implications of trade regulation by bodies such as the World Trade Organization have been the subject of heated debate.

c. Development of human rights law through treaty based human rights committees

The monitoring bodies established under specific human rights treaties are playing an increasingly significant role. These expert bodies include the Human Rights Committee, which considers states' reports under the International Covenant on Civil and Political Rights and adjudicates individual cases under the First Optional Protocol to the Civil and Political Covenant. The Human Rights Committee also issues General Comments, which are the considered views of the Committee Members on the nature and substance of state obligations in respect to particular articles of the Covenant. These Comments are very important in setting out general understandings of the nature and content of state obligations under the Covenant. The other treaty bodies similarly oversee the implementation of multilateral conventions in their respective domains: the Committee on the Elimination of All Forms of Racial Discrimination; the Committee on the Elimination of Discrimination against Women; the Committee against Torture; the Committee on the Rights of the Child, the Committee on Economic, Social and Cultural Rights, and the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families. Some of these bodies have, or are developing individual complaint mechanisms (see, e.g., the CEDAW Committee, and the Economic, Social and Cultural Rights Committee)

6. Regional Organizations and Law-Making

During the period in which U.N. mechanisms for implementing human rights were being created, regional human rights structures were also being developed in Europe and the Americas. European states, in particular, fresh from the horrors of the Second World War, gave particular priority to the

creation of human rights enforcement mechanisms that would meaningfully protect ordinary individuals in times of war and peace. The African human rights system was slower to consolidate but it is now moving to a status and enforcement capacity similar to its regional counterparts. The rights protected by these structures are similar to those of the International Bill of Human Rights, but each of the structures has developed unique approaches to seeking assurance that the rights are put into practice.

The Organization for Security and Cooperation in Europe, which arose from the 1975 Helsinki Accords and follow-up efforts, now has 56 members, from the U.S. and Canada in the West to Russia and Kazakhstan in the East. It has created the office of High Commissioner for Minorities and has begun to employ a staff in Prague and Warsaw to encourage democracy and deal with ethnic strife and other serious human rights problems in Central Europe. Relatively little has been done, however, to establish a regional human rights system in Asia.

a. European System

The European system is the most developed of the regional human rights structures. In 1950 the Council of Europe promulgated the European Convention for the Protection of Human Rights and Fundamental Freedoms, which entered into force in 1953. Following the entry into force of Protocol No. 11 on November 1, 1998, and a transitional period for pending cases, the European Convention is implemented by a single permanent body, the European Court of Human Rights. (Formerly, two part-time bodies, the European Commission of Human Rights and the European Court of Human Rights, had enforcement roles). Review of the effectiveness of the Court's structure remains ongoing, and further structural reform is likely. States parties to the Convention may refer alleged violations by other States parties to the Court, though the primary enforcement mechanism is activated through the applications brought by individuals. The Council of Europe has promulgated 14 protocols to expand the protections offered under the European Convention, by adding or redefining rights or by restructuring the implementation system.²³⁶ The European system has compiled impressive jurisprudence and has achieved a high degree of compliance with its decisions. Importantly the European Convention has been incorporated into the legal systems of all ratifying states in some form, thereby augmenting the enforcement capacity of the treaty.

²³⁶ Protocol No. 14 has not come into force, and remains inoperative pending Russian ratification.

In addition to the European Convention, there are several other European human rights treaties, including the European Social Charter, the Additional Protocol to the European Social Charter, and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. There also are several relevant European institutions with a human rights role, including the European Committee for the Prevention of Torture.

Another parallel institution with growing treaty and institutional competencies in human rights protections is the European Union. Historically, the European Union articulated its commitments to human rights and fundamental freedoms most strongly through social rights protections, and through the jurisprudence of the European Court of Justice based in Brussels. The European Union's Charter on Fundamental Rights is a document containing human rights provisions "solemnly proclaimed" in December 2000 by the European Parliament, the Council of the European Union, and the European Commission. The Charter does not have the status of binding law but clearly draws together all the human rights norms contained in the treaties of the European Union. The proposed European Constitution contains a version of the Charter. The Constitution proposes that the European Union should accede to the European Convention on Human Rights, thereby enabling the European Court of Justice to render decisions based on the Convention. The Council of Europe has a broader membership than the European Union (EU) (47 states as compared to 27, including many from Central and Eastern Europe).

b. Inter-American System

The Inter-American system for protecting human rights has two principal legal sources: the American Declaration of the Rights and Duties of Man, an instrument adopted by the Organization of American States (OAS) along with its Charter in 1948, and the American Convention on Human Rights, adopted by the OAS in 1969, which came into force in 1978. The OAS created the Inter-American Commission on Human Rights in 1959, but until 1970 the Commission's mandate to function came only from OAS General Assembly resolutions of uncertain legal force. In 1970, revisions in the OAS Charter transformed the Inter-American Commission into one of the principal organs of the OAS. The Inter-American Commission and the Inter-American Court of Human Rights are the bodies charged with the implementation of the American Convention.

The Commission's main functions are to promote respect for and to defend human rights. In fulfilling its functions, the Inter-American Commission on Human Rights has done impressive fact-finding work in a number

of grave country situations. It has issued many individual decisions, but has had difficulty in achieving compliance.

The Commission initiates country studies if it receives a large number of complaints charging a particular government with serious and widespread human rights violations. The Commission prepared its first country reports on Cuba, Haiti, and the Dominican Republic in the 1960s. Although the governments of Cuba and Haiti refused to admit the Commission into their countries, the Dominican Republic allowed the Commission to visit and thus became the subject of the Commission's first on-site investigation. Since then, the Commission has conducted on-site investigations in a number of other OAS countries, including Argentina, Bolivia, Chile, Colombia, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Paraguay, Suriname, and Uruguay.

The Commission can also receive individual petitions alleging human rights violations by OAS member states, whether or not the state in question has ratified the American Convention. The Commission determines admissibility, engages in fact-finding, attempts to arrange friendly settlements and, if necessary, decides whether a violation of the American Convention or the American Declaration has been committed. The Commission may also refer cases involving State parties to the American Convention to the Inter-American Court of Human Rights. A State party to the Convention must specifically recognize the Court's competence to hear contentious cases in order to be subject to the Court's jurisdiction. The Court also exercises a broadly defined advisory jurisdiction, and has issued significant advisory opinions concerning the meaning of the American Convention and other human rights instruments. In addition to the OAS Charter, the American Declaration, and the American Convention, the OAS has promulgated several other treaties and protocols relating to economic, social and cultural rights; the death penalty; disappearances; torture; and violence against women. For more on the Inter-American system, see chapter 11, *Infra*.

c. African Union

The African Union (AU) is the successor organization to the Organization for African Unity (OAU). The OAU was originally formed to rid the African continent of the last vestiges of colonialism, but it also took steps to promote human rights. The Charter of the OAU, adopted in 1963, reaffirms adherence to the principles of the U.N. Charter and the Universal Declaration of Human Rights. In 1981 the OAU adopted its principal human rights treaty, the African Charter on Human and Peoples' Rights. The African Charter entered into force in 1986 and has been ratified by all 53 current members of the AU. In 2002 the AU was formed. Among other goals the AU aims "to encourage internal cooperation, taking due account of the Charter of the United Nations and the

Universal Declaration of Human rights [and) to promote and protect human and peoples' rights in accordance with the African Charter on Human and People's Rights and other relevant human rights instruments."²³⁷

The African Commission on Human and Peoples' Rights has eleven members who serve in their individual capacity. Under Article 45 of the AU Charter the Commission's mandate includes taking measures to promote human rights such as researching specific situations, on-site missions, organizing seminars and conferences, giving recommendations to states, setting out human rights principles, and cooperating with other international organizations. It monitors states' compliance through review of reports that are required every two years. It can also receive communications from states, individuals, and NGOs. Unfortunately, the process of state reporting has not been effective in part because states have been very tardy in submitting reports to the Commission after ratifying the Charter.

The Protocol to the African Charter for the establishment of the African Court on Human and Peoples' Rights came into force on January 25, 2004. The Protocol calls for a Court of eleven judges who are nationals of member states of the AU. The African Court has adopted its rules of procedure and is expected to hear cases brought by AU member states and African intergovernmental organizations, and receive requests from nongovernmental organizations. Individuals can bring a case only with the agreement of the relevant government or through the African Commission for Human and Peoples' Rights.

Regional Systems: Europe

Leyla Sahin v. Turkey, Decision of the European Court of Human Rights, 2004²³⁸

**Note the difference in the Court's decision and analysis from that of the Human Rights Committee in Raibon Hudoyberganova v. Uzbekistan provided earlier in this chapter.*

I. THE CIRCUMSTANCES OF THE CASE

The applicant was born in 1973 and has lived in Vienna since 1999, when she left Istanbul to pursue her medical studies at the Faculty of Medicine at

²³⁷ See The Objectives of the African Union, available at <http://www.african-union.org/>.

²³⁸ Leyla Sahin v. Turkey, Application no. 44774/98, Decision of the European Court of Human Rights (10 November 2005).

Vienna University. She comes from a traditional family of practising Muslims and considers it her religious duty to wear the Islamic headscarf.

A. Circular of 23 February 1998

On 26 August 1997 the applicant, who was then in her fifth year at the Faculty of Medicine at the University of Bursa, enrolled at the Cerrahpaşa Faculty of Medicine at the University of Istanbul. She says that she wore the Islamic headscarf during the four years she spent studying medicine at the University of Bursa and continued to do so until February 1998.

On 23 February 1998 the Vice-Chancellor of Istanbul University issued a circular regulating students' admission to the university campus. The relevant part of the circular provides:

“By virtue of the Constitution, the law and regulations, and in accordance with the case-law of the Supreme Administrative Court and the European Commission of Human Rights and the resolutions adopted by the university administrative boards, students whose ‘heads are covered’ (wearing the Islamic headscarf) and students (including overseas students) with beards must not be admitted to lectures, courses or tutorials. Consequently, the name and number of any student with a beard or wearing the Islamic headscarf must not be added to the lists of registered students. However, if students whose names and numbers are not on the lists insist on attending tutorials and entering lecture theatres, they must be advised of the position and, should they refuse to leave, their names and numbers must be noted and they must be informed that they are not entitled to attend lectures. If they refuse to leave the lecture theatre, the teacher shall record what has happened in a report explaining why it has not been possible to give the lecture and shall bring the matter to the attention of the university authorities as a matter of urgency so that disciplinary measures can be taken.”

On 12 March 1998, in accordance with the aforementioned circular, the applicant was denied access by invigilators to a written examination on oncology because she was wearing the Islamic headscarf. On 20 March 1998 the secretarial offices of the chair of orthopaedic traumatology refused to allow her to enroll because she was wearing a headscarf. On 16 April 1998 she was refused admission to a neurology lecture and on 10 June 1998 to a written examination on public health, again for the same reason....

6. Judgement

(a) The relevant principles

In democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on freedom to manifest one's religion or belief in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected (Kokkinakis, cited above, p. 18, § 33).

A margin of appreciation is particularly appropriate when it comes to the regulation by the Contracting States of the wearing of religious symbols in teaching institutions, since rules on the subject vary from one country to another depending on national traditions (see paragraphs 53-57 above) and there is no uniform European conception of the requirements of "the protection of the rights of others" and of "public order" (Wingrove, cited above, § 58; and Casado Coca, cited above, § 55). It should be noted in this connection that the very nature of education makes regulatory powers necessary (see, *mutatis mutandis*, Kjeldsen, Busk Madsen and Pedersen v. Denmark judgment of 7 December 1976, Series A no. 23, p. 26, § 53, X v. the United Kingdom, no. 8160/78, Commission decision of 12 March 1981, DR 22, p. 27; and 40 mothers v. Sweden, no. 6853/74, Commission decision of 9 March 1977, DR 9, p. 27).

(b) Application of the foregoing principles to the present case

In order to assess the "necessity" of the interference caused by the circular of 23 February 1998 imposing restrictions as to place and manner on the rights of students such as Ms Şahin to wear the Islamic headscarf on university premises, the Court must put the circular in its legal and social context and examine it in the light of the circumstances of the case. Regard being had to the principles applicable in the instant case, the Court's task is confined to determining whether the reasons given for the interference were relevant and sufficient and the measures taken at the national level proportionate to the aims pursued.

It must first be observed that the interference was based, in particular, on two principles – secularism and equality – which reinforce and complement each other (see paragraphs 34 and 36 above).

In its judgment of 7 March 1989, the Constitutional Court stated that secularism in Turkey was, among other things, the guarantor of democratic values, the principle that freedom of religion is inviolable – to the extent that it stems from individual conscience – and the principle that citizens are equal before the law (see paragraph 36 above). Secularism also protected the

individual from external pressure. It added that restrictions could be placed on freedom to manifest one's religion in order to defend those values and principles.

This notion of secularism appears to the Court to be consistent with the values underpinning the Convention and it accepts that upholding that principle may be regarded as necessary for the protection of the democratic system in Turkey.

In addition, like the Constitutional Court (see paragraph 36 above), the Court considers that, when examining the question of the Islamic headscarf in the Turkish context, there must be borne in mind the impact which wearing such a symbol, which is presented or perceived as a compulsory religious duty, may have on those who choose not to wear it. As has already been noted (see *Karaduman*, decision cited above; and *Refah Partisi and Others*, cited above, § 95), the issues at stake include the protection of the "rights and freedoms of others" and the "maintenance of public order" in a country in which the majority of the population, while professing a strong attachment to the rights of women and a secular way of life, adhere to the Islamic faith. Imposing limitations on freedom in this sphere may, therefore, be regarded as meeting a pressing social need by seeking to achieve those two legitimate aims, especially since, as the Turkish courts stated (see paragraphs 32 and 34 above), this religious symbol has taken on political significance in Turkey in recent years.

The Court does not lose sight of the fact that there are extremist political movements in Turkey which seek to impose on society as a whole their religious symbols and conception of a society founded on religious precepts (see paragraphs 32 and 33 above). It has previously said that each Contracting State may, in accordance with the Convention provisions, take a stance against such political movements, based on its historical experience (*Refah Partisi and Others*, cited above, § 124). The regulations concerned have to be viewed in that context and constitute a measure intended to achieve the legitimate aims referred to above and thereby to preserve pluralism in the university.

111. The applicant has been critical of the manner in which the university authorities applied the measures (see paragraphs 86-88 above). However, the Court notes that it is undisputed that in Turkish universities, to the extent that they do not overstep the limits imposed by the organisational requirements of State education, practising Muslim students are free to perform the religious duties that are habitually part of Muslim observance. In addition, the resolution which was adopted by Istanbul University on 9 July 1998 (see paragraph 45 above) treated all forms of dress symbolising or manifesting a religion

or faith on an equal footing in barring them from the university premises....

ALLEGED VIOLATION OF ARTICLES 8 AND 10, ARTICLE 14 TAKEN TOGETHER WITH ARTICLE 9, AND ARTICLE 2 OF PROTOCOL NO. 1

116. The applicant alleged that the ban on wearing the Islamic headscarf in higher-education institutions had infringed her right under Article 2 of Protocol No. 1 to the Convention.

She also said that it obliged students to choose between religion and education and discriminated between believers and non-believers. That, in her view, constituted an unjustified interference with her rights guaranteed by Article 14 of the Convention, taken together with Article 9.

Lastly, she complained of a violation of Articles 8 and 10 of the Convention.

117. The Court finds that no separate question arises under the other provisions relied on by the applicant, as the relevant circumstances are the same as those it examined in relation to Article 9, in respect of which the Court has found no violation.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Dismisses the Government's preliminary objection;
2. Holds that there has been no violation of Article 9 of the Convention
3. Holds that no separate question arises under Articles 8 and 10, Article 14 taken together with Article 9 of the Convention, and Article 2 of Protocol No. 1.

Regional Systems: Inter-American

International Human Rights: Problems of Law, Policy, and Practice²³⁹

I. Human Rights in Argentina

The phenomenon of forced or involuntary "disappearance" is not new, but it became the subject of widespread attention in the 1970s and 1980s, particularly in Latin America. Disappearance poses particular hardship for the

²³⁹ Richard B. Lillich, Hurst Hannum, S. James Anaya, Dinah L. Shelton, [excerpt reprinted with permission from the authors and Aspen Publishers].

relatives and friends of the missing person; they live in a state of uncertainty for years and sometimes decades, not knowing the fate or whereabouts of their loved one. Disappearance also poses problems for human rights inter-governmental and non-governmental human rights bodies, because it is designed to conceal and destroy all evidence that would connect the perpetrators to the victims. This chapter examines the practice of the Inter-American Human Rights system in addressing human rights violations, by focusing on the problem of disappearances in Argentina.²⁴⁰

A long phase of political and social instability began in Argentina in 1930. It gave rise to institutional crises, the establishment of irregular or *de facto* governments, an internal state of war, state of siege and martial law, attempts at totalitarian or joint rule, changes in the organization of state powers, enactment of repressive legislation and especially in the last ten years, an abrupt increase in terrorist violence by the extreme left and the extreme right, as a means of armed conflict. All of this has been detrimental to the rule of law.

In the last fifty years only two governments have completed their constitutional mandate: that of General Agustín P. Justo, 1932 to 1938, and that of General Juan Domingo Perón, 1946-1952. Military takeovers have prevented the completion of the other legal mandates during that same period and since 1952 [until 1980], no government has completed its constitutional term of office.

Such conditions have had a direct effect on the constitutional legal order and have made it difficult to realize the representative and republican form of government provided for in Article 1 of the Constitution.

The political organization of the Argentine State... has been substantially altered by the military takeover of March 24, 1976, the date on which the Armed Forces, "in view of the current state of the country," proceeded to "take over the reins of Government of the Republic" in accordance with a public proclamation. To achieve this, they resolved to adopt measures concerning the organization and operation of the state authorities. In the Act for the National Reorganization Process the following measures were included: a) to establish a military junta with the General Commanders of the Armed Forces, "which shall assume the political power of the Republic," b) to declare the terms of office of the President and of the Governors and Vice Governors of the provinces to be null and void, c) to dissolve the National Congress,

²⁴⁰ Inter-American Commission on Human Rights, Report on the Situation of Human Rights in Argentina, OAS Doc. OEA/Ser.L/V/II.49, doc. 19, corr. 1, April 11, 1980, pp. 14-15, 18-19, 21, 53-56.

the provincial legislature, the House of Representatives of the city of Buenos Aires and the Municipal Councils of the provinces or similar bodies, d) to remove the members of the Supreme Court, the Attorney General and the other members of the higher provincial courts, and e) to appoint the citizen who shall serve as President....

With the military takeover of 1976, the constitutional system was altered by the new Government, by provisions which affect the full observance and exercise of human rights, despite the fact that in the Act issued on March 24 of that year, in which the purpose and basic objectives for the National Reorganization Process were set forth, a prime objective was “the validity of Christian moral values, national tradition and the dignity of the Argentine” and “a full enforcement of the juridical and social system.”

When the change of government occurred in March 1976, the country was in a state of siege, pursuant to Article 23 of the Constitution, which made possible implementation of severe national security measures in order to eradicate subversion....

By virtue of the Institutional Act of June 18, 1976, the Military Junta assumed “the power and responsibility to consider the actions of those individuals who have injured the national interest,” but on grounds as generic as “failure to observe basic moral principles in the exercise of public, political or union offices or activities that involve the public interest.” Based on that Act, a number of special laws have been enacted, which, because of the discretionary nature of the powers granted, have led to the use of arbitrary measures, which have been the cause of intimidation and uncertainty

During [1976-1979], the IACHR... received a large number of claims affecting a considerable number of persons in Argentina. These claims allege that said persons have been apprehended either in their homes, their jobs, or on the public thoroughfares, by armed men, who are occasionally in uniform, in operations and under conditions that indicate, due to the characteristics in which they are carried out, that they are conducted by agents of the State. After these actions have occurred, the persons apprehended disappear, and nothing is ever known of their whereabouts....

The Commission has in its files, lists with names, dates, and other data, as well as several studies that have been carried out regarding this problem. Without giving, for the time being, exact figures on the number of these disappeared persons, the information obtained makes it clear that there exists a situation of extreme irregularity requiring special discussion and analysis....

In ... denunciations or claims received by the IACHR it has been reported

that the armed groups that carry out the operations in the homes apprehend the victim and occasionally his spouse and children, carry out a search of the home, looting the belongings of the residents, and as a general rule, take away all members of the family after placing hoods over their heads and eyes.

The persons affected by these operations, included in the lists at the IA-CHR, are mostly men and women between 20 and 30 years of age, although older persons and minors have also been known to disappear. Some of the children, kidnapped with their parents, have been released and delivered to relatives or have been abandoned in the streets. Other children, however, continue to be listed among the disappeared.

According to the Commission's information the phenomenon of the disappeared affects professionals, students, union workers, employees in various areas of business, journalists, religious leaders, military recruits and business men; in other words, most elements of Argentine society.

II. Evolution of the Human Rights System in the Americas

The Inter-American system as it exists today began with the transformation of the Pan American Union, which dates back to the nineteenth century, into the Organization of American States (OAS). Article 3 of the OAS Charter proclaims the "fundamental rights of the individual" as one of the Organization's basic principles (Documentary Supplement, page xxx).^{*} Concern with human rights not only inspired the Organization of American States to refer to human rights in its Charter but led it to adopt the Inter-American Declaration on the Rights and Duties of Man in May 1948, half a year before the United Nations completed the Universal Declaration of Human Rights.

The Commission may prepare country reports and conduct on-site visits to individual countries, examining the human rights situation in the particular country and making recommendations to the government. Country reports have been prepared on the Commission's own initiative and at the request of the country concerned. The Commission also may appoint special rapporteurs to prepare studies on hemisphere-wide problems.

Like the European system, the Inter-American system has expanded its protections over time through the adoption of additional human rights norms. ...

The Commission has been given competence over matters relating to the fulfillment of obligations undertaken by states parties to all human rights conventions adopted in the regional framework, with the exception of the Convention on Persons with Disabilities, which creates a separate supervisory committee.

The early history and basic structure of the inter-American system is summarized in the following extract.

Cecelia Medina, "The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: Reflections on a Joint Venture" 12 Hum. Rts. Q. 439-447 (1990)

The Inter-American Commission on Human Rights was... originally conceived as a study group concerned with abstract investigations in the field of human rights. However, the creators of the Commission did not foresee the appeal this organ would have for the individual victims of human rights violations. As soon as it was known that the Commission had been created, individuals began to send complaints about human rights problems in their countries. Prompted by these complaints, the Commission started its activities with the conviction that in order to promote human rights it had to protect them.

A significant part of the Commission's work was addressing the problem of countries with gross, systematic violations of human rights, characterized by an absence or a lack of effective national mechanisms for the protection of human rights and a lack of cooperation on the part of the governments concerned. The main objective of the Commission was not to investigate isolated violations but to document the existence of these gross, systematic violations and to exercise pressure to improve the general condition of human rights in the country concerned. For this purpose, and by means of its regulatory powers, the Commission created a procedure to "take cognizance" of individual complaints and use them as a source of information about gross, systematic violations of human rights in the territories of the OAS member states.

The Commission's competence to handle individual communications was formalized in 1965, after the OAS reviewed and was satisfied with the Commission's work. The OAS passed Resolution XXII, which allowed the Commission to "examine" isolated human rights violations, with a particular focus on certain rights. This procedure, however, provided many obstacles for the Commission. Complaints could be handled only if domestic remedies had been exhausted, a requirement that prevented swift reactions to violations.

Indigenous Peoples Rights

United Nations Declaration on the Rights of Indigenous Peoples

Resolution adopted by the General Assembly (U.N. Doc. A/61/L.67 and Add.1)

The General Assembly,

Taking note of the recommendation of the Human Rights Council contained in its resolution 1/2 of 29 June 2006,²⁴¹ by which the Council adopted the text of the United Nations Declaration on the Rights of Indigenous Peoples,

Recalling its resolution 61/178 of 20 December 2006, by which it decided to defer consideration of and action on the Declaration to allow time for further consultations thereon, and also decided to conclude its consideration before the end of the sixty-first session of the General Assembly,

Adopts the United Nations Declaration on the Rights of Indigenous Peoples as contained in the annex to the present resolution.

107th plenary meeting

13 September 2007

Environmental Rights

Laurie R. Tanner, “Kawas vs. Honduras – Protecting Environmental Defenders,” 2011²⁴²

Environmental activists find themselves in a special situation of double vulnerability. This is due to the fact that the majority of the cases they defend confront not only State interests but also the interests of powerful economic groups in connivance with, and much more powerful than, the State, with their own armed forces and an enormous degree of impunity.

²⁴¹ See Official Records of the General Assembly, Sixty-first Session, Supplement No. 53 (A/61/53), part one, chap. II, sect. A.

²⁴² Laurie R. Tanner, “Kawas vs. Honduras – Protecting Environmental Defenders,” 3 *Journal of Human Rights Practice* 309 (Issue 3) (2011)[reprinted with permission of the author].

CEDHA – Center for Human Rights & Environment

INTRODUCTION: BACKGROUND, HISTORY & FACTS

This article examines the reasoning and implications of the Inter-American Court of Human Rights' judgment in the milestone case of *Kawas-Fernández v. Honduras*. In April 2009, in its first-ever ruling on environmental defenders, the Court found a positive obligation on the part of member States in the hemisphere to protect environmentalists who are in serious jeopardy from human rights violations....

This is a pioneering case considering the context of historical violence that natural resources defenders have to face in Honduras and throughout the Region, and this paper examines the holding from the perspective of its application to future protection of these activists around the world. The groundbreaking Center for Human Rights & Environment (CEDHA) 2002-03 Report, *The Human Cost of Defending the Planet*, described the unfortunate reality that exists in the world today:

To be an environmentalist is a dangerous undertaking; environmental activists in the Americas and around the world are being systematically beaten, threatened, detained, raped, tortured and murdered as part of a deliberate attempt to silence and intimidate both the defenders and those they represent.

The facts of the *Kawas* case illustrate this horrific reality.

Forty-seven-year-old environmental advocate Blanca Jeannette Kawas Fernández was shot to death in her home on the night of February 6, 1995, in connection to her opposition of the exploitation of the Punta Sal Peninsula forestlands and illegal logging in a National Park area, which she helped to designate and now bears her name. She was a founder of PROLANSATE, a Honduran conservation foundation that sought to safeguard the human right to a healthy environment by improving the quality of life of the people (including approximately 1,500 Garífuna Indians) living in the watersheds of the Tela Bay area on the Caribbean coast.

In its introduction to the case, the Court refers to the application filed by the Inter-American Commission on Human Rights (IACHR), and points out that as President of PROLANSATE, Kawas “had denounced, among other matters, the attempts by private individuals and entities to illegally appropriate Punta Sal, as well as the contamination of the lakes and the depredation of the forests of the region.”

Jeannette was the first person assassinated in Honduras for defending natural resources and the environment. Without doubt, her activities and

the advances she achieved for preserving diverse areas, along with plant and animal species ... was a major obstacle for commercial developers who wanted to exploit the area, despite it having been declared a National Park through Kawas's efforts....

In its ruling, the Court found the Honduran government legally responsible for Kawas's assassination. The Court held that the Honduran government, which had colluded with those commercial interests operating in the area, failed to properly investigate her murder and prosecute her killers. This cover-up resulted in a continuation of the State culture of impunity in violations of the human rights of environmental defenders, and this is the situation currently found throughout the hemisphere....

RIGHT TO LIFE & DUE PROCESS VIOLATIONS

...Despite Honduras's denial, the Court found that, although the Kawas assassination was under orders from private interests, her killing was facilitated by the intervention of government agents; at least one agent of the state participated in the events that ended Kawas's life; and, these acts were motivated by her "vision regarding environmental protection."...

The Court also established Honduras's responsibility for failing to guarantee access to justice (Articles 8.1 and 25) to the next-of-kin, as well as for violating their right to humane treatment (Article 5.1), noting that Kawas's murder remained unpunished, with the legal proceedings still in preliminary stages, even as Judgment was passed April 2009. In light of the Convention, the judges opined that fourteen years largely exceeds any reasonable term, and that all impediments encountered were the Honduran judicial authorities' complete responsibility.

VIOLATION OF ARTICLE 16: RIGHT TO FREEDOM OF ASSOCIATION

...[T]hose who are protected by the Convention not only have the right and freedom to associate freely with other persons, without the interference of the public authorities limiting or obstructing the exercise of the respective right, which thus represents a right of each individual; but they also enjoy the right and freedom to seek the common achievement of a licit goal, without pressure or interference that could alter or change their purpose.

The Court emphasized the importance of protecting human rights advocates for the role they play in defending and promoting the rights in a democratic society, pointing out that the States have the duty to provide the necessary means for human rights defenders to conduct their activities freely; to protect them when they are subject to threats in order to ward off any attempt on their life or safety; to refrain from placing restrictions that would

hinder the performance of their work, and to conduct serious and effective investigations of any violations against them, thus preventing impunity....

In arriving at the strategic conclusion that environmental defenders should be considered human rights defenders, the tribunal expounded on the concept that human rights defense is “not limited to civil and political rights, but necessarily involves economic, social and cultural rights monitoring, reporting and education ...”

Additionally, the Court commented, with extensive footnotes, on the “undeniable link between the protection of the environment and the enjoyment of other human rights” and the multi-faceted issue of “the right to healthy environment,” citing to case law both of this Court and the European Court of Human Rights, as well as OAS Resolutions, the Convention’s Protocol of San Salvador Article 11, and domestic national constitutions in the region....

REPARATIONS: GUARANTEES OF NON-REPETITION & DUTY TO PROTECT

The noteworthy recognition by the Inter-American Court that environmental activists are human rights defenders, and that those advocates who are shown to be “at-risk” require protection by States, is manifested in the Judgment’s “Reparations” Chapter, as well as in the “Preservation of the Environment” section of the Separate Opinion by Judge Garcha-Ramirez that accompanies the Judgment.

In this remedies chapter, the Court ordered the State to:

- pay the victim’s relatives compensation for material and nonmaterial damages and expenses;
- provide the fees to cover long-term psychological support for the next-of-kin;
- finally conclude its investigation of the crime and have the case settled in a reasonable period; and
- conduct various public acts of international recognition to honor Jeannette Kawas....

Kawas reached its decisive and critical holding regarding protection of “at-risk” environmental defenders in that same paragraph, when it declared that:

... the State has a duty to adopt [and] fulfill [all] measures guaranteeing the free performance of environmental advocacy activities; the instant protection of environmental activists facing danger or threats as a result of their work; and the instant, responsible and effective investigation of any acts endangering the life or integrity of environmentalists on account of their work.

Consequently, Paragraph 214 concludes:

... as a way to contribute to avoiding the recurrence of facts such as those of the instant case, the Court finds it appropriate to order the State to carry out a national campaign to create awareness and sensitivity regarding the importance of environmentalists' work in Honduras and their contribution to the protection of human rights, targeting security officials, agents of the justice system and the general population.

Regional Systems: Africa

Burkinabe African Commission Case²⁴³

The Complainant claims that Burkina Faso has violated Articles 3, 4, 5, 6, 7, 8, 9(2), 10, 11, 12 and 13(2) of the African Charter on Human and Peoples' Rights.

37. Article 3 of the Charter, stipulates that:

- (1) Every individual shall be equal before the law.
- (2) Every individual shall be entitled to equal protection of the law.

38. In order to redress the effects of the suspensions, dismissals and retirements of magistrates which took place on 10th June 1987, the Burkinabñ State introduced an amnesty, aimed at rehabilitating workers abusively removed under the so-called "Conseil National de la Rñvolution" regime, which ruled over Burkina Faso from 1983 to 1987. As part of the said measure, many workers were restored to their posts, while many others, according to information available to the Commission, remained unaffected by the measure. The Complainant, Mr. Halidou Ouñdraogo and Mr. Compaorñ Christophe, both magistrates, fall in the latter category. They both demanded to be compensated in kind. The request made by Mr. Compaore has not been met to date. The Supreme Court, before which the case was filed over fifteen years ago has passed no verdict on it. The Commission further notes that no reason with a basis in law was given to justify this delay in considering the case. Nor does the Respondent State give any legal reasons to justify the retention of the punishment meted out to these two magistrates. The Commission considers therefore that this is a violation of Articles 18 and 19 of the Fundamental Principles on the Independence of the Judiciary, adopted by the

²⁴³ *Mouvement Burkinabñ des Droits de l'Homme et des Peuples v. Burkina Faso*, African Commission on Human and Peoples' Rights, Comm. No. 204/97 (2001).

seventh United Nations Congress on Crime Prevention and the Treatment of Offenders, held from 26th August to 6th September 1985, and confirmed by the General Assembly in its Resolutions 40/32 of 29 November 1985 and 40/146 of 13th December 1985....

40. It is abundantly clear, as the Commission has already noted that the Respondent State has shown reasons as to why the rehabilitation measure was applied in a selective manner. The Commission also wonders at the reasons behind the Supreme Court's failure to proceed with the case. Fifteen years without any action being taken on the case, or any decision being made either on the fate of the concerned persons or on the relief sought, constitutes a denial of justice and a violation of the equality of all citizens before the law. It is also a violation of Article 7(1)(d) of the African Charter, which proclaims the right to be tried within a reasonable time by an impartial court or tribunal.

41. Article 4 of the Charter states that:

“Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.”

42. The communication contains the names of various people who were victims of assassinations, forced disappearances, attacks or attempted attacks against their physical integrity, and acts of intimidation. The Respondent State did not deny these facts.... The Commission would also like to reiterate a fundamental principle proclaimed in Article 1 of the Charter that not only do the States Parties recognise the rights, duties and freedoms enshrined in the Charter, they also commit themselves to respect them and to take measures to give effect to them. In other words, if a State Party fails to ensure respect of the rights contained in the African Charter, this constitutes a violation of the Charter. Even if the State or its agents were not the perpetrators of the violation.

43. ... The communication also mentions the deaths of citizens who were shot or tortured to death, as well as the deaths of two young students who had gone onto the streets with their colleagues to express certain demands and to support those of the secondary school and higher institution teachers. The Commission deplores the abusive use of means of State violence against demonstrators even when the demonstrations are not authorised by the competent administrative authorities. It believes that the public authorities possess adequate means to disperse crowds, and that those responsible for public order must make an effort in these types of operations to cause only the barest minimum of damage and violation of physical integrity, to respect and preserve human life.

44. ...The disappearances of persons suspected or accused of plotting against the instituted authorities, including Mr. Guillaume Sessouma and a medical student, Dabo Boukary, arrested in May 1990 by the presidential guard and who have not been seen since then constitute a violation of the above-cited texts and principles. In this last case, the Commission notes the submission of a complaint on 16th October 2000.

For these reasons:

The Commission finds the Republic of Burkina Faso in violation of Articles 3, 4, 5, 6, 7(1)(d) and 12(2) of the African Charter.

Recommends that the Republic of Burkina Faso draws all the legal consequences of this decision, in particular by:

- Identifying and taking to court those responsible for the human rights violations cited above;
- Accelerating the judicial process of the cases pending before the courts;
- Compensating the victims of the human rights violations stated in the complaint.

CHAPTER 3 INTERNATIONAL HUMANITARIAN LAW

Sources of International Humanitarian Law

***The First Geneva Convention*²⁴⁴**

Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949

Chapter I. General Provisions

ARTICLE 1

The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.

ARTICLE 2

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance. Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

ARTICLE 3

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict

²⁴⁴ Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949; available at www.icrc.org.

shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further Endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

ARTICLE 4

Neutral Powers shall apply by analogy the provisions of the present Convention to the wounded and sick, and to members of the medical personnel and to chaplains of the armed forces of the Parties to the conflict, received or interned in their territory, as well as to dead persons found.

ARTICLE 5

For the protected persons who have fallen into the hands of the enemy, the present Convention shall apply until their final repatriation.

ARTICLE 6

In addition to the agreements expressly provided for in Articles 10, 15, 23, 28, 31, 36, 37 and 52, the High Contracting Parties may conclude other special agreements for all matters concerning which they may deem it suitable to make separate provision.

No special agreement shall adversely affect the situation of the wounded and sick, of members of the medical personnel or of chaplains, as defined by the present Convention, nor restrict the rights which it confers upon them.

Wounded and sick, as well as medical personnel and chaplains, shall continue to have the benefit of such agreements as long as the Convention is applicable to them, except where express provisions to the contrary are contained in the aforesaid or in subsequent agreements, or where more favorable measures have been taken with regard to them by one or other of the Parties to the conflict.

List of Customary Rules of International Humanitarian Law²⁴⁵

THE PRINCIPLE OF DISTINCTION

Distinction between Civilians and Combatants

Rule 1. The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians. [IAC/NIAC]

Rule 2. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

Rule 3. All members of the armed forces of a party to the conflict are combatants, except medical and religious personnel.

Rule 4. The armed forces of a party to the conflict consist of all organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates.

Rule 5. Civilians are persons who are not members of the armed forces. The civilian population comprises all persons who are civilians.

²⁴⁵ Source: "Annex to Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict," by Jean-Marie Henckaerts, IRRIC, Volume 87, No. 857, March 2005, pp. 198-212; available on www.icrc.org.

Rule 6. Civilians are protected against attack, unless and for such time as they take a direct part in hostilities.

Distinction between Civilian Objects and Military Objectives

Rule 7. The parties to the conflict must at all times distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives. Attacks must not be directed against civilian objects.

Rule 8. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

Rule 9. Civilian objects are all objects that are not military objectives.

Rule 10. Civilian objects are protected against attack, unless and for such time as they are military objectives.

Indiscriminate Attacks

Rule 11. Indiscriminate attacks are prohibited.

Rule 12. Indiscriminate attacks are those:

- (a) which are not directed at a specific military objective;
- (b) which employ a method or means of combat which cannot be directed at a specific military objective; or
- (c) which employ a method or means of combat the effects of which cannot be limited as required by international humanitarian law;

and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

Rule 13. Attacks by bombardment by any method or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects are prohibited.

Proportionality in Attack

Rule 14. Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.

Precautions in Attack

Rule 15. In the conduct of military operations, constant care must be taken to spare the civilian population, civilians and civilian objects. All feasible precautions must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects.

Rule 16. Each party to the conflict must do everything feasible to verify that targets are military objectives.

Rule 17. Each party to the conflict must take all feasible precautions in the choice of means and methods of warfare with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.

Rule 18. Each party to the conflict must do everything feasible to assess whether the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

Rule 19. Each party to the conflict must do everything feasible to cancel or suspend an attack if it becomes apparent that the target is not a military objective or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

Rule 20. Each party to the conflict must give effective advance warning of attacks which may affect the civilian population, unless circumstances do not permit.

Rule 21. When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected must be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.

SPECIFICALLY PROTECTED PERSONS AND OBJECTS

Medical and Religious Personnel and Objects

Rule 25. Medical personnel exclusively assigned to medical duties must be respected and protected in all circumstances. They lose their protection if they commit, outside their humanitarian function, acts harmful to the enemy.

Rule 29. Medical transports assigned exclusively to medical transportation must be respected and protected in all circumstances. They lose their protec-

tion if they are being used, outside their humanitarian function, to commit acts harmful to the enemy.

Rule 30. Attacks directed against medical and religious personnel and objects displaying the distinctive emblems of the Geneva Conventions in conformity with international law are prohibited.

Humanitarian Relief Personnel and Objects

Rule 31. Humanitarian relief personnel must be respected and protected.

Rule 32. Objects used for humanitarian relief operations must be respected and protected.

Personnel and Objects Involved in a Peacekeeping Mission

Rule 33. Directing an attack against personnel and objects involved in a peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians and civilian objects under international humanitarian law, is prohibited.

Journalists

Rule 34. Civilian journalists engaged in professional missions in areas of armed conflict must be respected and protected as long as they are not taking a direct part in hostilities.

Protected Zones

Rule 35. Directing an attack against a zone established to shelter the wounded, the sick and civilians from the effects of hostilities is prohibited.

Rule 36. Directing an attack against a demilitarized zone agreed upon between the parties to the conflict is prohibited.

Rule 37. Directing an attack against a non-defended locality is prohibited. [IAC/NIAC]

Cultural Property

Rule 38. Each party to the conflict must respect cultural property:

A. Special care must be taken in military operations to avoid damage to buildings dedicated to religion, art, science, education or charitable purposes and historic monuments unless they are military objectives.

B. Property of great importance to the cultural heritage of every people must not be the object of attack unless imperatively required by military necessity.

The Natural Environment

Rule 43. The general principles on the conduct of hostilities apply to the natural environment:

A. No part of the natural environment may be attacked, unless it is a military objective.

B. Destruction of any part of the natural environment is prohibited, unless required by imperative military necessity.

C. Launching an attack against a military objective which may be expected to cause incidental damage to the environment which would be excessive in relation to the concrete and direct military advantage anticipated is prohibited.

Rule 44. Methods and means of warfare must be employed with due regard to the protection and preservation of the natural environment. In the conduct of military operations, all feasible precautions must be taken to avoid, and in any event to minimize, incidental damage to the environment. Lack of scientific certainty as to the effects on the environment of certain military operations does not absolve a party to the conflict from taking such precautions.

Rule 45. The use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment is prohibited. Destruction of the natural environment may not be used as a weapon.

SPECIFIC METHODS OF WARFARE

Denial of Quarter

Rule 46. Ordering that no quarter will be given, threatening an adversary therewith or conducting hostilities on this basis is prohibited.

Rule 47. Attacking persons who are recognized as hors de combat is prohibited. A person hors de combat is:

- (a) anyone who is in the power of an adverse party;
- (b) anyone who is defenseless because of unconsciousness, shipwreck, wounds or sickness; or
- (c) anyone who clearly expresses an intention to surrender; provided he or she abstains from any hostile act and does not attempt to escape.

Destruction and Seizure of Property

Rule 49. The parties to the conflict may seize military equipment belonging to an adverse party as war booty. [IAC]

Rule 50. The destruction or seizure of the property of an adversary is prohibited, unless required by imperative military necessity.

Rule 51. In occupied territory:

(a) movable public property that can be used for military operations may be confiscated;

(b) immovable public property must be administered according to the rule of usufruct; and

(c) private property must be respected and may not be confiscated; except where destruction or seizure of such property is required by imperative military necessity.

Rule 52. Pillage is prohibited.

Starvation and Access to Humanitarian Relief

Rule 53. The use of starvation of the civilian population as a method of warfare is prohibited.

Rule 54. Attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population is prohibited.

Rule 55. The parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control.

Rule 56. The parties to the conflict must ensure the freedom of movement of authorised humanitarian relief personnel essential to the exercise of their functions. Only in case of imperative military necessity may their movements be temporarily restricted.

WEAPONS

General Principles on the Use of Weapons

Rule 70. The use of means and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering is prohibited.

Rule 71. The use of weapons which are by nature indiscriminate is prohibited.

Poison

Rule 72. The use of poison or poisoned weapons is prohibited.

Biological Weapons

Rule 73. The use of biological weapons is prohibited.

Chemical Weapons

Rule 74. The use of chemical weapons is prohibited.

Expanding Bullets

Rule 77. The use of bullets which expand or flatten easily in the human body is prohibited. [IAC/NIAC]

Exploding Bullets

Rule 78. The anti-personnel use of bullets which explode within the human body is prohibited. [IAC/NIAC]

Weapons Primarily Injuring by Non-detectable Fragments

Rule 79. The use of weapons the primary effect of which is to injure by fragments which are not detectable by X-rays in the human body is prohibited. [IAC/NIAC]

Booby-traps

Rule 80. The use of booby-traps which are in any way attached to or associated with objects or persons entitled to special protection under international humanitarian law or with objects that are likely to attract civilians is prohibited.

Landmines

Rule 81. When landmines are used, particular care must be taken to minimize their indiscriminate effects.

Rule 82. A party to the conflict using landmines must record their placement, as far as possible.

Rule 83. At the end of active hostilities, a party to the conflict which has used landmines must remove or otherwise render them harmless to civilians, or facilitate their removal.

Incendiary Weapons

Rule 84. If incendiary weapons are used, particular care must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects.

Rule 85. The anti-personnel use of incendiary weapons is prohibited, unless it is not feasible to use a less harmful weapon to render a person hors de combat.

Blinding Laser Weapons

Rule 86. The use of laser weapons that are specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision is prohibited.

TREATMENT OF CIVILIANS AND PERSONS HORS DE COMBAT

Fundamental Guarantees

Rule 87. Civilians and persons hors de combat must be treated humanely.

Rule 88. Adverse distinction in the application of international humanitarian law based on race, color, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status or on any other similar criteria is prohibited.

Rule 89. Murder is prohibited.

Rule 90. Torture, cruel or inhuman treatment and outrages upon personal dignity, in particular humiliating and degrading treatment, are prohibited.

Rule 91. Corporal punishment is prohibited.

Rule 92. Mutilation, medical or scientific experiments or any other medical procedure not indicated by the state of health of the person concerned and not consistent with generally accepted medical standards are prohibited.

Rule 93. Rape and other forms of sexual violence are prohibited.

Rule 94. Slavery and the slave trade in all their forms are prohibited.

Rule 95. Uncompensated or abusive forced labor is prohibited.

Rule 96. The taking of hostages is prohibited.

Rule 97. The use of human shields is prohibited.

Rule 98. Enforced disappearance is prohibited.

Rule 99. Arbitrary deprivation of liberty is prohibited.

Rule 100. No one may be convicted or sentenced, except pursuant to a fair trial affording all essential judicial guarantees.

Rule 101. No one may be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time it was committed; nor may a

heavier penalty be imposed than that which was applicable at the time the criminal offence was committed.

Rule 102. No one may be convicted of an offence except on the basis of individual criminal responsibility.

Rule 103. Collective punishments are prohibited.

Rule 104. The convictions and religious practices of civilians and persons hors de combat must be respected.

Rule 105. Family life must be respected as far as possible.

Combatants and Prisoner-of-War Status

Rule 106. Combatants must distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. If they fail to do so, they do not have the right to prisoner-of-war status.

Rule 107. Combatants who are captured while engaged in espionage do not have the right to prisoner-of-war status. They may not be convicted or sentenced without previous trial.

Rule 108. Mercenaries, as defined in Additional Protocol I, do not have the right to combatant or prisoner-of-war status. They may not be convicted or sentenced without previous trial.

The Wounded, Sick and Shipwrecked

Rule 109. Whenever circumstances permit, and particularly after an engagement, each party to the conflict must, without delay, take all possible measures to search for, collect and evacuate the wounded, sick and shipwrecked without adverse distinction.

The Dead

Rule 112. Whenever circumstances permit, and particularly after an engagement, each party to the conflict must, without delay, take all possible measures to search for, collect and evacuate the dead without adverse distinction.

Missing Persons

Rule 117. Each party to the conflict must take all feasible measures to account for persons reported missing as a result of armed conflict and must provide their family members with any information it has on their fate.

Persons Deprived of their Liberty

Rule 118. Persons deprived of their liberty must be provided with adequate food, water, clothing, shelter and medical attention.

Displacement and Displaced Persons

Rule 129.

A. Parties to an international armed conflict may not deport or forcibly transfer the civilian population of an occupied territory, in whole or in part, unless the security of the civilians involved or imperative military reasons so demand.

B. Parties to a non-international armed conflict may not order the displacement of the civilian population, in whole or in part, for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand.

Other Persons Afforded Specific Protection

Rule 134. The specific protection, health and assistance needs of women affected by armed conflict must be respected.

Rule 135. Children affected by armed conflict are entitled to special respect and protection.

Rule 136. Children must not be recruited into armed forces or armed groups.

Rule 137. Children must not be allowed to take part in hostilities.

Rule 138. The elderly, disabled and infirm affected by armed conflict are entitled to special respect and protection.

IMPLEMENTATION

Compliance with International Humanitarian Law

Rule 139. Each party to the conflict must respect and ensure respect for international humanitarian law by its armed forces and other persons or groups acting in fact on its instructions, or under its direction or control.

Rule 140. The obligation to respect and ensure respect for international humanitarian law does not depend on reciprocity.

Rule 141. Each State must make legal advisers available, when necessary, to advise military commanders at the appropriate level on the application of international humanitarian law.

Rule 142. States and parties to the conflict must provide instruction in international humanitarian law to their armed forces.

Rule 143. States must encourage the teaching of international humanitarian law to the civilian population.

Legality of the Threat or Use of Nuclear Weapons, I.C.J. Advisory Opinion, 1996²⁴⁶

“THE COURT... gives the following Advisory Opinion:

37. The Court will now address the question of the legality or illegality of recourse to nuclear weapons in the light of the provisions of the Charter relating to the threat or use of force.

38. The Charter contains several provisions relating to the threat and use of force....

39. ...A weapon that is already unlawful per se, whether by treaty or custom, does not become lawful by reason of its being used for a legitimate purpose under the Charter.

40. The entitlement to resort to self-defense under Article 51 is subject to certain constraints. Some of these constraints are inherent in the very concept of self-defense. Other requirements are specified in Article 51.

41. The submission of the exercise of the right of self-defense to the conditions of necessity and proportionality is a rule of customary international law. As the Court stated in the case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (I.C.J. Reports 1986, p. 94, para.176):

“there is a specific rule whereby self-defense would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law”....

42. The proportionality principle may thus not in itself exclude the use of nuclear weapons in self-defense in all circumstances. But at the same time, a use of force that is proportionate under the law of self-defense, must, in order to be lawful, also meet the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law.

43. Certain States... contend that the very nature of nuclear weapons, and the high probability of an escalation of nuclear exchanges, mean that there is an extremely strong risk of devastation. The risk factor is said to negate the possibility of the condition of proportionality being complied with. The Court does not find it necessary to embark upon the quantification of such risks; nor does it need to enquire into the question whether tactical nuclear

²⁴⁶ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226

weapons exist which are sufficiently precise to limit those risks: it suffices for the Court to note that the very nature of all nuclear weapons and the profound risks associated therewith are further considerations to be borne in mind by States believing they can exercise a nuclear response in self-defense in accordance with the requirements of proportionality...

51. Having dealt with the Charter provisions relating to the threat or use of force, the Court will now turn to the law applicable in situations of armed conflict. It will first address the question whether there are specific rules in international law regulating the legality or illegality of recourse to nuclear weapons *per se*; it will then examine the question put to it in the light of the law applicable in armed conflict proper, i.e. the principles and rules of humanitarian law applicable in armed conflict, and the law of neutrality.

Prohibition of the use of such weapons, but they do not constitute such a prohibition by themselves. As to the treaties of Tlatelolco and Rarotonga and their Protocols, and also the declarations made in connection with the indefinite extension of the Treaty on the Non-Proliferation of Nuclear Weapons, it emerges from these instruments that:

(a) a number of States have undertaken not to use nuclear weapons in specific zones (Latin America; the South Pacific) or against certain other States (nonnuclear- weapon States which are parties to the Treaty on the Non-Proliferation of Nuclear Weapons);

(b) nevertheless, even within this framework, the nuclear-weapon States have reserved the right to use nuclear weapons in certain circumstances; and

(c) these reservations met with no objection from the parties to the Tlatelolco or Rarotonga Treaties or from the Security Council.

...63. These two treaties, the security assurances given in 1995 by the nuclear-weapon States and the fact that the Security Council took note of them with satisfaction, testify to a growing awareness of the need to liberate the community of States and the international public from the dangers resulting from the existence of nuclear weapons. The Court moreover notes the signing, even more recently, on December 15, 1995, at Bangkok, of a Treaty on the Southeast Asia Nuclear- Weapon-Free Zone, and on April 11, 1996, at Cairo, of a treaty on the creation of a nuclear-weapons-free zone in Africa. It does not, however, view these elements as amounting to a comprehensive and universal conventional prohibition on the use, or the threat of use, of those weapons as such.

64. The Court will now turn to an examination of customary international law to determine whether a prohibition of the threat or use of nuclear

weapons as such flows from that source of law. As the Court has stated, the substance of that law must be “looked for primarily in the actual practice and *opinio juris* of States” (Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985, p. 29, para.27).

65. States which hold the view that the use of nuclear weapons is illegal have endeavored to demonstrate the existence of a customary rule prohibiting this use. They refer to a consistent practice of non-utilization of nuclear weapons by States since 1945 and they would see in that practice the expression of an *opinio juris* on the part of those who possess such weapons.

66. Some other States, which assert the legality of the threat and use of nuclear weapons in certain circumstances, invoked the doctrine and practice of deterrence in support of their argument. They recall that they have always, in concert with certain other States, reserved the right to use those weapons in the exercise of the right to self-defense against an armed attack threatening their vital security interests. In their view, if nuclear weapons have not been used since 1945, it is not on account of an existing or nascent custom but merely because circumstances that might justify their use have fortunately not arisen.

67. ...[T]he Members of the international community are profoundly divided on the matter of whether non-recourse to nuclear weapons over the past fifty years constitutes the expression of an *opinio juris*. Under these circumstances the Court does not consider itself able to find that there is such an *opinio juris*.

68. According to certain States, the important series of General Assembly resolutions, beginning with resolution 1653 (XVI) of November 24, 1961, that deal with nuclear weapons and that affirm, with consistent regularity, the illegality of nuclear weapons, signify the existence of a rule of international customary law which prohibits recourse to those weapons...

70. The Court notes that General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule.

71. Examined in their totality,... several of the resolutions under consideration in the present case have been adopted with substantial numbers of negative votes and abstentions; ... they... fall short of establishing the existence

of an *opinio juris* on the illegality of the use of such weapons...

73. Having said this, the Court points out that the adoption each year by the General Assembly, by a large majority, of resolutions recalling the content of resolution 1653 (XVI), and requesting the member States to conclude a convention prohibiting the use of nuclear weapons in any circumstance, reveals the desire of a very large section of the international community to take, by a specific and express prohibition of the use of nuclear weapons, a significant step forward along the road to complete nuclear disarmament. The emergence, as *lex lata*, of a customary rule specifically prohibiting the use of nuclear weapons as such is hampered by the continuing tensions between the nascent *opinio juris* on the one hand, and the still strong adherence to the practice of deterrence on the other.

74. The Court not having found a conventional rule of general scope, nor a customary rule specifically proscribing the threat or use of nuclear weapons *per se*, it will now deal with the question whether recourse to nuclear weapons must be considered as illegal in the light of the principles and rules of international humanitarian law applicable in armed conflict and of the law of neutrality.

75. A large number of customary rules have been developed by the practice of States and are an integral part of the international law relevant to the question posed. The “laws and customs of war” – as they were traditionally called – were the subject for the Protection of War Victims; the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of October 18, 1907; the Convention on the Prevention and Punishment of the Crime of Genocide of December 9, 1948; and the Charter of the International Military Tribunal of August 8, 1945...

82. The extensive codification of humanitarian law and the extent of the accession to the resultant treaties, as well as the fact that the denunciation clauses that existed in the codification instruments have never been used, have provided the international community with a corpus of treaty rules the great majority of which had already become customary and which reflected the most universally recognized humanitarian principles. These rules indicate the normal conduct and behavior expected of States...

84. Nor is there any need for the Court to elaborate on the question of the applicability of Additional Protocol I of 1977 to nuclear weapons. It need only observe that while, at the Diplomatic Conference of 1974-1977, there was no substantive debate on the nuclear issue and no specific solution concerning this question was put forward, Additional Protocol I in no way replaced the general customary rules applicable to all means and methods of combat including nuclear weapons. In particular, the Court recalls that all States are

bound by those rules in Additional Protocol I which, when adopted, were merely the expression of the pre-existing customary law, such as the Martens Clause, reaffirmed in the first article of Additional Protocol I.

The fact that certain types of weapons were not specifically dealt with by the 1974 -1977 Conference does not permit the drawing of any legal conclusions relating to the substantive issues which the use of such weapons would raise....

86. ...[N]uclear weapons were invented after most of the principles and rules of humanitarian law applicable in armed conflict had already come into existence; the Conferences of 1949 and 1974-1977 left these weapons aside, and there is a qualitative as well as quantitative difference between nuclear weapons and all conventional arms. However, it cannot be concluded from this that the established principles and rules of humanitarian law applicable in armed conflict did not apply to nuclear weapons. Such a conclusion would be incompatible with the intrinsically humanitarian character of the legal principles in question which permeates the entire law of armed conflict and applies to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future....

None of the statements made before the Court in any way advocated a freedom to use nuclear weapons without regard to humanitarian constraints. Quite the reverse; it has been explicitly stated, “Restrictions set by the rules applicable to armed conflicts in respect of means and methods of warfare definitely also extend to nuclear weapons” (Russian Federation, CR 95/29, p. 52);

“So far as the customary law of war is concerned, the United Kingdom has always accepted that the use of nuclear weapons is subject to the general principles of the jus in bello” (United Kingdom, CR 95/34, p. 45)....

Prosecutor v. Dusko Tadić, International Criminal Tribunal for Yugoslavia²⁴⁷

Appeals Chamber, Jurisdiction

Decision on the Defence Motion For Interlocutory Appeal on Jurisdiction

I. INTRODUCTION

A. The Judgement Under Appeal

1. The Appeals Chamber... is seized of an appeal lodged by Appellant the Defence against a judgement rendered by the Trial Chamber II on 10 August

²⁴⁷ International Criminal Tribunal for Yugoslavia, *The Prosecutor v. Dusko Tadić*, IT-94-1-AR72, Appeals Chamber, Decision, 2 October 1995. [Citations omitted].

1995. By that judgement, Appellant's motion challenging the jurisdiction of the International Tribunal was denied.

2. Before the Trial Chamber, Appellant had launched a three-pronged attack:

- a. illegal foundation of the International Tribunal;
- b. wrongful primacy of the International Tribunal over national courts;
- c. lack of jurisdiction *ratione materiae*.

The judgment under appeal denied the relief sought by Appellant; in its essential provisions, it reads as follows:

“THE TRIAL CHAMBER ... HEREBY DISMISSES the motion insofar as it relates to primacy jurisdiction and subject-matter jurisdiction under Articles 2, 3 and 5 and otherwise decides it to be incompetent insofar as it challenges the establishment of the International Tribunal

HEREBY DENIES the relief sought by the Defense in its Motion on the Jurisdiction of the Tribunal.”...

II. UNLAWFUL ESTABLISHMENT OF THE INTERNATIONAL TRIBUNAL...

A. Meaning of Jurisdiction....

11. A narrow concept of jurisdiction may, perhaps, be warranted in a national context but not in international law....

98. The emergence of international rules governing internal strife has occurred at two different levels: at the level of customary law and at that of treaty law. Two bodies of rules have thus crystallized, which are by no means conflicting or inconsistent, but instead mutually support and supplement each other. Indeed, the interplay between these two sets of rules is such that some treaty rules have gradually become part of customary law. This holds true for common Article 3 of the 1949 Geneva Conventions, as was authoritatively held by the International Court of Justice (Nicaragua Case, at para.218), but also applies to Article 19 of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and, as we shall show below (para.117), to the core of Additional Protocol II of 1977.

99. Before pointing to some principles and rules of customary law that have emerged in the international community for the purpose of regulating civil strife, a word of caution on the law-making process in the law of armed conflict is necessary. When attempting to ascertain State practice with a view to establishing the existence of a customary rule or a general principle, it is

difficult, if not impossible, to pinpoint the actual behavior of the troops in the field for the purpose of establishing whether they in fact comply with, or disregard, certain standards of behavior. This examination is rendered extremely difficult by the fact that not only is access to the theatre of military operations normally refused to independent observers (often even to the ICRC) but information on the actual conduct of hostilities is withheld by the parties to the conflict; what is worse, often recourse is had to misinformation with a view to misleading the enemy as well as public opinion and foreign Governments. In appraising the formation of customary rules or general principles one should therefore be aware that, on account of the inherent nature of this subject-matter, reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial decisions.

b. Principal Rules

100. The first rules that evolved in this area were aimed at protecting the civilian population from the hostilities. As early as the Spanish Civil War (1936-39), State practice revealed a tendency to disregard the distinction between international and internal wars and to apply certain general principles of humanitarian law, at least to those internal conflicts that constituted large-scale civil wars. [...] Significantly, both the republican Government and third States refused to recognize the insurgents as belligerents. They nonetheless insisted that certain rules concerning international armed conflict applied. Among rules deemed applicable were the prohibition of the intentional bombing of civilians, the rule forbidding attacks on non-military objectives, and the rule regarding required precautions when attacking military objectives. Thus, for example, on 23 March 1938, Prime Minister Chamberlain explained the British protest against the bombing of Barcelona as follows...

Jus Ad Bellum and Jus In Bello

Fundamental Distinction Between Jus Ad Bellum (On The Legality Of The Use Of Force) And Jus In Bello (On The Humanitarian Rules To Be Respected In Warfare)

International Humanitarian Law (IHL) developed at a time when the use of force was a lawful form of international relations, when States were not prohibited from waging war, when they had the right to make war (i.e., when they had *jus ad bellum*). It did not appear illogical for international law to oblige them to respect certain rules of behavior in war (*jus in bello*) if they resorted to hostilities. Today, the use of force between States is prohibited by a

peremptory rule of international law [Expressed in Art. 2(4) of the UN Charter] (*jus ad bellum* has changed into *jus contra bellum*). Exceptions are admitted in the case of individual and collective self-defense, [Recognized in Art. 51 of the UN Charter] based upon Security Council resolutions [As foreseen in Chapter VII of the UN Charter] and, arguably, the right of peoples to self-determination [The legitimacy of the use of force to enforce the right of people to self-determination (recognized in Art. 1 of both UN Human Rights) (national liberation wars)]. Logically, at least one side of an international armed conflict is therefore violating international law by the sole fact of using force, however respectful it is of IHL. By the same token, all municipal laws anywhere in the world prohibit the use of force against (governmental) law enforcement agencies.

Although armed conflicts are prohibited, they happen, and it is today recognized that international law has to address this reality of international life not only by combating the phenomenon, but also by regulating it to ensure a minimum of humanity in this inhumane and illegal situation. For practical, policy and humanitarian reasons, however, IHL has to be the same for both belligerents: the one resorting lawfully to force and the one resorting unlawfully to force. From a practical point of view, respect for IHL could otherwise not be obtained, as, at least between the belligerents, which party is resorting to force in conformity with *jus ad bellum* and which is violating *jus contra bellum* is always a matter of controversy. In addition, from the humanitarian Covenants) was recognized for the first time in Resolution 2105 (XX) of the UN General Assembly (20 December 1965).

The victims of the conflict on both sides need and deserve the same protection, and they are not necessarily responsible for the violation of *jus ad bellum* committed by “their” party. IHL must therefore be respected independently of any argument of, and be completely distinguished from, *jus ad bellum*. Any past, present and future theory of just war only concerns *jus ad bellum* and cannot justify (but is in fact frequently used to imply) that those fighting a just war have more rights or fewer obligations under IHL than those fighting an unjust war.

The two Latin terms were coined only in the last century, but Emmanuel Kant already distinguished the two ideas. Earlier, when the doctrine of just war prevailed, Grotius’ *temperamenta belli* (restraints to the waging of war) only addressed those fighting a just war. Later, when war became a simple fact of international relations, there was no need to distinguish between *jus ad bellum* and *jus in bello*. It is only with the prohibition of the use of force that the separation between the two became essential. It has since been recognized in the preamble to Protocol I:

“The High Contracting Parties, Proclaiming their earnest wish to see peace prevail among peoples,

Recalling that every State has the duty, in conformity with the Charter of the United Nations, to refrain in its international relations from the threat or use of force against the sovereignty, territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations,

Believing it necessary nevertheless to reaffirm and develop the provisions protecting the victims of armed conflicts and to supplement measures intended to reinforce their application,

Expressing their conviction that nothing in this Protocol or in the Geneva Conventions of 12 August 1949 can be construed as legitimizing or authorizing any act of aggression or any other use of force inconsistent with the Charter of the United Nations,

Reaffirming further that the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict.

This complete separation between *jus ad bellum* and *jus in bello* implies that IHL applies whenever there is *de facto* an armed conflict, no matter how that conflict is qualified under *jus ad bellum*, and that no *jus ad bellum* arguments may be used to interpret it; it also implies, however, that the rules of IHL are not to be drafted so as to render *jus ad bellum* impossible to implement, e.g., render efficient self-defense impossible.

Some consider that the growing institutionalization of international relations through the United Nations, concentrating the legal monopoly of the use of force in its hands or a hegemonic international order, will return IHL to a state of *temperamenta belli* addressing those who fight for international legality. This would fundamentally modify the philosophy of existing IHL.

International Law Commission, Articles on State Responsibility

International Law Commission Report, A/56/10, August 2001²⁴⁸

CHAPTER IV: STATE RESPONSIBILITY...

Responsibility of States for Internationally Wrongful Acts

PART ONE

THE INTERNATIONALLY WRONGFUL ACT OF A STATE

CHAPTER I

GENERAL PRINCIPLES

Article I

Responsibility of a State for its internationally wrongful acts

Every internationally wrongful act of a State entails the international responsibility of that State.

Article 2

Elements of an internationally wrongful act of a State

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

(a) The act would, but for the coercion, be an internationally wrongful act of the coerced State; and

(b) The coercing State does so with knowledge of the circumstances of the act.

Article 19

Effect of this chapter

This chapter is without prejudice to the international responsibility, under other provisions of these articles, of the State which commits the act in question, or of any other State.

²⁴⁸ ILC Draft Articles on State Responsibility, United Nations, International Law Commission, Report on the work of its fifty-third session (23 April-1 June and 2 July-10 August 2001), General Assembly, Official Records, Fifty-fifth Session, Supplement No. 10 (A/56/10), available at <http://www.un.org/law/ilc/>. The UN General Assembly took note of the Draft Articles in Resolution A/RES/56/83 of 12 December 2001.

CHAPTER V

CIRCUMSTANCES PRECLUDING WRONGFULNESS

Article 20

Consent

Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.

Article 21

Self-defense

The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defense taken in conformity with the Charter of the United Nations.

Commentary

...2) Self-defense may justify non-performance of certain obligations other than that under Article 2, paragraph (4), of the Charter, provided that such non-performance is related to the breach of that provision. Traditional international law dealt with these problems by instituting a separate legal regime of war, defining the scope of belligerent rights and suspending most treaties in force between the belligerents on the outbreak of war. In the Charter period, declarations of war are exceptional and military actions proclaimed as self-defence by one or both parties occur between States formally at “peace” with each other. The Vienna Convention on the Law of Treaties leaves such issues to one side by providing in article 73 that the Convention does not prejudice “any question that may arise in regard to a treaty... from the outbreak of hostilities between States.”

3) This is not to say that self-defense precludes the wrongfulness of conduct in all cases or with respect to all obligations. Examples relate to international humanitarian law and human rights obligations. The Geneva Conventions of 1949 and Protocol I of 1977 apply equally to all the parties in an international armed conflict, and the same is true of customary international humanitarian law. Human rights treaties contain derogation provisions for times of public emergency, including actions taken in self-defense. As to obligations under international humanitarian law and in relation to non-derogable human rights provisions, self-defense does not preclude the wrongfulness of conduct....

Article 25

Necessity

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

(a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and

(b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

(a) The international obligation in question excludes the possibility of invoking necessity; or

(b) The State has contributed to the situation of necessity.

Commentary

...19) ...Subparagraph (2) (a) concerns cases where the international obligation in question explicitly or implicitly excludes reliance on necessity. Thus certain humanitarian conventions applicable to armed conflict expressly exclude reliance on military necessity. Others while not explicitly excluding necessity are intended to apply in abnormal situations of peril for the responsible State and plainly engage its essential interests. In such a case the non-availability of the plea of necessity emerges clearly from the object and the purpose of the rule....

21) As embodied in article 25, the plea of necessity is not intended to cover conduct which is in principle regulated by the primary obligations. This has a particular importance in relation to the rules relating to the use of force in international relations and to the question of "military necessity," ... [a] doctrine... which is, in the first place, the underlying criterion for a series of substantive rules of the law of war and neutrality, as well as being included in terms in a number of treaty provisions in the field of international humanitarian law. [footnote 435: See e.g. art. 23 (g) of the Hague Regulations Respecting the Laws and Customs of War on Land (annexed to Convention II of 1899 and Convention IV of 1907), which prohibits the destruction of enemy property "unless such destruction or seizure be imperatively demanded by the necessities of war".... Similarly, art. 54 (5) of the Protocol Additional to the Geneva

Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), appears to permit attacks on objects indispensable to the survival of the civilian population if “imperative military necessity” so requires.] In both respects, while considerations akin to those underlying article 25 may have a role, they are taken into account in the context of the formulation and interpretation of the primary obligations.

Inter-American Commission on Human Rights, *Tablada*²⁴⁹

CDH/3398

IV. ANALYSIS

146. In order to facilitate the analysis of key events and issues raised in this case, this report will examine those events and issues under the following three headings:

the attack on and the recovery of the military base; the events that followed the surrender of the attackers and the arrest of their alleged accomplices; and the trial of those same persons for the crime of rebellion in the Abella case.

A. THE ATTACK AND RECAPTURE OF THE MILITARY BASE

147. In their complaint, petitioners invoke various rules of International Humanitarian Law, i.e. the law of armed conflict, in support of their allegations that state agents used excessive force and illegal means in their efforts to recapture the Tablada military base. For its part, the Argentine State, while rejecting the applicability of interstate armed conflict rules to the events in question, nonetheless have in their submissions to the Commission characterized the decision to retake the Tablada base by force as a military operation. The State also has cited the use of arms by the attackers to justify their prosecution for the crime of rebellion as defined in Law 23.077. Both the Argentine State and petitioners are in agreement that on the 23 and 24 of January 1989 an armed confrontation took place at the Tablada base between attackers and Argentine armed forces for approximately 30 hours.

148. The Commission believes that before it can properly evaluate the merits of petitioners claims concerning the recapture of the Tablada base

²⁴⁹ Inter-American Commission on Human Rights, Report No. 55/97, Case No. 11.137: Argentina, OEA/Ser/L/V/II.98, Doc. 38, December 6 rev., 1997, citations partially omitted. Available at <http://www.cidh.org>

by the Argentine military, it must first determine whether the armed confrontation at the base was merely an example of an internal disturbance or tensions or whether it constituted a non-international or internal armed conflict within the meaning of Article 3 common to the four 1949 Geneva conventions (Common Article 3). Because the legal rules governing an internal armed conflict vary significantly from those governing situations of internal disturbances or tensions, a proper characterization of the events at the Tablada military base on January 23 and 24, 1989 is necessary to determine the sources of applicable law. This, in turn, requires the Commission to examine the characteristics that differentiate such suspension under these humanitarian law instruments, the Commission should conclude that these derogation measures are in violation of the State Parties obligations under both the American Convention and the humanitarian law treaties concerned...

V. PETITIONERS' CLAIMS

172. Petitioners do not dispute the fact that some MTP members planned, initiated and participated in the attack on the military base. They contend, however, that the reason or motive for the attack – to stop a rumored military coup against the Alfonsín government – was legally justified by Article 21 of the National Constitution which obliged citizens to take up arms in defense of the Constitution. Consequently, they assert that their prosecutions for the crime of rebellion was violative of the American Convention. In addition, petitioners argue that because their cause was just and lawful, the State, by virtue of its excessive and unlawful use of force in retaking the military base, must bear full legal and moral responsibility for all the loss of life and material damage occasioned by its actions.

173. The Commission believes that petitioners' arguments reflect certain fundamental misconceptions concerning the nature of international humanitarian law. It should be understood that neither application of Common Article 3, nor of any other humanitarian law rules relevant to the hostilities at the Tablada base, can be interpreted as recognizing the legitimacy of the reasons or the cause for which the members of the MTP took up arms. Most importantly, application of the law is not conditioned by the causes of the conflict. This basic tenant of humanitarian law is enshrined in the preamble of Additional Protocol I which states in pertinent part:

Reaffirming further that the provisions of the Geneva Conventions of August 12, 1949 ... must be fully applied in all circumstances ... without any adverse distinction based on the nature or origin of [sic] the armed conflict or on the causes espoused by or attributed to the Parties of the Conflict.

174. Unlike human rights law which generally restrains only the abusive practices of state agents, Common Article 3's mandatory provisions expressly bind and apply equally to both parties to internal conflicts, i.e., government and dissident forces. Moreover, the obligation to apply Common Article 3 is absolute for both parties and independent of the obligation of the other. [Footnote 27 reads: A breach of Article 3 by one party, such as an illegal method of combat, could not be invoked by the other party as a ground for its non-compliance with the Article's obligatory provisions. See generally, Vienna Convention on the Law of Treaties, Art. 60.] Therefore, both the MTP attackers and the Argentine armed forces had the same duties under humanitarian law, and neither party could be held responsible for the acts of the other.

Combatants and Prisoners of War

The First Protocol Additional to the Geneva Conventions (Protocol I)²⁵⁰

8 June 1977

Section II. Combatants and Prisoners of War

ARTICLE 43. Armed forces

1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct or its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.

2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.

3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.

²⁵⁰ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 U.N.T.S. 3, entered into force Dec. 7, 1978.

ARTICLE 44. Combatants and prisoners of war

1. Any combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war.

2. While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse Party, of his right to be a prisoner of war, except as provided in paragraphs 3 and 4.

3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:

- (a) during each military engagement, and
- (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.

Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1 (c).

4. A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol.

The Third Geneva Convention, 1949²⁵¹

Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949

ARTICLE 4

A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

²⁵¹ Third Geneva Convention, Convention (III) relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, entered into force Oct. 21, 1950.

(1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:

(a) that of being commanded by a person responsible for his subordinates;

(b) that of having a fixed distinctive sign recognizable at a distance;

(c) that of carrying arms openly;

(d) that of conducting their operations in accordance with the laws and customs of war.

(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

(4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labor units or of services responsible for the welfare of the armed forces, provided that they have received authorization, from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

(5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.

(6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

B. The following shall likewise be treated as prisoners of war under the present Convention:

(1) Persons belonging, or having belonged, to the armed forces of the occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them, even though it has originally liberated them while hostilities were going on outside the territory it occupies, in particular where such persons have made an unsuccessful attempt to rejoin the armed

forces to which they belong and which are engaged in combat, or where they fail to comply with a summons made to them with a view to internment.

(2) The persons belonging to one of the categories enumerated in the present Article, who have been received by neutral or non-belligerent Powers on their territory and whom these Powers are required to intern under international law, without prejudice to any more favourable treatment which these Powers may choose to give and with the exception of Articles 8, 10, 15, 30, fifth paragraph, 58-67, 92, 126 and, where diplomatic relations exist between the Parties to the conflict and the neutral or non-belligerent Power concerned, those Articles concerning the Protecting Power. Where such diplomatic relations exist, the Parties to a conflict on whom these persons depend shall be allowed to perform towards them the functions of a Protecting Power as provided in the present Convention, without prejudice to the functions which these Parties normally exercise in conformity with diplomatic and consular usage and treaties.

C. This Article shall in no way affect the status of medical personnel and chaplains as provided for in Article 33 of the present Convention.

ARTICLE 5

The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation. Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

Convention on the Safety of UN Personnel²⁵²

[Source: Convention on the Safety of United Nations and Associated Personnel, UN Doc. Annex to Resolution 49/59, New York, 9 December, 1994; available at untreaty.un.org]

Article 7: Duty to ensure the safety and security of United Nations and associated personnel

1. United Nations and associated personnel, their equipment and premises shall not be made the object of attack or of any action that prevents them from discharging their mandate.

²⁵² Convention on the Safety of United Nations and Associated Personnel, G.A. res. 49/59, 49 U.N. GAOR Supp. (No. 49) at 299, U.N. Doc. A/49/49 (1994).

2. States Parties shall take all appropriate measures to ensure the safety and security of United Nations and associated personnel. In particular, States Parties shall take all appropriate steps to protect United Nations and associated personnel who are deployed in their territory from the crimes set out in article 9.

3. States Parties shall cooperate with the United Nations and other States Parties, as appropriate, in the implementation of this Convention, particularly in any case where the host State is unable itself to take the required measures.

Article 8: Duty to release or return United Nations and associated personnel captured or detained

Except as otherwise provided in an applicable status-of-forces agreement, if United Nations or associated personnel are captured or detained in the course of the performance of their duties and their identification has been established, they shall not be subjected to interrogation and they shall be promptly released and returned to United Nations or other appropriate authorities. Pending their release such personnel shall be treated in accordance with universally recognized standards of human rights and the principles and spirit of the Geneva Conventions of 1949.

Article 9: Crimes against United Nations and associated personnel

1. The intentional commission of:

(a) A murder, kidnapping or other attack upon the person or liberty of any United Nations or associated personnel;

(b) A violent attack upon the official premises, the private accommodation or the means of transportation of any United Nations or associated personnel likely to endanger his or her person or liberty;

(c) A threat to commit any such attack with the objective of compelling a physical or juridical person to do or to refrain from doing any act;

(d) An attempt to commit any such attack; and

(e) An act constituting participation as an accomplice in any such attack, or in an attempt to commit such attack, or in organizing or ordering others to commit such attack, shall be made by each State Party a crime under its national law.

2. Each State Party shall make the crimes set out in paragraph 1 punishable by appropriate penalties which shall take into account their grave nature.

Article 10: Establishment of jurisdiction

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in article 9 in the following cases:...

Article 19: Dissemination

The States Parties undertake to disseminate this Convention as widely as possible and, in particular, to include the study thereof, as well as relevant provisions of international humanitarian law, in their programmes of military instruction.

Article 20: Savings clauses

Nothing in this Convention shall affect:

(a) The applicability of international humanitarian law and universally recognized standards of human rights as contained in international instruments in relation to the protection of United Nations operations and United Nations and associated personnel or the responsibility of such personnel to respect such law and standards;

Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel²⁵³

Article 1: Relationship

This Protocol supplements the Convention on the Safety of United Nations and Associated Personnel, done at New York on 9 December 1994 (hereinafter referred to as “the Convention”), and as between the Parties to this Protocol, the Convention and the Protocol shall be read and interpreted together as a single instrument.

Article 2: Application of the Convention to United Nations operations

1. The Parties to this Protocol shall, in addition to those operations as defined in article 1 (c) of the Convention, apply the Convention in respect of all other United Nations operations established by a competent organ of the United Nations in accordance with the Charter of the United Nations and conducted under United Nations authority and control for the purposes of:

(a) Delivering humanitarian, political or development assistance in peace building, or

(b) Delivering emergency humanitarian assistance.

²⁵³ Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel, New York, 8 December 2005; available at untreaty.un.org.

2. Paragraph I does not apply to any permanent United Nations office, such as headquarters of the Organization or its specialized agencies established under an agreement with the United Nations.

3. A host State may make a declaration to the Secretary-General of the United Nations that it shall not apply the provisions of this Protocol with respect to an operation under article II(1)(b) which is conducted for the sole purpose of responding to a natural disaster. Such a declaration shall be made prior to the deployment of the operation.

Article 3: Duty of a State Party with respect to Article 8 of the Convention

The duty of a State Party to this Protocol with respect to the application of article 8 of the Convention to United Nations operations defined in article II of this Protocol shall be without prejudice to its right to take action in the exercise of its national jurisdiction over any United Nations or associated personnel who violates the laws and regulations of that State, provided that such action is not in violation of any other international law obligation of the State Party.

Detention of Unlawful Combatants

Iyad v. State of Israel, Decision of the Supreme Court of Israel, 2008²⁵⁴

The Supreme Court of Israel sitting as the Court of Criminal Appeals

JUDGMENT

President D. Beinisch:

We have before us appeals against the decisions of the Tel-Aviv-Jaffa District Court ..., in which the detention of the appellants under the Internment of Unlawful Combatants Law ... (hereafter: 'the Internment of Unlawful Combatants Law' or 'the law') was upheld as lawful. Beyond the specific cases of the appellants, the appeals raise fundamental questions concerning the interpretation of the provisions of the Internment of Unlawful Combatants Law,... and to what extent the law is consistent with international humanitarian law.

The main facts and sequence of events

1. The first appellant is an inhabitant of the Gaza Strip, born in 1973, who was placed under administrative detention on 1 January 2002 pursuant to the Administrative Detentions...Order.... The detention of the first appellant

²⁵⁴ Iyad v. State of Israel, Supreme Court of Israel, 1 CrimA 6659/06, 11 June 2008, available at http://elyon1.court.gov.il/files_eng/06/590/066/n04/06066590.n04.pdf.

was extended from time to time by the military commander and upheld on judicial review by the Gaza Military Court. The second appellant is also an inhabitant of Gaza, born in 1972, and he was placed under administrative detention on 24 January 2003 pursuant to the aforesaid order. The detention of the second appellant was also extended from time to time and reviewed by the Gaza Military Court. On 12 September 2005 a statement was published by the Southern District Commander with regard to the end of military rule in the territory of the Gaza Strip. On the same day, in view of the change in circumstances and also the change in the relevant legal position, internment orders were issued against the appellants;

1. The appellant in this case was initially referred to as Anonymous, but his name was subsequently released. [Note of the authors]

2. On 22 September 2005 a judicial review proceeding began in the Tel-Aviv-Jaffa District Court [...] in the appellants' case. On 25 January 2006 the District Court held that there had been no impropriety in the procedure of issuing internment orders against the appellants and that all the conditions prescribed in the Internment of Unlawful Combatants Law were satisfied, including the fact that their release would harm state security. The appellants appealed this decision to the Supreme Court, and on 14 March 2006 their appeal was denied [...]. In the judgment it was held that from material that was presented to the court it could be seen that the appellants were clearly associated with the Hezbollah organization and that they participated in combat activities against the citizens of Israel before they were detained. The court emphasized in this context the individual threat presented by the two appellants and the risk that they would return to their activities if they were released, as could be seen from the material presented to the court.

The Internment of Unlawful Combatants Law – the background to its legislation and its main purpose

6. The Internment of Unlawful Combatants Law gives the state authorities power to detain 'unlawful combatants' as defined in section 2 of the law, i.e., persons who participate in hostilities or are members of forces that carry out hostilities against the State of Israel and who do not satisfy the conditions that grant a prisoner of war status under international humanitarian law. As we shall explain below, the law allows the internment of foreign persons who belong to a terrorist organization or who participate in hostilities against the security of the state, and it was intended to prevent these persons returning to the cycle of hostilities against Israel...

Interpreting the provisions of the law

7. [W]e should first consider the interpretation of the main arrangements prescribed in the Internment of Unlawful Combatants Law....

9. With regard to the presumption of conformity to international humanitarian law, as we have said, section 1 of the law expressly declares that its purpose is to regulate the internment of unlawful combatants ‘... in a manner that is consistent with the commitments of the State of Israel under the provisions of international humanitarian law.’ The premise in this context is that an international armed conflict prevails between the State of Israel and the terrorist organizations that operate outside Israel [...] [See also Case No 136, Israel, The Targeted Killings Case, paras18-21].

The international law that governs an international armed conflict is enshrined mainly in the Hague Convention (IV) Respecting the Laws and Customs of War on Land (1907) (hereafter: ‘the Hague Convention’) and the regulations appended to it, whose provisions have the status of customary international law [...]; the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 1949 (hereafter: ‘the Fourth Geneva Convention’), whose customary provisions constitute a part of the law of the State of Israel and some of which have been considered in the past by this court [...]; and the Protocol Additional to the Geneva Convention of 12 August 1949 Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977 (hereafter: ‘the First Protocol’), to which Israel is not a party, but whose customary provisions also constitute a part of the law of the State of Israel In addition, where there is a lacuna in the laws of armed conflict set out above, it is possible to fill it by resorting to international human rights law

...[I]t should be noted that when we approach the task of interpreting provisions of the statute in a manner consistent with the accepted norms of international law, we cannot ignore the fact that the provisions of international law that exist today have not been adapted to changing realities and the phenomenon of terrorism that is changing the form and characteristics of armed conflicts and those who participate in them.... In view of this, we should do our best in order to interpret the existing laws in a manner that is consistent with new realities and the principles of international humanitarian law.

10. In view of all of the aforesaid, let us now turn to the interpretation of the statutory definition of ‘unlawful combatant’ and the interpretation of the conditions required for proving the existence of a ground for detention under the law....

The definition of 'unlawful combatant' and its scope of application

11. Section 2 of the law defines 'unlawful combatant' as follows:

'Definitions 2. In this law – 'Unlawful combatant' – a person who took part in hostilities against the State of Israel, whether directly or indirectly, or who is a member of a force carrying out hostilities against the State of Israel, who does not satisfy the conditions granting a prisoner of war status under international humanitarian law, as set out in article 4 of the Third Geneva Convention of 12 August 1949 relative to the Treatment of Prisoners of War,...

This statutory definition of 'unlawful combatant' relates to those persons who take part in hostilities against the State of Israel or who are members of a force that carries out such hostilities, and who are not prisoners of war under international humanitarian law. In this regard two points should be made: first, from the language of the aforesaid section 2 it can clearly be seen that it is not essential for someone to take part in hostilities against the State of Israel; his being a member of a 'force carrying out hostilities' – i.e., a terrorist organization – may include that person within the definition of 'unlawful combatant.' We will discuss the significance of these two alternatives in the definition of 'unlawful combatant' later (paragraph 21 below).

Second, as we said above, the purpose clause in the law refers expressly to the provisions of international humanitarian law. The definition of 'unlawful combatant' in the aforesaid section 2 also refers to international humanitarian law when it provides that the law applies to someone who does not enjoy a prisoner of war status under the Third Geneva Convention. As a rule, the rules of international humanitarian law were not intended to apply to the relationship between the state and its citizens (see, for example, the provisions of article 4 of the Fourth Geneva Convention, according to which a 'protected civilian' is someone who is not a citizen of the state that is holding him in circumstances of an international armed conflict). The express reference by the legislature to international humanitarian law, together with the requirement stipulated in the wording of the law that there is no prisoner of war status, show that the law was intended to apply only to foreign parties who belong to a terror organization that operates against the security of the state. We are not unaware that in the draft law of 14 June 2000 there was a provision that stated expressly that the law would not apply to Israeli inhabitants (and also to inhabitants of the territories), except in certain circumstances that were set out there in [...]. This provision of statute was omitted from the final wording of the law. Notwithstanding, in view of the express reference made by the law to international humanitarian law and the laws concerning prisoners of war as stated above, we are drawn to the conclusion that according to the wording and purpose

of the law it was not intended to apply to local parties (citizens and residents of Israel) who endanger state security. For these there are other legal measures that are intended for a security purpose, which we shall address later.

It is therefore possible to summarize the matter by saying that an ‘unlawful combatant’ under section 2 of the law is a foreign party who belongs to a terrorist organization that operates against the security of the State of Israel. This definition may include residents of a foreign country that maintains a state of hostilities against the State of Israel, who belong to a terrorist organization that operates against the security of the state and who satisfy the other conditions of the statutory definition of ‘unlawful combatant.’ This definition may also include inhabitants of the Gaza Strip which today is no longer held under belligerent occupation. In this regard it should be noted that since the end of Israeli military rule in the Gaza Strip in September 2005, the State of Israel has no permanent physical presence in the Gaza Strip, and it also has no real possibility of carrying out the duties required of an occupying power under international law, including the main duty of maintaining public order and security. Any attempt to impose the authority of the State of Israel on the Gaza Strip is likely to involve complex and prolonged military operations. In such circumstances, where the State of Israel has no real ability to control what happens in the Gaza Strip in an effective manner, the Gaza Strip should not be regarded as a territory that is subject to a belligerent occupation from the viewpoint of international law, even though because of the unique situation that prevails there, the State of Israel has certain duties to the inhabitants of the Gaza Strip [...] [See Case No. 137, Israel, Power Cuts in Gaza]. In our case, in view of the fact that the Gaza Strip is no longer under the effective control of the State of Israel, we are drawn to the conclusion that the inhabitants of the Gaza Strip constitute foreign parties who may be subject to the Internment of Unlawful Combatants Law in view of the nature and purpose of this law.

With regard to the inhabitants of the territory (Judaea and Samaria) that is under the effective control of the State of Israel, [...] I tend to the opinion that in so far as this is required for security reasons, the administrative detention of these inhabitants should be carried out pursuant to the security legislation that applies in the territories and not by virtue of the Internment of Unlawful Combatants Law. [...]

Conformity of the definition of ‘unlawful combatant’ to a category recognized by international law

12. The appellants argued before us that the definition of ‘unlawful combatant’ in section 2 of the law is contrary to the provisions of international humanitarian law, since international law does not recognize the existence

of an independent and separate category of ‘unlawful combatants.’ In their view there are only two categories in international law, ‘combatants’ and ‘civilians,’ who are subject to the provisions and protections enshrined in the Third and Fourth Geneva Conventions respectively. In their view international law does not have an intermediate category that includes persons who are not protected by either of these conventions.

With regard to the appellants’ aforesaid arguments we should point out that the question of the conformity of the term ‘unlawful combatant’ to the categories recognized by international law has already been addressed in our case law in *Public Committee against Torture in Israel v. Government of Israel*, in which it was held that the term ‘unlawful combatants’ does not constitute a separate category but is a sub-category of ‘civilians’ recognized by international law [See Case No 136, Israel, *The Targeted Killings Case*]. This conclusion is based on the approach of customary international law, according to which the category of ‘civilians’ includes everyone who is not a ‘combatant.’ We are therefore dealing with a negative definition. [...] In this context, two additional points should be made: first, the finding that ‘unlawful combatants’ belong to the category of ‘civilians’ in international law is consistent with the official interpretation of the Geneva Conventions, according to which in an armed conflict or a state of occupation, every person who finds himself in the hands of the opposing party is entitled to a certain status under international humanitarian law – a prisoner of war status which is governed by the Third Geneva Convention or a protected civilian status which is governed by the Fourth Geneva Convention....

Second, it should be emphasized that *prima facie* the statutory definition of ‘unlawful combatant’ under section 2 of the law applies to a broader group of people than the group of ‘unlawful combatants’ discussed in *Public Committee against Torture in Israel v. Government of Israel*, in view of the difference in the measures under discussion: the judgment in *Public Committee against Torture in Israel v. Government of Israel* considered the legality of the measure of a military operation intended to cause the death of an ‘unlawful combatant.’ According to international law, it is permitted to attack an ‘unlawful combatant’ only during the period of time when he is taking a direct part in the hostilities. By contrast, the *Internment of Unlawful Combatants Law* addresses the measure of internment. For the purposes of detention under the law, it is not necessary that the ‘unlawful combatant’ will take a direct part in the hostilities, nor is it essential that his detention will take place during the period of time when he is taking part in hostilities; all that is required is that the conditions of the definition of ‘unlawful combatant’ in section 2 of the law are proved. This statutory definition does not conflict with the provisions

of international humanitarian law since, as we shall clarify clear below [sic], the Fourth Geneva Convention also permits the detention of a protected 'civilian' who endangers the security of the detaining state. Thus we see that our reference to the judgment in *Public Committee against Torture in Israel v. Government of Israel* was not intended to indicate that an identical issue was considered in that case. Its purpose was to support the finding that the term 'unlawful combatants' in the law under discussion does not create a separate category of treatment from the viewpoint of international humanitarian law, but constitutes a sub-group of the category of 'civilians.'

13. Further to our finding that 'unlawful combatants' are members of the category of 'civilians' from the viewpoint of international law, it should be noted that this court has held in the past that international humanitarian law does not grant 'unlawful combatants' the same degree of protection to which innocent civilians are entitled, and that in this respect there is a difference from the viewpoint of the rules of international law between 'civilians' who are not 'unlawful combatants' and 'civilians' who are 'unlawful combatants.' ... As we shall explain below, in the present context the significance of this is that someone who is an 'unlawful combatant' is subject to the Fourth Geneva Convention, but according to the provisions of the aforesaid convention it is possible to apply various restrictions to them and inter alia to detain them when they represent a threat to the security of the state.

14. In summary, in view of the purpose clause of the Internment of Unlawful Combatants Law, according to which the law was intended to regulate the status of 'unlawful combatants' in a manner that is consistent with the rules of international humanitarian law, and in view of the finding of this court in *Public Committee against Torture in Israel v. Government of Israel* that 'unlawful combatants' constitute a subcategory of 'civilians' under international law, it is possible to determine that, contrary to the appellants' claim, the law does not create a new reference group from the viewpoint of international law.

United States, Military Commissions

The Military Commissions were first established by President George W. Bush in 2001. Following the U.S. Supreme Court's judgment in *Hamdan v. Rumsfeld*,²⁵⁵ in which the Court ruled that the military commissions did not comply with common Article 3 of the Geneva Conventions requirements, the Congress passed the Military Commission Act of 2006, with the view to re-establishing the commissions.

²⁵⁵ *Hamdan v Rumsfeld*, United States Supreme Court, 548 U.S. 577 (2006).

I. Military Commission Act of 2006²⁵⁶

SEC. 2. CONSTRUCTION OF PRESIDENTIAL AUTHORITY TO ESTABLISH MILITARY COMMISSIONS.

The authority to establish military commissions under chapter 47A of title 10, United States Code, as added by section 3(a), may not be construed to alter or limit the authority of the President under the Constitution of the United States and laws of the United States to establish military commissions for areas declared to be under martial law or in occupied territories should circumstances so require....

“§ 948a. Definitions

“In this chapter:

“(1) UNLAWFUL ENEMY COMBATANT.—

(A) The term ‘unlawful enemy combatant’ means—

“(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or

“(ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.

“(B) CO-BELLIGERENT.—In this paragraph, the term ‘cobelligerent’, with respect to the United States, means any State or armed force joining and directly engaged with the United States in hostilities or directly supporting hostilities against a common enemy.

“(2) LAWFUL ENEMY COMBATANT.—The term ‘lawful enemy combatant’ means a person who is—

“(A) a member of the regular forces of a State party engaged in hostilities against the United States;

²⁵⁶ United States Department of Defense, “Military Commission Act of 2006,” Pub. L. No. 109-366, 120 Stat. 2600 (2006).

“(B) a member of a militia, volunteer corps, or organized resistance movement belonging to a State party engaged in such hostilities, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the law of war; or

“(C) a member of a regular armed force who professes allegiance to a government engaged in such hostilities, but not recognized by the United States.

“(3) ALIEN.—The term ‘alien’ means a person who is not a citizen of the United States....

“§ 948b. Military commissions generally

“(a) PURPOSE.—This chapter establishes procedures governing the use of military commissions to try alien unlawful enemy combatants engaged in hostilities against the United States for violations of the law of war and other offenses triable by military commission.

“(b) AUTHORITY FOR MILITARY COMMISSIONS UNDER THIS CHAPTER.—The President is authorized to establish military commissions under this chapter for offenses triable by military commission as provided in this chapter....

“(f) STATUS OF COMMISSIONS UNDER COMMON ARTICLE 3.— A military commission established under this chapter is a regularly constituted court, affording all the necessary ‘judicial guarantees which are recognized as indispensable by civilized peoples’ for purposes of common Article 3 of the Geneva Conventions.

“(g) GENEVA CONVENTIONS NOT ESTABLISHING SOURCE OF RIGHTS.—No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights.

***Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict*²⁵⁷**

Montreux, 17 September 2008

INFORMAL SUMMARY OF THE MONTREUX DOCUMENT BY SWITZERLAND

1. Private military and security companies (PMSCs) are nowadays often relied on in areas of armed conflict – by individuals, companies, and governments. They are contracted for a range of services, from the operation of weapon systems to the protection of diplomatic personnel. Recent years have seen an increase in the use of PMSCs, and with it the demand for a clarification of pertinent legal obligations under international humanitarian law and human rights law.

2. The Montreux Document seeks to meet this demand. The result of a joint initiative by Switzerland and the International Committee of the Red Cross (ICRC) launched in 2006, it recalls existing obligations of States, PMSCs and their personnel under international law whenever PMSCs – for whatever reason – are present during armed conflict. In a second part, it contains a set of over 70 good practices designed to assist States in complying with these obligations. Neither parts are legally binding, nor are they intended to legitimize the use of PMSCs in any particular circumstance. They were developed by governmental experts from seventeen States [Footnote: Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Sierra Leone, South Africa, Sweden, Switzerland, the United Kingdom of Great Britain and Northern Ireland, Ukraine, and the United States of America] with a particular interest in the issue of PMSCs or international humanitarian law. Representatives of civil society and of the PMSC industry were also consulted.

3. Part I differentiates between contracting States, territorial States and home States. For each category of States, Part I recalls pertinent international legal obligations according to international humanitarian law and human rights law. The question of attribution of private conduct to the State under with customary international law is also addressed. In addition, Part I devotes sections to the pertinent international legal obligations of “all other States.”

²⁵⁷ United Nations, “Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict,” U.N. Doc. A/63/467-S/2008/636, 6 October 2008; available at www.un.org.

to the duties of PMSCs and their personnel, as well as to questions of superior responsibility.

4. Like Part I, Part II also differentiates between contracting States, territorial States and home States. The good practices draw largely from existing practices of States not only directly with regard to PMSCs but also, for instance, from existing regulations for arms and armed services. They range from introducing transparent licensing regimes to ensuring better supervision and accountability – so that only PMSCs which are likely to respect international humanitarian law and human rights law, through appropriate training, internal procedures and supervision, can provide services during armed conflict.

5. In the preface of the Montreux Document, the participating States invite other States and international organisations to communicate their support for the document to the Federal Department of Foreign Affairs of Switzerland.

PREFACE

This document is the product of an initiative launched cooperatively by the Government of Switzerland and the International Committee of the Red Cross. It was developed with the participation of governmental experts from Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Sierra Leone, South Africa, Sweden, Switzerland, the United Kingdom of Great Britain and Northern Ireland, Ukraine, and the United States of America in meetings convened in January and November 2006, November 2007, and April and September 2008. Representatives of civil society and of the private military and security industry were consulted. The following understandings guided the development of this document:

1. That certain well-established rules of international law apply to States in their relations with private military and security companies (PMSCs) and their operation during armed conflict, in particular under international humanitarian law and human rights law;

2. That this document recalls existing legal obligations of States and PMSCs and their personnel (Part One), and provides States with good practices to promote compliance with international humanitarian law and human rights law during armed conflict (Part Two);

3. That this document is not a legally binding instrument and does not affect existing obligations of States under customary international law or under international agreements to which they are parties, in particular their obligations under the Charter of the United Nations (especially its articles 2(4) and 51);

4. That this document should therefore not be interpreted as limiting, prejudicing or enhancing in any manner existing obligations under international law, or as creating or developing new obligations under international law;

5. That existing obligations and good practices may also be instructive for post conflict situations and for other, comparable situations; however, that international humanitarian law is applicable only during armed conflict;

6. That cooperation, information sharing and assistance between States, commensurate with each State's capacities, is desirable in order to achieve full respect for international humanitarian law and human rights law; as is cooperative implementation with the private military and security industry and other relevant actors;

7. That this document should not be construed as endorsing the use of PMSCs in any particular circumstance but seeks to recall legal obligations and to recommend good practices if the decision has been made to contract PMSCs;

8. That while this document is addressed to States, the good practices may be of value for other entities such as international organizations, NGOs and companies that contract PMSCs, as well as for PMSCs themselves;

9. That for the purposes of this document:

a) "PMSCs" are private business entities that provide military and/or security services, irrespective of how they describe themselves. Military and security services include, in particular, armed guarding and protection of persons and objects, such as convoys, buildings and other places; maintenance and operation of weapons systems; prisoner detention; and advice to or training of local forces and security personnel.

b) "Personnel of a PMSC" are persons employed by, through direct hire or under a contract with, a PMSC, including its employees and managers.

c) "Contracting States" are States that directly contract for the services of PMSCs, including, as appropriate, where such a PMSC subcontracts with another PMSC.

d) "Territorial States" are States on whose territory PMSCs operate.

e) "Home States" are States of nationality of a PMSC, i.e. where a PMSC is registered or incorporated; if the State where the PMSC is incorporated is not the one where it has its principal place of management, then the State where the PMSC has its principal place of management is the "Home State."

The participating States commend this document to the attention of other States, international organizations, NGOs, the private military and security industry and other relevant actors, which are invited to adopt those good practices that they consider appropriate for their operations. The participating States invite other States and international organizations to communicate their support for this document to the Federal Department of Foreign Affairs of Switzerland. The participating States also declare their readiness to review and, if necessary, to revise this document in order to take into account new developments.

Protection for Wounded, Sick and Shipwrecked

The Second Geneva Convention, 1949²⁵⁸

Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces, Geneva, 12 August 1949ARTICLE 11

In cases where they deem it advisable in the interest of protected persons, particularly in cases of disagreement between the Parties to the conflict as to the application or interpretation of the provisions of the present Convention, the Protecting Powers shall lend their good offices with a view to settling the disagreement.

For this purpose, each of the Protecting Powers may, either at the invitation of one Party or on its own initiative, propose to the Parties to the conflict a meeting of their representatives, in particular of the authorities responsible for the wounded, sick and shipwrecked, medical personnel and chaplains, possibly on neutral territory suitably chosen. The Parties to the conflict shall be bound to give effect to the proposals made to them for this purpose. The Protecting Powers may, if necessary, propose for approval by the Parties to the conflict, a person belonging to a neutral Power or delegated by the International Committee of the Red Cross, who shall be invited to take part in such a meeting.

²⁵⁸ Second Geneva Convention, Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea⁷⁵ U.N.T.S. 85, entered into force Oct. 21, 1950.

Chapter II. Wounded, Sick and Shipwrecked

ARTICLE 12

Members of the armed forces and other persons mentioned in the following Article, who are at sea and who are wounded, sick or shipwrecked, shall be respected and protected in all circumstances, it being understood that the term “shipwreck” means shipwreck from any cause and includes forced landings at sea by or from aircraft.

Such persons shall be treated humanely and cared for by the Parties to the conflict in whose power they may be, without any adverse distinction founded on sex, race, nationality, religion, political opinions, or any other similar criteria. Any attempts upon their lives, or violence to their persons, shall be strictly prohibited; in particular, they shall not be murdered or exterminated, subjected to torture or to biological experiments; they shall not willfully be left without medical assistance and care, nor shall conditions exposing them to contagion or infection be created.

Only urgent medical reasons will authorize priority in the order of treatment to be administered.

Women shall be treated with all consideration due to their sex.

ARTICLE 13

The present Convention shall apply to the wounded, sick and shipwrecked at sea belonging to the following categories:

(1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:

- (a) that of being commanded by a person responsible for his subordinates;
- (b) that of having a fixed distinctive sign recognizable at a distance;
- (c) that of carrying arms openly;

(d) that of conducting their operations in accordance with the laws and customs of war.

(3) Members of regular armed forces who profess allegiance to a Government or an authority not recognized by the Detaining Power.

(4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labor units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany.

(5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.

(6) Inhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

British Military Court at Hamburg, the Peleus Trial²⁵⁹

Trial of Kapitanleutnant Heinz Eck and four others for the killing of members of the crew of the Greek steamship Peleus, sunk on the high seas, in the British Military Court for the trial of war criminals held at the war crimes court, Hamburg, 17th-20th, October 1945.

2. THE CHARGE

The prisoners were: Kapitanleutnant Heinz Eck, Leutnant zur See August Hoffmann, Marine Stabsarzt Walter Weisspfennig, Kapitanleutnant (Ing) Hans Richard Lenz, Gefreiter Schwender.

They were charged jointly with:

“Committing a war crime in that you in the Atlantic Ocean on the night of 13/14th March, 1944, when Captain and members of the crew of Unterseeboat 852 which had sunk the steamship “Peleus” in violation of the laws and usages of war were concerned in the killing of members of the crew of the said steamship, Allied nationals, by firing and throwing grenades at them.”...

²⁵⁹ The United Nations War Crimes Commission, Law Reports of Trials of War Criminals, vol. I, 1947, pp. 1-21.

3. THE OPENING OF THE CASE BY THE PROSECUTOR

The “Peelus” was a Greek ship chartered by the British Ministry of War Transport. The crew consisted of a variety of nationalities; on board there were 18 Greeks, 8 British seamen, one seaman from Aden, two Egyptians, three Chinese, a Russian, a Chilean and a Pole.

On the 13th March, 1944, the ship was sunk in the middle of the Atlantic Ocean by the German submarine No. 852, commanded by the first accused, Heinz Eck. Apparently the majority of the members of the crew of the “Peelus” got into the water and reached two rafts and wreckage that was floating about. The submarine surfaced, and called over one of the members of the crew who was interrogated as to the name of the ship, where she was bound and other information.

The submarine then proceeded to open fire with a machine-gun or machine-guns on the survivors in the water and on the rafts, and also threw hand grenades on the survivors, with the result that all of the crew in the water were killed or died of their wounds, except for three, namely the Greek first officer, a Greek seaman and a British seaman. These men remained in the water for over 25 days, and were then picked up by a Portuguese steamship and taken into port...

4. EVIDENCE FOR THE PROSECUTION

...The fifth accused, Kapitän-Leutnant Engineer Lenz, appears to have behaved in the following way: (a) When he heard that the captain had decided to eliminate all traces of the sinking, he approached the captain and informed him that he was not in agreement with this order. Eck replied that he was nevertheless determined to eliminate all traces of the sinking. Lenz then went below to note the survivors’ statements in writing and did not take part in the shooting and throwing of grenades. (b) Later on, Lenz went on the bridge and noticed the accused Schwender with a machine gun in his hand. He saw that Schwender was about to fire his machine gun at the target and thereupon he, Lenz, took the machine gun from Schwender’s hand and fired it himself in the general direction of the target indicated. He did this because he considered that Schwender, long known to him as one of the most unsatisfactory ratings in the boat, was unworthy to be entrusted with the execution of such an order.

5. OUTLINE OF THE DEFENSE

...The Defense claimed that the elimination of the traces of the “Peelus” was operationally necessary in order to save the U-boat.

The other accused relied mainly on the pleas of superior orders...

With regard to the plea of superior orders, Professor Wegner said that he stuck “to the good old English principles” laid down by the “Caroline case,” according to which, he submitted, it was a well-established rule of International Law that the individual forming part of a public force and acting under authority of his own Government is not to be held answerable as a private trespasser or malefactor, that what such an individual does is a public act, performed by such a person in His Majesty’s service acting in obedience to superior orders, and that the responsibility, if any, rests with His Majesty’s Government...

6. EVIDENCE BY THE ACCUSED HEINZ ECK, COMMANDER OF THE SUBMARINE

The accused, Heinz Eck,... thought that the rafts were a danger to him, first because they would show aeroplanes the exact spot of the sinking, and secondly because rafts at that time of the war, as was well-known, could be provided with modern signaling communication. When he opened fire there were no human beings to be seen on the rafts. He also ordered the throwing of hand grenades after he had realized that mere machine gun fire would not sink the rafts. He thought that the survivors had jumped out of the rafts...

It was clear to him, he went on, that all possibility of saving the survivors’ lives had gone. He could not take the survivors on board the U-boat because it was against his orders. He was under the impression that the mood on board was rather depressed. He himself was in the same mood; consequently he said to the crew that with a heavy heart he had finally made the decision to destroy the remainder of the sunken ship. Eck referred to an alleged incident involving the German ship “Hartenstein” of which he had been told by two officers. After this boat had saved the lives of many survivors, it was located by an aeroplane. The boat showed the Red Cross sign and one of the survivors, a flying officer, had, with a signal lamp, given some signals to the aeroplane not to attack the boat because of the survivors being on board, including women. The plane left, and after a time it returned and attacked the boat, which was forced to unload the survivors again, in order to dive, and it survived only after sustaining some damage. This case, about which he had been told before the beginning of his voyage, showed him that on the enemy side military reasons came before human reasons, that is to say before the saving of the lives of survivors. For that reason, he thought his measures justified...

Eck’s description of the “Hartenstein” incident was, in the main, confirmed by an English witness, a solicitor serving as a temporary civil servant at the Admiralty. He confirmed that, as a result of the incident, the German U-boat Command issued instructions as follows:

“No attempt of any kind should be made at rescuing members of ships sunk, and this includes picking up persons in the water and putting them in lifeboats, righting capsized lifeboats and handing over food and water. Rescue runs counter to the rudimentary demands of warfare for the destruction of enemy ships and crews. Orders for bringing Captains and Chief Engineers still apply. Rescue the shipwrecked only if their statements will be of importance for your boat. Be harsh, having in mind that the enemy takes no regard of women and children in his bombing attacks of German cities.”...

8. EXAMINATION OF THE FOUR OTHER ACCUSED

...The accused Weisspfennig also referred to the order but admitted that in the German navy there were regulations about the conduct of medical officers which forbade them to use weapons for offensive purposes. Weisspfennig disregarded this regulation because he had received an order from the Commandant. He did not know whether his regulations provided that he could refuse to obey an order which was against the Geneva Convention. He knew what the Geneva Convention was and realized that one of the reasons why he was given protection as a doctor was because he was a noncombatant.

He realized that there were survivors. He did not regard the use of the machine gun in his particular case as an offensive action...

12. SUMMING UP BY THE JUDGE ADVOCATE

The Judge Advocate stated at the very outset that the court should be in no way embarrassed by the alleged complications of International Law which, it had been suggested, surrounded such a case as this. It was a fundamental usage of war that the killing of unarmed enemies was forbidden as a result of the experience of civilized nations through many centuries. To fire so as to kill helpless survivors of a torpedoed ship was a grave breach of the law of nations. The right to punish persons who broke such rules of war had clearly been recognised for many years...

Regarding the defense of operational necessity, the Judge Advocate stated: “The question whether or not any belligerent is entitled to kill an unarmed person for the purpose of saving his own life has been the subject of much discussion. It may be that circumstances can arise – it is not necessary to imagine them – in which such a killing might be justified. But the court had to consider this case on the facts which had emerged from the evidence of Eck. He cruised about the site of this sinking for five hours, he refrained from using his speed to get away as quickly as he could, he preferred to go round shooting, as he says, at wreckage by means of machine guns.” The Judge Advocate asked the court whether it thought or did not think that the shooting of

a machine gun on substantial pieces of wreckage and rafts would be an effective way of destroying every trace of the sinking. He asked whether it was not clearly obvious that in any event, a patch of oil would have been left which would have been an indication to any aircraft that a ship had recently been sunk. He went on to say: "Do you or do you not think that a submarine commander who was really and primarily concerned with saving his crew and his boat would have done as Captain Schnee, who was called for the defense, said he would have done, namely have removed himself and his boat at the highest possible speed at the earliest possible moment for the greatest possible distance?"

Eck did not reply on the defense of superior orders. He stood before the court taking upon himself the sole responsibility of the command which he issued. With regard to the defense of superior orders, the Judge Advocate said: "The duty to obey is limited to the observance of orders which are lawful. There can be no duty to obey that which is not a lawful order. The fact that a rule of warfare has been violated in pursuance of an order of a belligerent government or of an individual belligerent commander does not deprive the act in question of its character as a war crime, neither does it confer upon the perpetrator immunity from punishment by the injured belligerent."

The Judge Advocate added: "It is quite obvious that no sailor and no soldier can carry with him a library on international law or have immediate access to a professor in that subject who can tell him whether or not a particular command is a lawful one. If this were a case which involved the careful consideration of questions of international law as to whether or not the command to fire at helpless survivors struggling in the water was lawful, you might well think it would not be fair to hold any of the subordinate accused in this case responsible for what they are alleged to have done; but is it not fairly obvious to you that if in fact the carrying out of Eck's command involved the killing of these helpless survivors, it was not a lawful command, and that it must have been obvious to the most rudimentary intelligence that it was not lawful command, and that those who did that shooting are not to be excused for doing it upon the ground of superior orders?"...

13. THE VERDICT

The five accused were found guilty of the charge.

14. THE SENTENCE

After Counsel for the Defense had pleaded in mitigation on behalf of the accused and some of them had also called witnesses, the following findings and sentences of the court were pronounced on 20th October, 1945, subject to confirmation:

Eck, Hoffmann, Weisspfennig were sentenced to suffer death by shooting. Lenz was sentenced to imprisonment for life, Schwender was sentenced to suffer imprisonment for 15 years.

The sentences were confirmed by the Commander-in-Chief, British Army of the Rhine, on 12th November, 1945, and the sentences of death imposed on Kapitanleutnant Heinz Eck, Marine Oberstabsarzt Walter Weisspfennig, and Leutnant zur See August Hoffmann, were put into execution at Hamburg on 30th November, 1945.

***ICRC Report on Yemen, 1967*²⁶⁰**

The ICRC's medical activity in North Yemen. Giving medical assistance to the wounded and sick in the part of the Yemen under Royalist control was the ICRC's main action in that area during 1967...

This mission's work was, however, rendered extremely difficult by several incidents. First of all there was that of Ketaf in the Jauf in January, when about 120 persons, many of them women and children, were killed as a result of an air raid on the village on January 5, 1967.

As a result of this attack, the ICRC made the following appeal on January 31 to the belligerents:

“The International Committee of the Red Cross in Geneva is extremely concerned about the air-raids against the civilian population and the alleged use of poisonous gas recently in the Yemen and the neighboring regions.

In view of the suffering thereby caused, the ICRC earnestly appeals to all authorities involved in this conflict for respect in all circumstances of the universally recognized humanitarian rules of international morality and law.

The ICRC depends on the understanding and support of all the powers involved in order to enable its doctors and delegates in the Yemen to continue under the best conditions possible to carry out their work of impartial assistance to the victims of this conflict.

The ICRC takes the opportunity to affirm that, in the interest of the persons in need of its assistance, it has adopted as a general rule to give no publicity to the observations made by its

²⁶⁰ International Committee of the Red Cross (ICRC) Annual Report 1967, ICRC, pp. 15-17.

delegates in the exercise of their functions. Nevertheless, these observations are used to back up the appropriate negotiations which it unflinchingly undertakes whenever necessary.⁴

A further raid on May 12 having caused 75 deaths, an ICRC medical mission went to give its aid there, after having itself been attacked from the air. On June 2 a report, drawn up by the doctors of the ICRC, was sent to the governments parties to the conflict giving their observations and engaging them in no circumstances to resort to methods of fighting prohibited by the Geneva Protocol of 1925.

Since then, no further incident of this kind has been reported to the ICRC. At the end of June, one of the ICRC delegates was the victim of a serious accident. Mr. Laurent Vust who was accompanying a consignment of medicines in the aircraft on the Najran-Gizan line was seriously hurt after a crash landing. He was the only survivor and suffering from bad burns. Mr. Vust was still undergoing treatment at the end of December 1967.

Another accident befell this mission. On August 26 an ICRC convoy was ambushed by Bedouins in the Jauf desert. A young doctor, Dr. Frédéric de Bros was hit by a bullet in the left arm causing an open fracture and resulted in partial paralysis in that limb. In the autumn, as a result of agreements concluded in Khartoum, the ICRC had, in principle, arranged to terminate its medical action by the end of the year. However, in December fighting again broke out around Sanaa. Consequently, the medical action had to be continued in the rear of the Royalist positions. After a journey of 600 kilometres on tracks between Najran and Jihanah with all the difficulties involved, an ICRC medical team was installed in the town of Jihanah which worked at night and took cover in case during the day. In Jihanah where it expected to find only a small number of wounded, the ICRC team discovered some thirty wounded abandoned and in indescribable conditions of distress of whom about twenty were seriously wounded, most of them women and children, and savagely mutilated. In such conditions, it can be understood that the task of the ICRC doctors was one of the utmost difficulty, if one adds the fact that medical teams protected by the red cross emblem were twice bombed and attacked during the course of 1967. The courage of their members deserves high praise for risking their lives for others.

Finally, in view of the renewal of the fighting, a second appeal made by the ICRC in the last days of 1967 to the two parties in conflict for them to respect the fundamental humanitarian principles contained in the Geneva Conventions.

Afghanistan, Separate Hospital Treatment for Men and Women

[After the events related in this case, the policy referred to was no longer applied by the Taliban Afghan authorities]²⁶¹

A. Women barred from Kabul hospitals, Perrin, J.-P., “Les hôpitaux de Kaboul interdits aux femmes,” 1997²⁶² Women Barred from Kabul Hospitals...

Taliban prohibiting treatment for sick women and turning them out of the hospitals....

First, the women of Kabul were forbidden to work. Next they were forbidden to study or train for a profession. Then it was decreed that they could go out in public only if accompanied by a husband, father or brother. But nobody in Kabul, previously a very Westernized city, would have imagined that the Taliban, who took control of the Afghan capital just over a year ago, would go so far as to prevent women from receiving medical attention. However, this was what the latest directive issued by the “students of Islamic theology” on 6 September ordered in very clear terms. It is now strictly forbidden for any of the town’s public hospitals to treat women except in emergencies – a rather theoretical and flimsy proviso. And the few female staff remaining in these hospitals are not allowed to give any treatment at all. From now on, until the (hypothetical) opening of a hospital reserved for women, there is only one establishment to treat all the female inhabitants of Kabul. But, according to the Western doctors who have visited it, “the Central Polyclinic” has no running water, no electricity above the second floor, no laboratory, no functioning operating theatre and only one microscope. What is worse, it has a mere 45 beds available for the entire female population of a city which has almost one and a half million inhabitants and, moreover, is devastated by the war and plagued by shortages of all kinds.

Since the decree was issued, not only are sick women being refused treatment but those already in hospital are being turned out – and this is in a town with a large number of medical facilities. In a recently published document, *Médécins sans frontières* (MSF) reported that 12 female patients, some of them with bullet wounds, had been turned out of one of the major hospitals, Wazir Akbar Khan, on October 19, and only two of them were later found at the Polyclinic. That same day saw the dismissal of the last 15

²⁶¹ See ICRC News: Afghanistan: Women gradually being re-admitted to Kabul Hospitals, 97/47, November 26, 1997.

²⁶² Perrin, J.-P., “Les hôpitaux de Kaboul interdits aux femmes,” in *Libération*, October 23, 1997, original in French, unofficial translation.

female employees of the Karte Se hospital, which may soon cease to function because male workers are not willing to take charge of the laundry. Worse still, the decision whereby hospitals could treat women in emergencies, taken under Western NGO pressure by the Minister of Health, Mullawi Abbas, has been widely condemned. Already the emergency departments of two of the four large Kabul hospitals are refusing to admit women. At the beginning of October a woman in a deep coma was turned away and sent home. In September, another woman suffering from a highly contagious form of tuberculosis was also sent home before she had completed her course of treatment, thus exposing her entire family to the risk of infection. And recently a doctor at one of the large hospitals disclosed that he had not dared to treat a woman suffering from 80% burns because he would have had to remove her clothing. The NGOs present in Kabul are even more "sickened" by the violence with which the ministerial directives are applied. On September 27, the Ministry decided to close down all private clinics with in-patient facilities, and just two days later members of the Taliban entered one of these clinics and violently ejected two women who were in the process of giving birth. "What we are seeing is the total destruction of a health system which until now, in contrast to the education system, has remained relatively unscathed. People should be aware that today women are dying at home in Kabul because the Taliban will not allow them access to treatment. First of all, these women are afraid to go out. And then, when they do pluck up the courage to leave their homes, it is often too late and their condition is irremediable. The same applies to their children," declared Pierre Salignon, the coordinator of the MSF mission in Kabul...

What the military/religious order of the Taliban is endeavouring to establish is a system of health care conforming to the ideal Islamic society which they are advocating, a system in which men and women are kept strictly apart, the women often living a completely cloistered life. The most incredible aspect of the situation is that this policy of apartheid is being financed, initiated even, by the World Health Organization. MSF notes in its report that the notorious directive depriving Kabul's female inhabitants of medical treatment coincided with the beginning of work on the renovation of the Rabia Balkhi hospital, which is destined to become the only "women's hospital" in the capital and might open in a year's time. The main donor for this construction project turns out to be WHO, which has made a contribution of \$64,000 for the first six months.

Security Council Resolution 1193 (1998)²⁶³

The Security Council,

Having considered the situation in Afghanistan,

Recalling its previous resolution 1076 (1996) of October 22, 1996 and the statements of the President of the Security Council on the situation in Afghanistan,

Recalling also resolution 52/211 of the General Assembly,

Expressing its grave concern at the continued Afghan conflict which has recently sharply escalated due to the Taliban forces' offensive in the northern parts of the country, causing a serious and growing threat to regional and international peace and security, as well as extensive human suffering, further destruction, refugee flows and other forcible displacement of large numbers of people, [...]

9. Urges all Afghan factions and, in particular the Taliban, to facilitate the work of the international humanitarian organizations and to ensure unimpeded access and adequate conditions for the delivery of aid by such organizations to all in need of it;

10. Appeals to all States, organizations and programmes of the United Nations system, specialized agencies and other international organizations to resume the provision of humanitarian assistance to all in need of it in Afghanistan as soon as the situation on the ground permits; [...]

12. Reaffirms that all parties to the conflict are bound to comply with their obligations under international humanitarian law and in particular the Geneva Conventions of August 12, 1949, and that persons who commit or order the commission of grave breaches of the Conventions are individually responsible in respect of such breaches;...

14. Urges the Afghan factions to put an end to the discrimination against girls and women and to other violations of human rights as well as violations of international humanitarian law and to adhere to the internationally accepted norms and standards in this sphere....

²⁶³ United Nations Security Council resolution 1193, U.N.Doc. S/Res/1193 (August 28, 1998).

Protection of Civilians

The Fourth Geneva Convention 1949²⁶⁴

Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949

ARTICLE 12

In cases where they deem it advisable in the interest of protected persons, particularly in cases of disagreement between the Parties to the conflict as to the application or interpretation of the provisions of the present Convention, the Protecting Powers shall lend their good offices with a view to settling the disagreement.

For this purpose, each of the Protecting Powers may, either at the invitation of one Party or on its own initiative, propose to the Parties to the conflict a meeting of their representatives, and in particular of the authorities responsible for protected persons, possibly on neutral territory suitably chosen. The Parties to the conflict shall be bound to give effect to the proposals made to them for this purpose. The Protecting Powers may, if necessary, propose for approval by the Parties to the conflict a person belonging to a neutral Power, or delegated by the International Committee of the Red Cross, who shall be invited to take part in such a meeting.

PART II. GENERAL PROTECTION OF POPULATIONS AGAINST CERTAIN CONSEQUENCES OF WAR

ARTICLE 13

The provisions of Part II cover the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion or political opinion, and are intended to alleviate the sufferings caused by war.

ARTICLE 14

In time of peace, the High Contracting Parties and, after the outbreak of hostilities, the Parties thereto, may establish in their own territory and, if the need arises, in occupied areas, hospital and safety zones and localities so organized as to protect from the effects of war, wounded, sick and aged persons, children under fifteen, expectant mothers and mothers of children under seven.

²⁶⁴ The Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, entered into force Oct. 21, 1950.

Upon the outbreak and during the course of hostilities, the Parties concerned may conclude agreements on mutual recognition of the zones and localities they have created. They may for this purpose implement the provisions of the Draft Agreement annexed to the present Convention, with such amendments as they may consider necessary.

The Protecting Powers and the International Committee of the Red Cross are invited to lend their good offices in order to facilitate the institution and recognition of these hospital and safety zones and localities.

ARTICLE 15

Any Party to the conflict may, either direct or through a neutral State or some humanitarian organization, propose to the adverse Party to establish, in the regions where fighting is taking place, neutralized zones intended to shelter from the effects of war the following persons, without distinction:

- (a) wounded and sick combatants or non-combatants;
- (b) civilian persons who take no part in hostilities, and who, while they reside in the zones, perform no work of a military character.

When the Parties concerned have agreed upon the geographical position, administration, food supply and supervision of the proposed neutralized zone, a written agreement shall be concluded and signed by the representatives of the Parties to the conflict. The agreement shall fix the beginning and the duration of the neutralization of the zone.

ARTICLE 16

The wounded and sick, as well as the infirm, and expectant mothers, shall be the object of particular protection and respect.

As far as military considerations allow, each Party to the conflict shall facilitate the steps taken to search for the killed and wounded, to assist the shipwrecked and other persons exposed to grave danger, and to protect them against pillage and ill-treatment.

ARTICLE 17

The Parties to the conflict shall endeavour to conclude local agreements for the removal from besieged or encircled areas, of wounded, sick, infirm, and aged persons, children and maternity cases, and for the passage of ministers of all religions, medical personnel and medical equipment on their way to such areas.

ARTICLE 18

Civilian hospitals organized to give care to the wounded and sick, the infirm and maternity cases, may in no circumstances be the object of attack but shall at all times be respected and protected by the Parties to the conflict.

States which are Parties to a conflict shall provide all civilian hospitals with certificates showing that they are civilian hospitals and that the buildings which they occupy are not used for any purpose which would deprive these hospitals of protection in accordance with Article 19.

Civilian hospitals shall be marked by means of the emblem provided for in Article 38 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, but only if so authorized by the State. The Parties to the conflict shall, in so far as military considerations permit, take the necessary steps to make the distinctive emblems indicating civilian hospitals clearly visible to the enemy land, air and naval forces in order to obviate the possibility of any hostile action.

In view of the dangers to which hospitals may be exposed by being close to military objectives, it is recommended that such hospitals be situated as far as possible from such objectives.

ARTICLE 19

The protection to which civilian hospitals are entitled shall not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy. Protection may, however, cease only after due warning has been given, naming, in all appropriate cases, a reasonable time limit and after such warning has remained unheeded. The fact that sick or wounded members of the armed forces are nursed in these hospitals, or the presence of small arms and ammunition taken from such combatants and not yet been handed to the proper service, shall not be considered to be acts harmful to the enemy.

ARTICLE 20

Persons regularly and solely engaged in the operation and administration of civilian hospitals, including the personnel engaged in the search for, removal and transporting of and caring for wounded and sick civilians, the infirm and maternity cases shall be respected and protected.

In occupied territory and in zones of military operations, the above personnel shall be recognizable by means of an identity card certifying their status, bearing the photograph of the holder and embossed with the stamp of the responsible authority, and also by means of a stamped, water-resistant armband which they shall wear on the left arm while carrying out their duties.

This armlet shall be issued by the State and shall bear the emblem provided for in Article 38 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949.

Other personnel who are engaged in the operation and administration of civilian hospitals shall be entitled to respect and protection and to wear the armlet, as provided in and under the conditions prescribed in this Article, while they are employed on such duties. The identity card shall state the duties on which they are employed. The management of each hospital shall at all times hold at the disposal of the competent national or occupying authorities an up-to-date list of such personnel.

ARTICLE 21

Convoys of vehicles or hospital trains on land or specially provided vessels on sea, conveying wounded and sick civilians, the infirm and maternity cases, shall be respected and protected in the same manner as the hospitals provided for in Article 18, and shall be marked, with the consent of the State, by the display of the distinctive emblem provided for in Article 38 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949.

ARTICLE 22

Aircraft exclusively employed for the removal of wounded and sick civilians, the infirm and maternity cases or for the transport of medical personnel and equipment, shall not be attacked, but shall be respected while flying at heights, times and on routes specifically agreed upon between all the Parties to the conflict concerned. They may be marked with the distinctive emblem provided for in Article 38 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949. Unless agreed otherwise, flights over enemy or enemy occupied territory are prohibited. Such aircraft shall obey every summons to land. In the event of a landing thus imposed, the aircraft with its occupants may continue its flight after examination, if any.

ARTICLE 23

Each High Contracting Party shall allow the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians of another High Contracting Party, even if the latter is its adversary. It shall likewise permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases.

The obligation of a High Contracting Party to allow the free passage of the consignments indicated in the preceding paragraph is subject to the condition that this Party is satisfied that there are no serious reasons for fearing:

- (a) that the consignments may be diverted from their destination,
- (b) that the control may not be effective, or

(c) that a definite advantage may accrue to the military efforts or economy of the enemy through the substitution of the above-mentioned consignments for goods which would otherwise be provided or produced by the enemy or through the release of such material, services or facilities as would otherwise be required for the production of such goods.

The Power which allows the passage of the consignments indicated in the first paragraph of this Article may make such permission conditional on the distribution to the persons benefited thereby being made under the local supervision of the Protecting Powers. Such consignments shall be forwarded as rapidly as possible, and the Power which permits their free passage shall have the right to prescribe the technical arrangements under which such passage is allowed.

ARTICLE 24

The Parties to the conflict shall take the necessary measures to ensure that children under fifteen, who are orphaned or are separated from their families as a result of the war, are not left to their own resources, and that their maintenance, the exercise of their religion and their education are facilitated in all circumstances. Their education shall, as far as possible, be entrusted to persons of a similar cultural tradition.

The Parties to the conflict shall facilitate the reception of such children in a neutral country for the duration of the conflict with the consent of the Protecting Power, if any, and under due safeguards for the observance of the principles stated in the first paragraph.

They shall, furthermore, endeavour to arrange for all children under twelve to be identified by the wearing of identity discs, or by some other means.

ARTICLE 25

All persons in the territory of a Party to the conflict, or in a territory occupied by it, shall be enabled to give news of a strictly personal nature to members of their families, wherever they may be, and to receive news from them. This correspondence shall be forwarded speedily and without undue delay.

If, as a result of circumstances, it becomes difficult or impossible to ex-

change family correspondence by the ordinary post, the Parties to the conflict concerned shall apply to a neutral intermediary, such as the Central Agency provided for in Article 140, and shall decide in consultation with it how to ensure the fulfillment of their obligations under the best possible conditions, in particular with the cooperation of the National Red Cross (Red Crescent, Red Lion and Sun) Societies.

If the Parties to the conflict deem it necessary to restrict family correspondence, such restrictions shall be confined to the compulsory use of standard forms containing twenty-five freely chosen words, and to the limitation of the number of these forms despatched to one each month.

ARTICLE 26

Each Party to the conflict shall facilitate enquiries made by members of families dispersed owing to the war, with the object of renewing contact with one another and of meeting, if possible. It shall encourage, in particular, the work of organizations engaged on this task provided they are acceptable to it and conform to its security regulations.

PART III. STATUS AND TREATMENT OF PROTECTED PERSONS

Section I. Provisions common to the territories of the parties to the conflict and to occupied territories

ARTICLE 27

Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.

Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the Convention.

***The First Protocol Additional to the Geneva Conventions,
1977***²⁶⁵

Protocol relating to the Protection of Victims of International Armed Conflicts

PART I. GENERAL PROVISIONS

ARTICLE 1. General principles and scope of application

1. The High Contracting Parties undertake to respect and to ensure respect for this Protocol in all circumstances.

2. In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from dictates of public conscience.

4. The Parties to the conflict shall protect relief consignments and facilitate their rapid distribution.

5. The Parties to the conflict and each High Contracting Party concerned shall encourage and facilitate effective international co-ordination of the relief actions referred to in paragraph 1....

ARTICLE 71. Personnel participating in relief actions

1. Where necessary, relief personnel may form part of the assistance provided in any relief action, in particular for the transportation and distribution of relief consignments; the participation of such personnel shall be subject to the approval of the Party in whose territory they will carry out their duties.

2. Such personnel shall be respected and protected.

3. Each Party in receipt of relief consignments shall, to the fullest extent practicable, assist the relief personnel referred to in paragraph 1 in carrying out their relief mission. Only in case of imperative military necessity may the activities of the relief personnel be limited or their movements temporarily restricted.

4. Under no circumstances may relief personnel exceed the terms of their mission under this Protocol. In particular they shall take account of the security requirements of the Party in whose territory they are carrying out their duties. The mission of any of the personnel who do not respect these conditions may be terminated.

²⁶⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 U.N.T.S. 3, entered into force Dec. 7, 1978.

Section III. Treatment of Persons in the Power of a Party to the Conflict

Chapter I. Field of application and protection of persons and objects

ARTICLE 72. Field of application

The provisions of this Section are additional to the rules concerning humanitarian protection of civilians and civilian objects in the power of a Party to the conflict contained in the Fourth Convention, particularly Parts I and III thereof, as well as to other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict.

ARTICLE 73. Refugees and stateless persons

Persons who, before the beginning of hostilities, were considered as stateless persons or refugees under the relevant international instruments accepted by the Parties concerned or under the national legislation of the State of refuge or State of residence shall be protected persons within the meaning of Parts I and III of the Fourth Convention, in all circumstances and without any adverse distinction.

ARTICLE 74. Reunion of dispersed families

The High Contracting Parties and the Parties to the conflict shall facilitate in every possible way the reunion of families dispersed as a result of armed conflicts and shall encourage in particular the work of the humanitarian organizations engaged in this task in accordance with the provisions of the Conventions and of this Protocol and in conformity with their respective security regulations.

ARTICLE 75. Fundamental guarantees

1. In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons.

2. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:

(a) violence to the life, health, or physical or mental well-being of persons, in particular:

- (i) murder;
- (ii) torture of all kinds, whether physical or mental;
- (iii) corporal punishment; and
- (iv) mutilation;
- (b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault;
- (c) the taking of hostages;
- (d) collective punishments; and
- (e) threats to commit any of the foregoing acts.

3. Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.

4. No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following:

(a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;

(b) no one shall be convicted of an offence except on the basis of individual penal responsibility;

(c) no one shall be accused or convicted of a criminal offence on account or any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;

(d) anyone charged with an offence is presumed innocent until proved guilty according to law;

(e) anyone charged with an offence shall have the right to be tried in his presence;

(f) no one shall be compelled to testify against himself or to confess guilt;

(g) anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(h) no one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure;

(i) anyone prosecuted for an offence shall have the right to have the judgement pronounced publicly; and

(j) a convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised.

5. Women whose liberty has been restricted for reasons related to the armed conflict shall be held in quarters separated from men's quarters. They shall be under the immediate supervision of women. Nevertheless, in cases where families are detained or interned, they shall, whenever possible, be held in the same place and accommodated as family units.

6. Persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this Article until their final release, repatriation or re-establishment, even after the end of the armed conflict.

7. In order to avoid any doubt concerning the prosecution and trial of persons accused of war crimes or crimes against humanity, the following principles shall apply:

(a) persons who are accused of such crimes should be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law; and

(b) any such persons who do not benefit from more favourable treatment under the Conventions or this Protocol shall be accorded the treatment provided by this Article, whether or not the crimes of which they are accused constitute grave breaches of the Conventions or of this Protocol.

8. No provision of this Article may be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1

Chapter II. Measures in favour of women and children

ARTICLE 76. Protection of women

1. Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault.

2. Pregnant women and mothers having dependent infants who are arrested, detained or interned for reasons related to the armed conflict, shall have their cases considered with the utmost priority.

3. To the maximum extent feasible, the Parties to the conflict shall endeavour to avoid the pronouncement of the death penalty on pregnant women or mothers having dependent infants, for an offence related to the armed conflict. The death penalty for such offences shall not be executed on such women.

ARTICLE 77. Protection of children

1. Children shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason.

2. The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years the Parties to the conflict shall endeavour to give priority to those who are oldest.

3. If, in exceptional cases, despite the provisions of paragraph 2, children who have not attained the age of fifteen years take a direct part in hostilities and fall into the power of an adverse Party, they shall continue to benefit from the special protection accorded by this Article, whether or not they are prisoners of war.

4. If arrested, detained or interned for reasons related to the armed conflict, children shall be held in quarters separate from the quarters of adults, except where families are accommodated as family units as provided in Article 75, paragraph 5.

5 . The death penalty for an offence related to the armed conflict shall not be executed on persons who had not attained the age of eighteen years at the time the offence was committed.

ARTICLE 78. Evacuation of children

1. No Party to the conflict shall arrange for the evacuation of children, other than its own nationals, to a foreign country except for a temporary evacuation where compelling reasons of the health or medical treatment of the children or, except in occupied territory, their safety, so require. Where the parents or legal guardians can be found, their written consent to such evacuation is required. If these persons cannot be found, the written consent to such evacuation of the persons who by law or custom are primarily responsible for the care of the children is required. Any such evacuation shall be supervised by the Protecting Power in agreement with the Parties concerned, namely, the Party arranging for the evacuation, the Party receiving the children and any Parties whose nationals are being evacuated. In each case, all Parties to the conflict shall take all feasible precautions to avoid endangering the evacuation....

Chapter III. Journalists

ARTICLE 79. Measures or protection for journalists

1. Journalists engaged in dangerous professional missions in areas of armed conflict shall be considered as civilians within the meaning of Article 50, paragraph 1.

2. They shall be protected as such under the Conventions and this Protocol, provided that they take no action adversely affecting their status as civilians, and without prejudice to the right of war correspondents accredited to the armed forces to the status provided for in Article 4 (A) (4) of the Third Convention.

3. They may obtain an identity card similar to the model in Annex II of this Protocol. This card, which shall be issued by the government of the State of which the Journalist is a national or in whose territory he resides or in which the news medium employing him is located, shall attest to his status as a journalist.

UN Secretary-General's Reports on the Protection of Civilians in Armed Conflict

Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict²⁶⁶

I. Towards a culture of protection....

2.Recruitment and use of child soldiers, the proliferation of small arms, the indiscriminate use of landmines, large-scale forced displacement and ethnic cleansing, the targeting of women and children, the denial of even the most basic human rights, and widespread impunity for atrocities are still all too familiar features of war. The growing number of threats to the lives of local and international staff members of international organizations and other aid groups has added one more shameful characteristic to the reality of today's conflicts.

3. The context is therefore clear: as internal armed conflicts proliferate, civilians have become the principal victims. It is now conventional to say that, in recent decades, the proportion of war victims who are civilians has leaped dramatically, to an estimated 75 per cent, and in some cases even more. I say "conventional" because the truth is that no one really knows. Relief agencies rightly devote their resources to helping the living rather than counting the dead. Whereas armies count their losses, there is no agency mandated to keep a tally of civilians killed. The victims of today's atrocious conflicts are not merely anonymous, but literally countless. To some extent, this can be explained by changes in the nature of conflict. The decline of inter-State warfare waged by regular armies has been matched by a rise in intra-State warfare waged by irregular forces. Furthermore, and particularly in conflicts with an element of ethnic or religious hatred, the affected civilians tend not to be the incidental victims of these new irregular forces; they are their principal object.

4. In September 2000, all the States Members of the Organization pledged, in the United Nations Millennium Declaration (General Assembly resolution 55/2), to expand and strengthen the protection of civilians in complex emergencies, in conformity with international humanitarian law. Yet just as Member States have too often failed to address the calamitous impact of modern warfare on civilians, so, too, has the United Nations often been unable to respond adequately to their need for protection and assistance. My

²⁶⁶ United Nations, U.N. Doc S/2001/331, 30 March 2001, available at www.un.org.

hope now is to move beyond an analysis of our past failures and to identify ways in which the international system can be strengthened to help meet the growing needs of civilians in war.... In the of recommendations already agreed upon, it should be possible to ensure that future efforts will be more effective in bringing genuine relief and protection to civilians in armed conflict...

B. 2009 Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict

Report of the secretary-general on the protection of civilians in armed conflict²⁶⁷

III. The five core challenges

26. Ultimately, the enduring need to strengthen the protection of civilians stems from the fundamental, and equally enduring, failure of parties to conflict to comply fully with their legal obligations to protect civilians. It is a failure that demands reinvigorated commitment and determined action so as to meet the following core challenges: enhancing compliance with international law; enhancing compliance by non-State armed groups; enhancing protection through more effective and better resourced United Nations peacekeeping and other relevant missions; enhancing humanitarian access; and enhancing accountability for violations.

A. Enhancing compliance

27. A defining feature of most, if not all, contemporary conflicts is the failure of the parties to respect and ensure respect for their legal obligations to protect civilians and spare them from the effects of hostilities....

28. Constant care must be taken to spare the civilian population from the effects of hostilities. This requires, inter alia, strict compliance by parties to conflict with international humanitarian law and, in particular, the principles of distinction and proportionality, and the requirement to take all feasible precautions in attack and defence. Under no circumstances do violations of these rules by one party to a conflict justify violations by others....

33. I would remind all parties to conflict of their obligations scrupulously to respect and ensure respect for the relevant rules. I would also urge them to consider practical steps that could be taken to spare civilians from the effects of hostilities, a process that may in some situations benefit from more

²⁶⁷ United Nations, U.N. Doc. S/2009/277, 29 May 2009, available at www.un.org.

discussion with local populations and their leaders, civilian authorities, civil society or humanitarian actors....

37. The Security Council also has a critical role in promoting systematic compliance with the law. In particular, the Council should:

(a) Use all available opportunities to condemn violations, without exception, and remind parties of, and demand compliance with, their obligations;

(b) Publicly threaten and, if necessary, apply targeted measures against the leadership of parties that consistently defy the demands of the Security Council and routinely violate their obligations to respect civilians;

(c) Systematically request reports on violations and consider mandating commissions of inquiry to examine situations where concerns exist regarding serious violations of international humanitarian law and human rights law, including with a view to identifying those responsible and prosecuting them at the national level, or referring the situation to the International Criminal Court.

B. Enhancing compliance by non-State armed groups

[See also Part I, Chapter 12, The Law of Non-International Armed Conflicts, VIII. Who Is Bound by the Law of Non-International Armed Conflicts?]

38. Together with the increased prevalence of non-international armed conflicts, pitting States against non-State armed groups, or two or more such groups against each other, a common feature of contemporary conflicts is the proliferation and fragmentation of such groups. They encompass a range of identities, motivations and varying degrees of willingness to observe international humanitarian law and human rights standards.

39. Armed groups are bound by international humanitarian law and must refrain from committing acts that would impair the enjoyment of human rights. For some groups, attacks and the commission of other violations against civilians are deliberate strategies, intended to maximize casualties and destabilize societies. Others may be less inclined to attack civilians deliberately, but their actions still have an adverse impact on the safety and security of civilians. We need urgently to develop a comprehensive approach towards improving compliance by all these groups with the law, encompassing actions that range from engagement to enforcement.

40. As stated in common article 3 of the Geneva Conventions and in Additional Protocol II thereto, the application of international humanitarian law does not affect the legal status of non-State parties to a conflict. In order to spare civilians the effects of hostilities, obtain access to those in need and ensure that aid workers can operate safely, humanitarian actors must have consistent and

sustained dialogue with all parties to conflict, State and non-State. Moreover, while engagement with non-State armed groups will not always result in improved protection, the absence of systematic engagement will almost certainly mean more, not fewer, civilian casualties in current conflicts.

41. The extensive experience of ICRC in working with armed groups, as well as that of United Nations actors and various non-governmental organizations, has demonstrated the possible benefits of dialogue on protection. Engagement can take the form of dissemination and training on international humanitarian law and human rights law standards. The incentives for armed groups to comply with the law should be emphasized, including increased likelihood of reciprocal respect for the law by opposing parties.

42. Bearing in mind that armed groups have legal obligations, engagement may be based around the conclusion of codes of conduct, unilateral declarations and special agreements, as envisaged under international humanitarian law, through which groups expressly commit themselves to comply with their obligations or undertake commitments that go above and beyond what are required by the law. Such instruments have been concluded in a number of contexts, including in Colombia, Liberia, Nepal, the Philippines, Sierra Leone, Sri Lanka, the Sudan and the former Yugoslavia. Their conclusion can send a clear signal to the groups' members and lead to the establishment of appropriate internal disciplinary measures. They also provide an important basis for follow-up interventions. It is, however, critically important that such tools and the commitments and principles therein are incorporated into instructions and communicated to the groups' members.

43. Other initiatives include those of my Special Representative on Children and Armed Conflict with respect to ending the recruitment and use of children by armed groups. Another specific and successful example is the Geneva Call Deed of Commitment, which seeks to end the use of anti-personnel mines by armed groups [See Case No. 202, Geneva Call, Puntland State of Somalia adhering to a total ban on anti-personnel mines]. To date, 38 groups have signed the Deed and have, for the most part, refrained from using anti-personnel mines, cooperated in mine action in areas under their control and destroyed stockpiles.

44. Member States can themselves promote compliance by armed groups. Members of such groups have little legal incentive to comply with international humanitarian law if they are likely to face domestic criminal prosecution for their mere participation in a non-international armed conflict, regardless of whether they respect the law or not. Granting amnesty for merely participating in hostilities, though not in respect of any war crimes and serious violations of human rights law which may have been commit-

ted, as envisaged in Additional Protocol II to the Geneva Conventions, may in some circumstances help provide the necessary incentive.

45. At the absolute minimum, it is critical that Member States support, or at least do not impede, efforts by humanitarian organizations to engage armed groups in order to seek improved protection for civilians – even those groups that are proscribed in some national legislation. Engagement through training or the conclusion of special agreements can provide entry points for dialogue on more specific concerns, such as humanitarian access, protection of humanitarian workers and sexual violence. Of particular relevance to the Security Council, such dialogue can also in some instances contribute to confidence-building between parties which can lead, in time, to the cessation of hostilities and the restoration of peace and security.

46. There will be times when engagement proves futile. However, it should not be dismissed out of hand. Armed groups are not monoliths. They have entry points, such as through the local population, and members who may be more predisposed to engagement. However, when such efforts fail, alternatives must be considered, including the application of the measures outlined in paragraph 37 above, namely systematic condemnation of violations committed by armed groups and demands for compliance together with the application of targeted measures.

47. As a first step towards developing a more comprehensive approach to armed groups, it may be useful to convene an Arria formula meeting to discuss the experience of United Nations and non-governmental actors in working with armed groups and to identify additional measures that the Security Council and Member States could take to improve compliance.

C. Protection of civilians and United Nations peacekeeping and other relevant missions...

52. ...[T]he “protection of civilians” mandate in peacekeeping missions remains largely undefined as both a military task and as a mission-wide task. Each mission interprets its protection mandate as best it can in its specific context. Some missions, such as the African Union-United Nations Hybrid Operation in Darfur (UNAMID) and MONUC, have developed force directives or mission-wide guidance to this end. Of course, heads of missions and force commanders must have latitude to interpret the mandate in light of their specific circumstances. However, this should take place within a broader policy framework that includes clear direction as to possible courses of action, including in situations where the armed forces of the host State are themselves perpetrating violations against civilians, as well as indicative tasks and the necessary capabilities for their implementation.

53. Protection of civilians is not a military task alone. All components of a mission, including police, humanitarian affairs, human rights, child protection, mine action, gender, political and civil affairs, public information, rule of law and security sector reform, can and must contribute to discharging the mission's protection mandate. To this end, more missions are beginning to develop inclusive mission specific protection strategies and plans of action, in consultation with Special Representatives of the Secretary-General, Force Commanders, humanitarian country teams, the host Government and communities. This is a welcome development and all missions should be encouraged to develop such inclusive strategies, establishing priorities, actions and clear roles and responsibilities....

Prosecutor v. Kunarac, Kovac and Vukovic, ICTY, 2002²⁶⁸

IN THE APPEALS CHAMBER...

Judgement of 12 June 2002

PROSECUTOR v. DRAGOLJUB KUNARAC, RADOMIR KOVAC AND ZORAN VUKOVIC

The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 is seised of appeals against the Trial Judgement rendered by Trial Chamber II on 22 February 2001 in the case of Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic.

Having considered the written and oral submissions of the parties, the Appeals Chamber

HEREBY RENDERS ITS JUDGEMENT...

INTRODUCTION...

C. FINDINGS OF THE APPEALS CHAMBER

1. Convictions

32. The Appeals Chamber finds that it is unable to discern any error in the Trial Chamber's assessment of the evidence or its findings in relation to any of the grounds of appeal set out.... Therefore, the Appeals Chamber dismisses the appeals of each of the Appellants on their convictions, as well as all common grounds of appeal...

²⁶⁸ International Criminal Tribunal for Yugoslavia, The Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, IT-96-23 and IT-96-23/1, Appeals Chamber, Decision 12 June 2002, citations omitted.

123. ...Slavery may exist even without torture. Slaves may be well fed, well clothed, and comfortably housed, but they are still slaves if without lawful process they are deprived of their freedom by forceful restraint. We might eliminate all proof of ill-treatment, overlook the starvation, beatings, and other barbarous acts, but the admitted fact of slavery – compulsory uncompensated labour – would still remain. There is no such thing as benevolent slavery. Involuntary servitude, even if tempered by humane treatment, is still slavery. The passage speaks of slavery; it applies equally to enslavement.

124. For the foregoing reasons, the Appeals Chamber is of the opinion that the Trial Chamber's definition of the crime of enslavement is not too broad and reflects customary international law at the time when the alleged crimes were committed. The Appellants' contentions are therefore rejected; the appeal relating to the definition of the crime of enslavement fails.

D. DEFINITION OF THE CRIME OF RAPE...

2. Discussion

127. After an extensive review of the Tribunal's jurisprudence and domestic laws from multiple jurisdictions, the Trial Chamber concluded:

the actus reus of the crime of rape in international law is constituted by: the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances. The men's *rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.

128. The Appeals Chamber concurs with the Trial Chamber's definition of rape. Nonetheless, the Appeals Chamber believes that it is worth emphasising two points. First, it rejects the Appellants' "resistance" requirement, an addition for which they have offered no basis in customary international law. The Appellants' bald assertion that nothing short of continuous resistance provides adequate notice to the perpetrator that his attentions are unwanted is wrong on the law and absurd on the facts.

129. Secondly, with regard to the role of force in the definition of rape, the Appeals Chamber notes that the Trial Chamber appeared to depart from the Tribunal's prior definitions of rape. [footnote 158: See, e.g., Furundzija Trial Judgement, para. 185 [available on <http://www.icty.org>] Prior attention has focused on force as the defining characteristic of rape. Under this line of

reasoning, force or threat of force either nullifies the possibility of resistance through physical violence or renders the context so coercive that consent is impossible.] However, in explaining its focus on the absence of consent as the *conditio sine qua non* of rape, the Trial Chamber did not disavow the Tribunal's earlier jurisprudence, but instead sought to explain the relationship between force and consent. Force or threat of force provides clear evidence of non-consent, but force is not an element *per se* of rape. In particular, the Trial Chamber wished to explain that there are "factors [other than force] which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim.

A narrow focus on force or threat of force could permit perpetrators to evade liability for sexual activity to which the other party had not consented by taking advantage of coercive circumstances without relying on physical force.

130. The Appeals Chamber notes, for example, that in some domestic jurisdictions, neither the use of a weapon nor the physical overpowering of a victim is necessary to demonstrate force. A threat to retaliate "in the future against the victim or any other person" is a sufficient indicium of force so long as "there is a reasonable possibility that the perpetrator will execute the threat." [...] While it is true that a focus on one aspect gives a different shading to the offence, it is worth observing that the circumstances giving rise to the instant appeal and that prevail in most cases charged as either war crimes or crimes against humanity will be almost universally coercive. That is to say, true consent will not be possible.

131. Under the chapter entitled "Crimes Against Sexual Self-Determination," German substantive law contains a section penalising sexual acts with prisoners and persons in custody of public authority. The absence of consent is not an element of the crime. Increasingly, the state and national laws of the United States – designed for circumstances far removed from war contexts – support this line of reasoning...

132. For the most part, the Appellants in this case were convicted of raping women held in *de facto* military headquarters, detention centres and apartments maintained as soldiers' residences. As the most egregious aspect of the conditions, the victims were considered the legitimate sexual prey of their captors. Typically, the women were raped by more than one perpetrator and with a regularity that is nearly inconceivable. (Those who initially sought help or resisted were treated to an extra level of brutality). Such detentions amount to circumstances that were so coercive as to negate any possibility of consent.

133. In conclusion, the Appeals Chamber agrees with the Trial Chamber's determination that the coercive circumstances present in this case made consent to the instant sexual acts by the Appellants impossible. The Appellants' grounds of appeal relating to the definition of the crime of rape therefore fail...

VII. CUMULATIVE CONVICTIONS...

B. The Instant Convictions...

2. Intra-Article Convictions under Article 5 of the Statute

(a) Rape and Torture

179. The Appeals Chamber will now consider the Appellants' arguments regarding intra-Article convictions. The Appellants contend that the Trial Chamber erred by entering convictions for both torture under Article 5(f) and rape under Article 5(g) of the Statute on the theory that neither the law nor the facts can reasonably be interpreted to establish distinct crimes. The Trial Chamber found that the crimes of rape and torture each contain one materially distinct element not contained in the other, making convictions under both crimes permissible. As its earlier discussion of the offences of rape and torture make clear, the Appeals Chamber agrees. The issue of cumulative convictions hinges on the definitions of distinct offences under the Statute which are amplified in the jurisprudence of the Tribunal. That torture and rape each contain a materially distinct element not contained by the other disposes of this ground of appeal.

That is, that an element of the crime of rape is penetration, whereas an element for the crime of torture is a prohibited purpose, neither element being found in the other crime...

181. In the *Celebici* Trial Judgement, the Trial Chamber considered the issue of torture through rape. The Appeals Chamber overturned the Appellant's convictions under Article 3 of the Statute as improperly cumulative in relation to Article 2 of the Statute, but the Trial Chamber's extensive analysis of torture and rape remains persuasive. Grounding its analysis in a thorough survey of the jurisprudence of international bodies, the Trial Chamber concluded that rape may constitute torture. Both the Inter-American Commission on Human Rights and the European Court of Human Rights have found that torture may be committed through rape. And the United Nations Special Rapporteur on Torture listed forms of sexual assault as methods of torture.

182. For rape to be categorised as torture, both the elements of rape and the elements of torture must be present. Summarising the international case-law, the Trial Chamber in the *Celebici* case concluded that "rape involves the

infliction of suffering at a requisite level of severity to place it in the category of torture.” [footnote 247: Celebici Trial Judgement, para. 489] By way of illustration, the Trial Chamber discussed the facts of two central cases, *Fernando and Raquel Mejca v Peru* from the Inter-American Commission and *Aydin v Turkey* from the European Commission for Human Rights. [footnote 248: *Fernando and Raquel Mejia v Peru*, Case No. 10,970, Judgement of 1 March 1996..., *Inter-American Yearbook on Human Rights*, 1996, p. 1120 [available in *Annual Report 1995*, <http://www.cidh.org>.] and *Aydin v Turkey*, Opinion of the European Commission of Human Rights, 7 March 1996, reprinted in *European Court of Human Rights*, ECHR 1997-VI, p. 1937, paras 186 and 189].

183. ...[T]he Trial Chamber in the Celebici case observed that “one must not only look at the physical consequences, but also at the psychological and social consequences of the rape”....

185. In the circumstances of this case, the Appeals Chamber finds the Appellants’ claim entirely unpersuasive. The physical pain, fear, anguish, uncertainty and humiliation to which the Appellants repeatedly subjected their victims elevate their acts to those of torture. These were not isolated instances. Rather, the deliberate and coordinated commission of rapes was carried out with breathtaking impunity over a long period of time. Nor did the age of the victims provide any protection from such acts. (Indeed, the Trial Chamber considered the youth of several of the victims as aggravating factors.) Whether roused from their unquiet rest to endure the grim nightly ritual of selection or passed around in a vicious parody of processing at headquarters, the victims endured repeated rapes, implicating not only the offence of rape but also that of torture under Article 5 of the Statute. In the egregious circumstances of this case, the Appeals Chamber finds that all the elements of rape and torture are met. The Appeals Chamber rejects, therefore, the appeal on this point.

(b) Rape and Enslavement

186. Equally meritless is the Appellants’ contention that Kunarac’s and Kovac’s convictions for enslavement under Article 5(c) and rape under Article 5(g) of the Statute are impermissibly cumulative. That the Appellants also forced their captives to endure rape as an especially odious form of their domestic servitude does not merge the two convictions. As the Appeals Chamber has previously explained in its discussion of enslavement, it finds that enslavement, even if based on sexual exploitation, is a distinct offence from that of rape. The Appeals Chamber, therefore, rejects this ground of appeal.

3. Article 3 of the Statute...

(b) Intra-Article Convictions under Article 3 of the Statute...

194. Article 3 of the Statute, as the Appeals Chamber has previously observed, also prohibits other serious violations of customary international law. The Appeals Chamber in the Tadic Jurisdiction Decision outlined four requirements to trigger Article 3 of the Statute [See Case No. 211, ICTY, *The Prosecutor v. Tadic* [Part A., para. 94]]:

(i) the violation must constitute an infringement of a rule of international humanitarian law; (ii) the rule must be customary in nature...; (iii) the violation must be ‘serious’, that is to say, it must constitute a breach of a rule protecting important values .; (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule. [...]

[R]ape is a “serious” war crime under customary international law entailing “individual criminal responsibility,” [...].

Means and Methods of Warfare

The First Protocol Additional to the Geneva Conventions, 1977²⁶⁹

PART III. METHODS AND MEANS OF WARFARE

COMBATANT AND PRISONERS-OF-WAR STATUS

Section I. Methods and Means of Warfare

ARTICLE 35. Basic rules

1. In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.

2. It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.

3. It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.

²⁶⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 U.N.T.S. 3, entered into force Dec. 7, 1978.

ARTICLE 36. New weapons

In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.

The Geneva Chemical Weapons Protocol, 1925²⁷⁰

The undersigned Plenipotentiaries, in the name of their respective Governments:

Whereas the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids materials or devices, has been justly condemned by the general opinion of the civilized world; and

Whereas the prohibition of such use has been declared in Treaties to which the majority of Powers of the world are Parties; and

To the end that this prohibition shall be universally accepted as a part of International Law, binding alike the conscience and the practice of nations;

Declare:

That the High Contracting Parties, so far as they are not already Parties to Treaties prohibiting such use, accept this prohibition, agree to extend this prohibition to the use of bacteriological methods of warfare and agree to be bound as between themselves according to the terms of this declaration.

The High Contracting Parties will exert every effort to induce other States to accede to the present Protocol. Such accession will be notified to the Government of the French Republic, and by the latter to all Signatory and Acceding Powers, and will take effect on the date of the notification by the Government of the French Republic.

The present Protocol of which the French and English texts are both authentic, shall be ratified as soon as possible. It shall bear today's date.

The ratifications of the present Protocol shall be addressed to the Government of the French Republic, which will at once notify the deposit of such ratification to each of the

²⁷⁰ Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, Geneva, 94 L.N.T.S. 65, entered into force Feb. 8, 1928.

Signatory and Acceding Powers.

The instruments of ratification and accession to the present Protocol will remain deposited in the archives of the Government of the French Republic.

The present Protocol will come into force for each Signatory Power as from the date of deposit of its ratification, and, from that moment, each Power will be bound as regards other Powers which have already deposited their ratifications.

In witness whereof the Plenipotentiaries have signed the present Protocol done at Geneva in a single copy, the seventeenth day of June, 1925.

John H. McNeill “The International Court of Justice, Advisory Opinion in the Nuclear Weapons Cases - A first appraisal”²⁷¹

Background:

There were two requests for advisory opinions from the International Court of Justice — the first from the World Health Organization (WHO), and the second from the United Nations General Assembly.

WHO asked: “In view of the health and environmental effects, would the use of nuclear weapons by a state in war or other armed conflict be a breach of its obligations under international law, including the WHO Constitution?” The Court held by eleven votes to three (Judges Shahabuddeen, Weeramantry and Koroma dissenting), that it was not able to give the advisory opinion requested by WHO. The Court’s opinion was consistent with the position argued by the United States and other countries and, in our view, is correct. As the WHO opinion primarily concerned jurisdictional issues, we will focus on the advice given in response to the request of the General Assembly.

The UN General Assembly asked: “Is the threat or use of nuclear weapons in any circumstance permitted under international law?” Over the sole objection of Judge Oda, the Court decided to hear the case. There were six specific findings in the Court’s Advisory Opinion. The ultimate advice of the Court, approved by seven of fourteen judges, with President Bedjaoui (Algeria) casting the deciding vote, was:

²⁷¹ John H. McNeill, *The International Court of Justice, Advisory Opinion in the Nuclear Weapons Cases - A first appraisal*, No. 316 *International Review of the Red Cross* (Feb. 28, 1997), available at: <http://www.icrc.org/eng/resources/documents/misc/57jnft.htm>. Reprinted with permission of ICRC Bishkek, contributing editor.

“... that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict... However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of a State would be at stake”...

Law of permission or prohibition?

The final clause of Paragraph 2E of the Court’s findings states: “... the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of a State would be at stake “The UN General Assembly asked the Court to advise on whether” ... the threat or use of nuclear weapons in any circumstance [is] permitted under international law.” Phrased in this way, the question incorrectly assumed that international law addressing the use of weapons is permissive rather than prohibitory. The Court affirmed that “State practice shows that the illegality of the use of certain weapons as such does not result from an absence of authorization but, on the contrary, is formulated in terms of prohibition.” The Court thus correctly recast the General Assembly’s question and proceeded to evaluate whether the threat or use of nuclear weapons is prohibited.

Application of international humanitarian law

The Court, having found no conventional or customary international law proscribing the threat or use of nuclear weapons per se, moved to a consideration of whether “recourse to nuclear weapons must be considered as illegal in the light of the principles and rules of international humanitarian law applicable in armed conflict and of the law of neutrality”

It is beyond reasonable dispute that international humanitarian law applies to nuclear weapons in the same way as it applies to conventional weapons. Analysis of international humanitarian law begins with the fundamental principle that the “right of belligerents to adopt means of injuring the enemy is not unlimited “. There are two cardinal” rules. First, the principle of distinction holds that States must not make civilians the object of attack and must not use weapons that are incapable of distinguishing between civilian and military targets. Second, it is prohibited to use weapons that cause unnecessary suffering, that is, weapons that cause “harm greater than that unavoidable to achieve legitimate military objectives.”

The Court found that the Martens clause is part of customary international law. The Martens clause first found expression in Hague Convention II with

Respect to the Laws and Customs of War on Land of 1899. The Court quoted from Article 1, paragraph 2, of Additional Protocol I of 1977 as a modern formulation of the Martens clause:

“In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.”

Parenthetically, the Court perceived no need to rule on the applicability of Additional Protocol I of 1977 to nuclear weapons, because that Protocol in no way replaced the general customary rules applicable to all means and methods of combat, including nuclear weapons. In particular, the Court recalled that all States are bound by those rules in Additional Protocol I which, when adopted, were merely the expression of the pre-existing customary law [34].

The Court briefly considered the principle of neutrality, which had been raised by several States. It declined to elaborate on the specific content of the principle of neutrality, which has been debated since the adoption of the UN Charter, stating merely that the rules of neutrality apply to “all international armed conflict, whatever type of weapons might be used” [35]. We think this is correct.

The Court proceeded to determine whether the threat or use of nuclear weapons is inherently incompatible with international humanitarian law or the law of neutrality. The proponents of the illegality of nuclear weapons argued, in essence, that the destructive force of nuclear weapons is so great that any use of them whatsoever would necessarily violate the principles of distinction and prevention of unnecessary suffering. The States that assert the legality of the threat or use of nuclear weapons in certain circumstances argued that the Court had insufficient evidence to conclude that any and every use of nuclear weapons would violate the principles of distinction and preventing unnecessary suffering. The Court concluded, we think correctly, that “it does not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance.”

The first two of the Court’s six findings were:

“(2) A. Unanimously,

There is in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons;

(2) B. By eleven votes to three [against, Judges Shahabuddeen, Weeramantry and Koroma],

There is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such.”

The third of the Court’s six findings was:

“(2) C. Unanimously,

A threat or use of force by means of nuclear weapons that is contrary to Article 2, paragraph 4, of the United Nations Charter and that fails to meet all the requirements of Article 51, is unlawful” [citations omitted] .

We agree that the limitations on the use of force found in the Charter “apply whatever the means of force used in self-defense “[22].

The fourth of the Court’s six findings was:

“(2) D. Unanimously,

A threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons” [citations omitted] .

The fifth of the Court’s six findings — its ultimate advice — was

“(2) E. By seven votes to seven... [Against, Vice-President Schwebel; Judges Oda, Guillaume, Shahabuddeen, Weeramantry, Koroma and Higgins] ,

It follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law;

However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of a State would be at stake.”

Finally, the Court addressed Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons, which provides:” Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.”

The Court's sixth and final finding was:

“(2) F. Unanimously,

There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.”

What the Court declined to decide

The Court declined to pronounce on two important issues: (1) the use of nuclear weapons in belligerent reprisal; and (2) the policy of deterrence. Regarding the use of nuclear weapons in belligerent reprisal, the Court declined to comment on the issue except to observe that such use would be governed by the principle of proportionality, a qualification that is consistent with international law. Regarding the policy of deterrence, the Court found that, in the face of an international community profoundly divided on the issue, there is no controlling opinion juris. Nevertheless, the Court recognized that the policy of deterrence has played a fundamental role in international security affairs.

Implementation of International Humanitarian Law

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory²⁷²

History of the proceedings (paras. 1-12)

The Court first recalls that on 10 December 2003 the Secretary-General of the United Nations officially communicated to the Court the decision taken by the General Assembly to submit the question set forth in its resolution ES-10/14, adopted on 8 December 2003 at its Tenth Emergency Special Session, for an advisory opinion. The question is the following:

“What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international

²⁷² Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory of 9 July 2004, International Court of Justice Summary, I.C.J. Summaries 2004/2 (2004).

law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?”

Jurisdiction

The Court concludes that it has jurisdiction to give an opinion on the question put to it by the General Assembly and that there is no compelling reason for it to use its discretionary power not to give that opinion.

International humanitarian law

As regards international humanitarian law, the Court first recalls that Israel is not a party to the Fourth Hague Convention of 1907, to which Hague Regulations are annexed. It considers, however, that the provisions of the Hague Regulations have become part of customary law, as is in fact recognized by all the participants in the proceedings before the Court. The Court also observes that, pursuant to Article 154 of the Fourth Geneva Convention, that Convention is supplementary to Sections II and III of the Hague Regulations. Section III of those Regulations, which concerns “Military authority over the territory of the hostile State,” is particularly pertinent in the present case.

Secondly, with regard to the Fourth Geneva Convention, the Court takes note that differing views have been expressed by the participants in these proceedings. Israel, contrary to the great majority of the participants, disputes the applicability *de jure* of the Convention to the Occupied Palestinian Territory. The Court recalls that the Fourth Geneva Convention was ratified by Israel on 6 July 1951 and that Israel is a party to that Convention; that Jordan has also been a party thereto since 29 May 1951; and that neither of the two States has made any reservation that would be pertinent to the present proceedings. The Court observes that the Israeli authorities have indicated on a number of occasions that in fact they generally apply the humanitarian provisions of the Fourth Geneva Convention within the occupied territories. However, according to Israel’s position, that Convention is not applicable *de jure* within those territories because, under Article 2, paragraph 2, it applies only in the case of occupation of territories falling under the sovereignty of a High Contracting Party involved in an armed conflict. Israel explains that the territories occupied by Israel subsequent to the 1967 conflict had not previously fallen under Jordanian sovereignty. The Court notes that, according to the first paragraph of Article 2 of the Fourth Geneva Convention, when two conditions are fulfilled, namely that there exists an armed conflict (whether or not a state of war has been recognized), and that the conflict has arisen between two contracting parties, then the Convention applies, in particular, in any territory occupied in the course of the conflict by one of the contracting parties. The object of the second paragraph of Article 2, which refers to

“occupation of the territory of a High Contracting Party,” is not to restrict the scope of application of the Convention, as defined by the first paragraph, by excluding therefrom territories not falling under the sovereignty of one of the contracting parties, but simply to making it clear that, even if occupation effected during the conflict met no armed resistance, the Convention is still applicable.

This interpretation reflects the intention of the drafters of the Fourth Geneva Convention to protect civilians who find themselves, in whatever way, in the hands of the occupying Power, regardless of the status of the occupied territories, and is confirmed by the Convention’s travaux préparatoires. The States parties to the Fourth Geneva Convention, at their Conference on 15 July 1999, approved that interpretation, which has also been adopted by the ICRC, the General Assembly and the Security Council. The Court finally makes mention of a judgment of the

Supreme Court of Israel dated 30 May 2004, to a similar effect.

In view of the foregoing, the Court considers that the Fourth Geneva Convention is applicable in the Palestinian territories which before the 1967 conflict lay to the east of the Green Line and which, during that conflict, were occupied by Israel, there being no need for any enquiry into the precise prior status of those territories.

Impact on right of Palestinian people to self-determination (paras 115-122)

It notes in this regard the contentions of Palestine and other participants that the construction of the wall is “an attempt to annex the territory contrary to international law” and “a violation of the legal principle prohibiting the acquisition of territory by the use of force” and that “the de facto annexation of land interferes with the territorial sovereignty and consequently with the right of the Palestinians to self-determination.” It notes also that Israel, for its part, has argued that the wall’s sole purpose is to enable it effectively to combat terrorist attacks launched from the West Bank, and that Israel has repeatedly stated that the Barrier is a temporary measure.

The Court recalls that both the General Assembly and the Security Council have referred, with regard to Palestine, to the customary rule of “the inadmissibility of the acquisition of territory by war.” As regards the principle of the right of peoples to self-determination, the Court observes that the existence of a “Palestinian people” is no longer in issue, and has been recognized by Israel, along with that people’s “legitimate rights.” The Court considers that those rights include the right to self-determination, as the General Assembly has moreover recognized on a number of occasions.

Whilst taking note of the assurance given by Israel that the construction of the wall does not amount to annexation and that the wall is of a temporary nature, the Court nevertheless considers that the construction of the wall and its associated régime create a “fait accompli” on the ground that could well become permanent, in which case, and notwithstanding the formal characterization of the wall by Israel, it would be tantamount to de facto annexation.

Self-defense and state of necessity (paras. 138-141)

The Court recalls that Annex I to the report of the Secretary-General states, however, that, according to Israel: “the construction of the Barrier is consistent with Article 51 of the Charter of the United Nations, its inherent right to self-defense and Security Council resolutions 1368 (2001) and 1373 (2001).”

The Court considers further whether Israel could rely on a state of necessity which would preclude the wrongfulness of the construction of the wall. In this regard, citing its decision in the case concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia), it observes that the state of necessity is a ground recognized by customary international law that “can only be invoked under certain strictly defined conditions which must be cumulatively satisfied” (I.C.J. Reports 1997, p. 40, para. 51), one of those conditions being that the act at issue be the only way for the State to guard an essential interest against a grave and imminent peril. In the light of the material before it, the Court is not convinced that the construction of the wall along the route chosen was the only means to safeguard the interests of Israel against the peril which it has invoked as justification for that construction. While Israel has the right, and indeed the duty to respond to the numerous and deadly acts of violence directed against its civilian population, in order to protect the life of its citizens, the measures taken are bound to remain in conformity with applicable international law. Israel cannot rely on a right of self-defense or on a state of necessity in order to preclude the wrongfulness of the construction of the wall. The Court accordingly finds that the construction of the wall, and its associated régime, are contrary to international law.

Conclusion

The Court considers that its conclusion that the construction of the wall by Israel in the Occupied Palestinian Territory is contrary to international law must be placed in a more general context. Since 1947, the year when General Assembly resolution 181 (II) was adopted and the Mandate for Palestine was terminated, there has been a succession of armed conflicts, acts of indiscriminate violence and repressive measures on the former mandated territory. The Court would emphasize that both Israel and Palestine are under

an obligation scrupulously to observe the rules of international humanitarian law, one of the paramount purposes of which is to protect civilian life. Illegal actions and unilateral decisions have been taken on all sides, whereas, in the Court's view, this tragic situation can be brought to an end only through implementation in good faith of all relevant Security Council resolutions, in particular resolutions 242 (1967) and 338 (1973). The "Roadmap" approved by Security Council resolution 1515 (2003) represents the most recent of efforts to initiate negotiations to this end. The Court considers that it has a duty to draw the attention of the General Assembly, to which the present Opinion is addressed, to the need for these efforts to be encouraged with a view to achieving as soon as possible, on the basis of international law, a negotiated solution to the outstanding problems and the establishment of a Palestinian State, existing side by side with Israel and its other neighbors, with peace and security for all in the region.

Implementation of International Humanitarian Law in the Kyrgyz Republic

ICRC, Advisory Services on International Humanitarian Law²⁷³

The three main priorities of the ICRC's Advisory Service are to encourage ratification of IHL treaties, to promote national implementation of the obligations arising from these treaties and to collect and facilitate the exchange of information on national implementation measures.

Why promote international humanitarian law?

Currently, dozens of conflicts are raging throughout the world. Each day brings news of yet another atrocity perpetrated in the name of war: massacres, tortures, summary executions, rape, deportation of civilians, children taking a direct part in hostilities... the list is endless.

Some may argue that these are just some of war's necessary evils. They are not. They are illegal. They are outright violations of a universally recognized body of law known as international humanitarian law (IHL).

As part of its humanitarian mission to protect the lives and dignity of victims of armed conflict, the International Committee of the Red Cross (ICRC)

²⁷³ ICRC, *Advisory Services on International Humanitarian Law*, available at: www.icrc.org.

strives to promote respect for the rules of IHL. Universal ratification of IHL instruments and effective implementation of the obligations they contain are promoted to ensure maximum protection for the victims of armed conflict.

How can IHL be implemented by States?

Adherence to IHL treaties is just the first step. The following measures must be taken before States can comply with their obligations arising from the Geneva Conventions of 1949, their Additional Protocols of 1977, the 1954 Convention for the Protection of Cultural Property and its two Protocols, other treaties relating to the prohibition and use of certain weapons, as well as the Rome Statute of the International Criminal Court:

- translation of IHL treaties into national languages
- adoption of criminal legislation punishing war crimes and other violations of IHL
- adoption of measures to prevent and punish misuse of the red cross and red crescent emblems and other signals and emblems recognized by the treaties
- definition and guarantee of the status of protected persons
- protection of fundamental and procedural guarantees in the event of armed Conflict
- establishment and/or regulation of National Societies, organization of civil defense and National Information Bureaux
- dissemination of IHL
- appointment of legal advisers for armed forces
- identification and marking of protected people, places and property
- observance of IHL in the location of military sites, and in the development and adoption of weapons and military tactics

How can the ICRC help?

The ICRC set up its Advisory Service in 1996 to step up its support to States committed to implementing IHL.

Aims:

- encourage all States to ratify IHL treaties
- encourage States to fulfill their obligations under these treaties at the national level

Structure:

- a unit attached to the ICRC's Legal Division in Geneva, i.e. one supervisor plus three legal advisers, one specialized in civil law, one in common law and one in the Advisory Service's database
- a team of legal experts based in each continent

What can the Advisory Service offer?

The Advisory Service works closely with governments, taking into account their specific needs and their respective political and legal systems. It also works with the following:

- National Red Cross and Red Crescent Societies
- academic institutions
- international and regional organizations

Specifically, the Advisory Service:

- Organizes meetings of experts
- Arranges national and regional seminars on the implementation of IHL and meetings of experts on selected topics; takes part in international forums
- Offers legal and technical assistance in incorporating IHL into national law
- Translates IHL treaties; carries out studies on the compatibility of national law with the obligations arising from these treaties; provides legal advice
- Encourages States to set up national IHL committees and assists them in their work
- Supports the work of advisory bodies to governments with respect to implementing, developing and disseminating IHL
- Promotes the exchange of information
- Manages a collection of texts on legislation, case law, national studies and manual for the armed forces; a database on the implementation of IHL accessible on the ICRC's website (www.icrc.org) and on the ICRC's CD-ROM on IHL
- Publishes specialist documents

- Produces factsheets on the main IHL treaties and topics relating to implementation; kits for ratifying treaties; guidelines on implementation measures; regular reports on national implementation worldwide; reports on seminars and meetings of experts.

Law of the Kyrgyz Republic “On Use and Protection of the Red Cross/Red Crescent Emblems”

(as of the eighth of September 2000, hereafter in referred to as the Law)

The Red Crescent emblem is used by:

1. Medical services of Armed forces of the Kyrgyz Republic and the religious personnel (during armed conflicts and in a peace time).

Article 3 of the Law:

2. Hospitals and civil medical institutions (during an armed conflict with permission of the Ministry of Health of the Kyrgyz Republic).

Article 4 of the Law:

3. The National Red Crescent society the Kyrgyz Republic (during an armed conflict with permission of the Ministry of Health of the Kyrgyz Republic or the Ministry of Defense of the Kyrgyz Republic; in peace time as a distinction sign, without any permissions)

Article 7 of the Law:

Legal Protection of the Emblems.

In the Kyrgyz Republic it shall be prohibited to: To use the emblem by persons and institutions having the right to use it (employees of national societies, ICRC, sanitary healthcare units) for the purposes mismatching the principles of the Red Cross and Red Crescent Movement (for supporting political actions and use during off-duty time).

Emblem imitation, i.e. use of the signs, which can be identified with emblems of Red Cross or Red Crescent (for example, because of matching in color or a configuration) and erroneously accept as the Red Cross emblems.

The Code of the Kyrgyz Republic on Administrative Responsibility

...Article 431-1: Illegal use of The Red Cross/Red Crescent emblems shall result in imposing of an administrative penalty on the citizens - from five to ten; on officials - from ten to fifty, on legal entities - from one hundred to five hundred minimum monthly wages with deprivation of a license (per-

mission) to be engaged in an appropriate kind of activity for the period of up to one year.

Article 431-2: Illegal use of the white cross on a red background shall result in imposing of the administrative penalty on citizens - from five to ten, on officials - from ten to fifty, on legal entities - from one hundred to five hundred minimum monthly wages with deprivation of a license (permission) to be engaged in an appropriate kind of activity for the period of up to one year.

4. Perfidious use of the emblem

Use of the Red Cross or Red Crescent (Red Crystal) emblems during a war-time for protection of armed persons (combatants) or military equipment and other facilities (for example, transportation of armed persons in ambulance cars or helicopters with an emblem on a board or installation of a flag with a red cross or a red crescent on a warehouse with arms) shall be a war crime.

Article 10 of the Law:

A person who deliberately committed or gave the order to commit actions leading to death or creating heavy harm to health of an enemy, perfidiously using the Red Cross / Red Crescent emblem Red, or a distinction signal, and thus committed a war crime, shall be subject to responsibility and punishment according to the legislation of the Kyrgyz Republic.

Perfidious use means applying to good will of an enemy with the intention to mislead it and to force it to believe that it had the right to receive or was supposed to provide protection according to provisions of the international humanitarian law.

1. The National Red Crescent society of the Kyrgyz Republic and other components of the Red Cross / Red Crescent Movement can use the emblems for carrying out of different actions related to fund raising in conformity with its Basic principles. Other entities, organizations or persons can be involved in such actions under specific conditions.

Under permission of the Red Crescent Society of the Kyrgyz Republic the Red Crescent emblem can be used during peace time for specified medical vehicles and in locations of assistance points intended exclusively for rendering of free medical assistance to wounded and sick people (Article 6 of the Law)

2. In compliance with paragraph 4.2. of the order of the Ministry of Health of the Kyrgyz Republic as of November the 8th 2007 N393 "On approval of specific requirements to pharmaceutical institutions for implementation of pharmaceutical activity and activity related to sale of medical and healthcare products in the Kyrgyz Republic":

... on a facade of pharmaceutical institutions' building (drugstores, outlets, chemist's warehouses) the signboard having: a green cross, green letters on a white background: "Daarikana" – "Drugstore" shall be installed.



Drugstore sign



Red Cross Emblem

3. The National Red Crescent society of the Kyrgyz Republic (NRCS of the Kyrgyz Republic) shall use the Red Crescent emblem with open ends to the left on a white background, as well as the title "Red Crescent."



Article 3 of the Charter of the National Red Crescent society of the Kyrgyz Republic.

1. Illegal use of the emblems in a peace time can lead to distortion of their actual meaning and loss of their value.

After beginning of military actions to fight against abusing its usage can be too late; victims of armed conflicts will appear left to mercy of their fates; rendering of humanitarian assistance to them will become a hardly resolvable problem.

Each of us can promote preservation and increase of the emblem's value as a protective mark.

All of us bear personal responsibility for providing protection stipulated by the emblems, which will perhaps rescue lives tomorrow!

Regulations of the Permanent Interdepartmental Commission Under the Ministry of Justice of the Kyrgyz Republic on Implementation of International Humanitarian Law²⁷⁴

I. Principal provisions

The Regulations of the permanent Interdepartmental Commission under the Ministry of Justice of the Kyrgyz Republic on implementation of international humanitarian law (hereinafter – the Regulations) defines the organization of work, conduct of meetings and making decisions by permanent Interdepartmental Commission under the Ministry of Justice of the Kyrgyz Republic on implementation of international humanitarian law (hereinafter – the Commission).

II. Organization of work of the Commission

2.1. The Commission carries out its activities in accordance with the Action Plan for implementation of international humanitarian law, developed on the basis of analysis of the legislation, approved by the Commission.

2.2. The Commission shall meet as necessary, but not less than once per quarter. Meeting of the Commission has a quorum if the meeting attended by at least two-thirds of the Commission members. Decisions shall be made by majority vote of those present, but only in the presence of interested members of the Commission on the subject. In their absence, this issue on the agenda of the Commission shall be postponed to the next meeting.

2.3. The draft agenda of the meeting of the Commission shall be formed by the Secretariat of the Commission seven days before the meeting and submitted to the Chairperson of the Commission with the related materials.

The draft agenda of the meeting and appropriate materials approved by the Chairperson of the Commission shall be sent to members of the Commission no later than 5 working days before the date of the meeting. Agenda of the meeting of the Commission shall be approved directly at the meeting by majority vote of those present to the Commission. Changes in the agenda may be amended at the suggestion of members of the Commission.

²⁷⁴ Dated August 20, 2010.

CHAPTER 4

CRIMINAL RESPONSIBILITY

Tribunals and the ICC

Yusuf Aksar, "From The Ad Hoc Tribunals to a Permanent International Criminal Court," 2004²⁷⁵

In contrast to the Nuremberg and Tokyo Tribunals, the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were established neither by the victors as a 'victor's court of justice' nor by the parties involved in the conflict, but rather by the UN Security Council on behalf of the entire international community in order to protect international peace and security. For this reason, the establishment of these Tribunals was innovative in character and some questions have arisen in relation to their creation by the UN Security Council.

As can be predicted, in the first case of the ICTY (Tadic Case), the defence challenged the legality of the establishment of the International Tribunal, on the grounds of jurisdiction of the Tribunal, as mentioned in detail above the Trial Chamber refused the jurisdictional challenge of the defence by deciding that 'the validity of the creation of the International Tribunal is not truly a matter of jurisdiction but rather of the lawfulness of its creation, involving scrutiny of the powers of the Security Council and of the manner of their exercise²⁷⁶. However, the fact that the Appeals Chamber did not accept the decision of the Trial Chamber with respect to the creation of the tribunal can be regarded as a separate concept from the jurisdiction of the Tribunal, and it took 'a more interventionist approach' and 'interpreted in an unprecedentedly broad manner the principle of competence de la competence.²⁷⁷ Under this principle, the examination of the establishment of the Tribunal is a part of jurisdiction

²⁷⁵ Yusuf Aksar, *Implementing International Humanitarian Law, The Ad Hoc Tribunals to a Permanent International Criminal Court*. pp. 3-4, 6-7 (Routledge, New York, 2004).

²⁷⁶ Trial Chamber, Tadic Case, Jurisdiction Decision, para.4; and also see paras. 5, 8, 40, and the explanation made on p.25 under the heading of 'In the Trial chamber' above.

²⁷⁷ Fox, pp. 435-6; see also Id. for the explanation made under 'In the Appeals Chamber', p. 34.

(‘incidental’ or ‘inherent’ jurisdiction) and every international tribunal or court does have a right to examine its creation as part of its jurisdiction.

From the point of view of international law, the decision held by the Appeals Chamber under the principle of competence de la competence should be regarded as reviewing the legality of the Security Council Resolution and the establishment of the Tribunal. This principle merely allows the Tribunal to examine and determine its own jurisdiction and it cannot be extended to the examination of the competence and appropriateness of the Security Council Resolution establishing the Tribunal²⁷⁸. As rightly held by the Trial Chamber and supported by the Prosecutor’s Response to the Defence Motions and Judge Li, in his separate opinion in the Appeals Chamber, the International Tribunal does not have any power to review its creation by the Security Council and its power as indicated in Article 1 of its Statute limited to ‘prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the Statute’, and also Articles 2-5 of the Statute of the Tribunal regulating the subject-matter jurisdiction of the Tribunal together with Article 1 cannot be interpreted as giving the Tribunal competence to review the acts of the Security Council in respect to the establishment of the Tribunal²⁷⁹....

In conclusion, the establishment of the International tribunals must be regarded as a contemporary example of the application of international humanitarian law for enforcing individual responsibility when the violations of international humanitarian and international human rights law have occurred²⁸⁰. Additionally, it should also be noted that the establishment of the ICTY and the ICTR has played a central role in the establishment of an international criminal court which should be considered as one of the major achievements of the international community before the new millennium. In this sense, the approach taken by the international community, just before the end of the twentieth century, should be perceived in the light that violations of fundamental human rights will not be tolerated in the new millennium....

There is no doubt that the established ICC will be guided by the practice of the ad hoc tribunals on a large scale. The impact of the Statutes of ad hoc tribunals on the ICC Statute clearly demonstrates this fact and it gives place to similar provisions regulating the principle of complementarity between national courts and the ICC which is different from ad hoc tribunals in terms of giving primacy to national courts as well as the principle of non bis in idem.

²⁷⁸ Separate Opinion of Judge Li, para. 2.

²⁷⁹ [citations omitted].

²⁸⁰ [citations omitted].

One of the other obstacles to creating an international criminal court is the question of the scope of the Court's subject-matter jurisdiction and personal jurisdiction. The practice of the international community with regard to the subject-matter jurisdiction of the ICTY and the ICTR have played the major role in preparing the ICC Statute. In fact, the ICC Statute should be seen mainly as a combination of Articles 2-5 of the ICTY and Articles 2-4 the ICTR Statutes on the ground that the crime of genocide, war crimes and crimes against humanity constitute the subject-matter jurisdiction of the ad hoc tribunals as well as the jurisdiction of the ICC. The only exception is the inclusion of the crime of aggression in the ICC Statute. The view taken by the international community at this point reflects the best way to provide universal acceptance of the ICC which paved the way for early ratification of the Statute and brought the ICC into operation. With regard to the personal jurisdiction of the ICC, the same view as that of the ICTY and the ICTR was deployed by the international community and according to this, the ICC has jurisdiction only over natural persons, not over legal entities and States.

In respect to the issue of procedural laws to be applied by an international criminal court, the procedural law being applied by the ad hoc tribunals should be seen as mainly reflecting the principles of international human rights law and as in compliance with the human rights instruments such as the ICCPR, ECHR and ACHR that all provide a fair trial for the accused persons. The impact of the ICTY and the ICTR Statutes on the ICC Statute and its Rules of Procedure and Evidence can be again examined in this regard.

Principal of Universal Jurisdiction

Arrest Warrant (Democratic Republic of the Congo v. Belgium), 2002²⁸¹

56. The Court will now address Belgium's argument that immunities accorded to incumbent Ministers for Foreign Affairs can in no case protect them where they are suspected of having committed war crimes or crimes against humanity. In support of this position, Belgium refers in its Counter-Memorial to various legal instruments creating international criminal tribunals, to examples from national legislation, and to the jurisprudence of national and international courts...

²⁸¹ Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 3.

58. The Court has carefully examined State practice, including national legislation and those few decisions of national higher courts, such as the House of Lords or the French Court of Cassation. It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.

The Court has also examined the rules concerning the immunity or criminal responsibility of persons having an official capacity contained in the legal instruments creating international criminal tribunals, and which are specifically applicable to the latter (see Charter of the International Military Tribunal of Nuremberg, Art. 7; Charter of the International Military Tribunal of Tokyo, Art. 6; Statute of the International Criminal Tribunal for the former Yugoslavia, Art. 7, para. 2; Statute of the International Criminal Tribunal for Rwanda, Art. 6, para. 2; Statute of the International Criminal Court, Art. 27). It finds that these rules likewise do not enable it to conclude that any such an exception exists in customary international law in regard to national courts.

Finally, none of the decisions of the Nuremberg and Tokyo international military tribunals, or of the International Criminal Tribunal for the former Yugoslavia, cited by Belgium deal with the question of the immunities of incumbent Ministers for Foreign Affairs before national courts where they are accused of having committed war crimes or crimes against humanity. The Court accordingly notes that those decisions are in no way at variance with the findings it has reached above.

In view of the foregoing, the Court accordingly cannot accept Belgium's argument in this regard.

59. It should further be noted that the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction. Thus, although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs. These remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions.

60. The Court emphasizes, however, that the immunity from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy

impunity in respect of any crimes they might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.

61. Accordingly, the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances.

First, such persons enjoy no criminal immunity under international law in their own countries, and may thus be tried by those countries' courts in accordance with the relevant rules of domestic law.

Secondly, they will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity.

Thirdly, after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.

Fourthly, an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The latter's Statute expressly provides, in Article 27, paragraph 2, that "[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."

Declaration of Judge Ranjeva

[p. 58 Decl. Ranjeva] I sum, the issue of universal jurisdiction in absentia arises from the problem created by the possibility of extraterritorial criminal jurisdiction in the absence of any connection between the State claiming such jurisdiction and the territory in which the alleged offences took place – of any effective authority of that State over the suspected offenders. This

problem stems from the nature of an instrument of criminal process: it is not a mere abstraction; it is enforceable, and, as such, requires a minimum material basis under international law. It follows that an explicit prohibition on the exercise, as construed by Belgium, of universal jurisdiction does not represent a sufficient basis.

Separate Opinion of Judge Higgins, Koijmans, and Buergenthal

[pp. 80-81 J.S.O. Higgins, Koijmans, Buergenthal] If, as we believe to be the case, a State may choose to exercise a universal criminal jurisdiction in absentia, it must also ensure that certain safeguards are in place. They are absolutely essential to prevent abuse and to ensure that the rejection of impunity does not jeopardize stable relations between States.

No exercise of criminal jurisdiction may occur which fails to respect the inviolability or infringes the immunities of the person concerned. We return below to certain aspects of this facet, but will say at this juncture that commencing an investigation on the basis of which an arrest warrant may later be issued does not of itself violate those principles. The function served by the international law of immunities does not require that States fail to keep themselves informed.

A State contemplating bringing criminal charges based on universal jurisdiction must first offer to the national State of the prospective accused person the opportunity itself to act upon the charges concerned. The Court makes reference to these elements in the context of this case at paragraph 16 of its Judgment.

Further, such charges may only be laid by a prosecutor or juge d'instruction who acts in full independence, without links to or control by the government of that State. Moreover, the desired equilibrium between the battle against impunity and the promotion of good inter-State relations will only be maintained if there are some special circumstances that do require the exercise of an international criminal jurisdiction and if this has been brought to the attention of the prosecutor or juge d'instruction. For example, persons related to the victims of the case will have requested the commencement of legal proceedings.

James Crawford, “Human Rights and State Responsibility”²⁸²

(a) Direct responsibility of armed opposition groups

The rules set out in the Articles on State Responsibility relate to the responsibility of States. They are without prejudice to the general law of responsibility. Moving beyond the question of attribution of the acts of an insurrectionist movement to a State, it may be asked whether such a movement might incur responsibility on its own under international law—for example, for acts in violation of the law of human rights.

Protocol I to the 1949 Geneva Conventions extends the protections of common Article 2 of the Conventions, *inter alia*, to “armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.” Subscription to Protocol I is incomplete, and, even on its terms, it is not explicit as to the responsibility of armed opposition groups involved in internal armed conflict. It may be that, because the Protocol extends to such groups the substantive rights earlier reserved to situations of inter-State warfare, the Protocol also establishes their responsibility on a footing similar to State responsibility.

Zegveld makes the point that much of the law concerning internal armed opposition relates to the rights of victims—i.e., to violations of the human rights and humanitarian interests of civilians caught up in an internal conflict; and that this focus of the law involves a neglect of the question of attribution of responsibility – i.e., of the question against whom to oppose the victims’ rights.²⁸³

Though international bodies have hesitated to attribute human rights violations to armed opposition groups, there have been instances in which human rights violations have been identified in internal armed conflicts. For example, the Inter-American Commission, in its Second Report on the Situation of Human Rights in Colombia (1993), stated that the activities of armed groups “are detrimental to the exercise of the most important human rights.”²⁸⁴ The special rapporteurs and working group chairpersons of the UN

²⁸² 12th Raymond & Beverly Sackler Distinguished Lecture Series (October 25, 2006).

²⁸³ Liesbeth Zegveld, *The Accountability of Armed Opposition Groups in International Law*, Cambridge, Cambridge University Press, 2002, p 3.

²⁸⁴ Inter-American Commission Second Report on the Situation of Human Rights in

Commission on Human Rights once noted “the adverse effects [the actions of armed groups] might have on the enjoyment of human rights.”²⁸⁵ The UN Secretary-General in his 1999 report on Fundamental Standards of Humanity, noted that “some argue that non-State actors should also be held accountable under international human rights law, especially in situations where the State structures no longer exist or where States are unable or unwilling to mete out punishment for crimes committed by non-State actors.”²⁸⁶ This is however rather equivocal, the practice of the international human rights bodies by no means establishing decisively the international responsibility of armed opposition groups engaged in hostilities against the State. Indeed, in various instances in which governments alleged violations of human rights by armed opposition groups, the Commission on Human Rights resisted characterizing acts of armed groups as violations of human rights.²⁸⁷

(b) Direct responsibility of private sector entities for complicity with the State

United States federal law presents the possibility of private litigants establishing the direct responsibility of private sector entities for complicity with the State in violations of human rights. This position, which is unusual in national legislation generally, owes to the Alien Tort Claims Act, which provides that “[t]he [federal] district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”²⁸⁸ After a long period of obscurity, the Act was applied to establish jurisdiction over a claim by Paraguayan nationals against a Paraguayan official for alleged acts of torture, *Filartiga v Pena-Irala*²⁸⁹ triggering a modern discussion over the meaning of the 18th century expression “violations of the law of nations.”²⁹⁰ Lower courts oscillated

Colombia, OEA/Ser.L/V/II.84, p 213 (1993).

²⁸⁵ UN Commission on Human Rights, E/CN.4/1997/3, para 44: Report of the Meeting of Special Rapporteurs/Representatives Experts and Chairpersons of Working Groups of the Special Procedures of the Commission on Human Rights and the Advisory Services Programme, 30 September 1996. Quoted in Zegveld, 38-9.

²⁸⁶ Report of the Secretary-General on Fundamental Standards of Humanity, Commission on Human Rights, E/CN.4/1999/92 (para 13), 18 December 1998. Quoted in Zegveld, 47.

²⁸⁷ Zegveld 46 and n 132.

²⁸⁸ Judiciary Act of 1789, ch 20 2 9(b), 1 Stat 73, 77 (1789), codified at 28 USC s 1350.

²⁸⁹ 630 F.2d 876 (2nd Cir 1980).

²⁹⁰ Some of the issues were identified immediately after *Filartiga*: see, e.g., Daniel Dokos, “Enforcement of International Human Rights in Federal Courts After *Filartiga v Pena-Irala*,” (1981) 67 *Virginia Law Review* 1379.

between a restrictive view, that the expression “law of nations” referred to international law as it existed in 1789²⁹¹, and an expansive one, that the Act establishes a cause of action under any international law rule now in force. The Supreme Court adopted the expansive view in *Sosa v Alvarez-Machain*.²⁹²

Two post-*Sosa* decisions in federal courts address the attribution of serious violations of human rights rules to private sector entities. *Sarei v Rio Tinto Plc.*, decided 7 August 2006 by a three-judge panel of the Court of Appeals for the Ninth Circuit, arose out of activities of a British mining company on the island of Bougainville in Papua New Guinea.²⁹³ *Presbyterian Church of Sudan v Talisman Energy Inc.*, decided 12 September 2006 by the District Court for the Southern District of New York, arose out of activities of a Canadian mining company in the Sudan.²⁹⁴ In both, federal jurisdiction was asserted on the basis of the Alien Tort Claims Act. The cases present questions concerning the responsibility (“liability”) of private sector actors under international law for acts of their own; and concerning the complicity of private sector actors in acts done by the State on the territory of which they operate.

The plaintiffs’ case in *Rio Tinto* had been dismissed by the District Court on grounds that it presented non-justiciable political questions, or was barred under act of state doctrine and the doctrine of international comity. The Court of Appeals set out the facts as alleged by the plaintiffs:

“[T]he defendant Rio Tinto, an international mining company, with the assistance of the PNG Government, committed various egregious violations of jus cogens norms and customary international law including racial discrimination, environmental devastation, war crimes and crimes against humanity, with severe repercussions for many citizens of PNG.”²⁹⁵

Black labourers in *Rio Tinto*’s copper and gold mining operations were alleged to have lived in “slave-like” conditions. Their mental and physical health was damaged, as was the surrounding environment, by the waste products of the mining operations. A civil war erupted between the Bougainvilians and the PNG, the former seeking to secede from the latter. This lasted ten years and involved serious violations of human rights and humanitarian

²⁹¹ See *Tel-Oren v Libyan Arab Republic*, 726 F.2d 724, 823 (D.C. Cir. 1984, Bork J concurring).

²⁹² 542 U.S. 692 (2004).

²⁹³ 456 F.3d 1069 (9th Cir. 2006; Fisher CJ; Bybee CJ dissenting).

²⁹⁴ 453 F.Supp.2d 633, 12 September 2006 (Cote J).

²⁹⁵ 456 F.3d 1069, 1074.

law.²⁹⁶ The lower court, though dismissing on the grounds noted, held that “if proven, the allegations supported liability against Rio Tinto for certain acts committed by the PNG government” and that the plaintiffs had stated “cognizable ATCA claims for racial discrimination, crimes against humanity and violations of the laws of war.”²⁹⁷

Command Responsibility

*Prosecutor v. Juvénal Kajelijeli*²⁹⁸

740. From the evidence presented in the present section and these findings regarding the Accused’s active involvement in the killings that occurred in Mukingo, Nkuli and Kigombe communes in April 1994, it follows that the Accused knew that Interahamwe from Mukingo and Nkuli communes—who were under his effective control at that time—were participating in those killings. The Chamber finds that the Accused failed to take any measures to prevent or stop those acts. In making this finding, the Chamber found further corroboration in the testimony of Prosecution Witness GBH, who stated that he pleaded with the Accused to stop the killings but the Accused refused, saying that “it was necessary to continue, look for those or hunt for those who had survived”²⁹⁹. Thus, even though the Prosecution failed to provide any evidence establishing that the Accused indeed had authority to issue circulation passes (*laissez-passer*) between the 1 January 1994 and 26 June 1994 or that he refused to do so, the Chamber finds that the Accused failed to prevent or stop the killings of early to mid-April 1994 in Mukingo, Nkuli and Kigombe communes...

770. Article 6(3) of the ICTR Statute addresses the criminal responsibility of a superior by virtue of his or her knowledge of the acts and omissions of subordinates and for failure to prevent, discipline, or punish the criminal acts of his or her subordinates in the preparation and execution of the crimes charged. The principle of superior responsibility, which derives from the principle of individual criminal responsibility as applied in the Nuremberg and

²⁹⁶ *ibid.*, 1075.

²⁹⁷ *Sarei v Rio Tinto PLC*, 221 F. Supp.2d 1116 (C.D. Cal. 2002), 1148-9, 1139-63.

²⁹⁸ International Criminal Tribunal for Rwanda, Judgment of 1 December 2003 Case No. ICTR-98-44A-T.

²⁹⁹ T. 17 July 2001, pp. 59-61 (GBH).

Tokyo trials, was subsequently codified in Article 86 of the Additional Protocol I to the Geneva Conventions in 1977. Article 6(3) of the Statute, which is applicable to genocide, crimes against humanity, and serious violations of Article 3 Common to the Geneva Conventions and Additional Protocol II, provides as follows: The fact that any of the acts referred to in Articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof³⁰⁰.

771. The jurisprudence of both the ICTR and the ICTY has recognised that a civilian or a military superior, with or without official status, may be held criminally responsible for offences committed by subordinates who are under his or her effective control³⁰¹. The chain of command between a superior and subordinates may be either direct or indirect³⁰².

772. The following three concurrent conditions must be satisfied before a superior may be held criminally responsible for the acts of his or her subordinates:

(i) There existed a superior-subordinate relationship between the person against whom the charge is directed and the perpetrators of the offence;

(ii) The superior knew or had reason to know that the criminal act was about to be or had been committed³⁰³;

(iii) The superior failed to exercise effective control to prevent the criminal act or to punish the perpetrators thereof³⁰⁴.

775. To hold a superior responsible for the criminal conduct of subordinates, the Chamber must be satisfied that the superior possessed the requisite mens rea, namely that he or she knew or had reason to know of such conduct.

³⁰⁰ International Criminal Tribunal for Rwanda ICTR Statute, Article 6(3).

³⁰¹ Semanza, Judgment (TC), para. 400; Bagilishema, Judgment (AC), paras. 50 and 51; Kayishema and Ruzindana, Judgment (TC), para. 294; Musema, Judgment (TC), para. 148; Celebici, Judgment (AC), paras. 192-196.

³⁰² Semanza Judgment (TC), para. 400.

³⁰³ For example, crimes within the jurisdiction of the Tribunal.

³⁰⁴ Celebici, Judgment (AC), paras. 189-198, 225-226, 238-239, 256 and 263; Celebici, Judgment (TC), para. 346; Blaskic, Judgment (TC), para. 294; Aleksovski, Judgment (TC), para. 69; Kordic, Judgment (TC), para. 401; Kunarac and Kovac, Judgment (TC), para. 395; Kayishema and Ruzindana, Judgment (TC), paras. 217-231; Bagilishema, Judgment (AC), paras. 26-62; Bagilishema, Judgment (TC), paras. 38-50; Semanza, Judgment (TC), para. 400; Niyitegeka, Judgment (TC), para. 477.

776. A superior in a chain of hierarchical command with authority over a given geographical area will not be held strictly liable for subordinates' crimes³⁰⁵. While an individual's hierarchical position may be a significant indicium that he or she knew or had reason to know about subordinates' criminal acts, knowledge will not be presumed from status alone³⁰⁶.

777. A superior is under a duty to act where he or she knew or had reason to know that subordinates had committed or were about to commit offences covered by Articles 2, 3, and 4 of the Statute³⁰⁷.

Genocide

Application of the Convention for the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)³⁰⁸

186. The Court notes that genocide as defined in Article II of the Convention comprises "acts" and an "intent." It is well established that the acts -

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group; [and]
- (e) Forcibly transferring children of the group to another group"

- themselves include mental elements. "Killing" must be intentional, as must "causing serious bodily or mental harm." Mental elements are made explicit in paragraphs (c) and (d) of Article II by the words "deliberately" and "intended," quite apart from the implications of the words "inflicting" and

³⁰⁵ Semanza, Judgment (TC), para. 404; Bagilishema, Judgment (TC), paras. 44-45; Akayesu, Judgment (TC), para. 489.

³⁰⁶ Semanza, (TC), para. 404; Bagilishema, Judgment (TC), para. 45.

³⁰⁷ Semanza, Judgment (TC), para. 405 ; Bagilishema, Judgment (TC), para.46; Celebici, Judgment (TC), paras. 384-386.

³⁰⁸ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, p. 43.

“imposing”; and forcible transfer too requires deliberate intentional acts. The acts, in the words of the ILC, are by their very nature conscious, intentional or volitional acts (Commentary on Article 17 of the 1996 Draft Code of Crimes against the Peace and Security of Mankind, ILC Report 1996, Yearbook of the International Law Commission, 1996, Vol. II, Part Two, p. 44, para. 5).

187. In addition to those mental elements, Article II requires a further mental element. It requires the establishment of the “intent to destroy, in whole or in part,... [the protected] group, as such.” It is not enough to establish, for instance in terms of paragraph (a), that deliberate unlawful killings of members of the group have occurred. The additional intent must also be established, and is defined very precisely. It is often referred to as a special or specific intent or *dolus specialis*; in the present Judgment it will usually be referred to as the “specific intent (*dolus specialis*).” It is not enough that the members of the group are targeted because they belong to that group, that is because the perpetrator has a discriminatory intent. Something more is required. The acts listed in Article II must be done with intent to destroy the group as such in whole or in part. The words “as such” emphasize that intent to destroy the protected group.

188. The specificity of the intent and its particular requirements are highlighted when genocide is placed in the context of other related criminal acts, notably crimes against humanity and persecution, as the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (hereinafter “ICTY” or “the Tribunal”) did in the Kupreškić et al case:

“the mens rea requirement for persecution is higher than for ordinary crimes against humanity, although lower than for genocide. In this context the Trial Chamber wishes to stress that persecution as a crime against humanity is an offence belonging to the same genus as genocide. Both persecution and genocide are crimes perpetrated against persons that belong to a particular group and who are targeted because of such belonging. In both categories what matters is the intent to discriminate: to attack persons on account of their ethnic, racial, or religious characteristics (as well as, in the case of persecution, on account of their political affiliation). While in the case of persecution the discriminatory intent can take multifarious inhumane forms and manifest itself in a plurality of actions including murder, in the case of genocide that intent must be accompanied by the intention to destroy, in whole or in part, the group to which the victims of the genocide belong. Thus, it can be said

that, from the viewpoint of mens rea, genocide is an extreme and most inhuman form of persecution. To put it differently, when persecution escalates to the extreme form of willful and deliberate acts designed to destroy a group or part of a group, it can be held that such persecution amounts to genocide.” (IT-95-16-T, Judgment, 14 January 2000, para. 636.)..

190. ... As the ICTY has observed, while “there are obvious similarities between a genocidal policy and the policy commonly known as ‘ethnic cleansing’” (Krstić, IT-98-33-T, Trial Chamber Judgment, 2 August 2001, para. 562), yet “[a] clear distinction must be drawn between physical destruction and mere dissolution of a group. The expulsion of a group or part of a group does not in itself suffice for genocide.” (Stakić, IT-97-24-T, Trial Chamber Judgment, 31 July 2003, para. 519.) In other words, whether a particular operation described as “ethnic cleansing” amounts to genocide depends on the presence or absence of acts listed in Article II of the Genocide Convention, and of the intent to destroy the group as such. In fact, in the context of the Convention, the term “ethnic cleansing” has no legal significance of its own. That said, it is clear that acts of “ethnic cleansing” may occur in parallel to acts prohibited by Article II of the Convention, and may be significant as indicative of the presence of a specific intent (*dolus specialis*) inspiring those acts.

Jorgic v. Germany, Decision of the European Court of Human Rights, 2007³⁰⁹

3. The applicant, invoking Article 5 § 1 (a) and Article 6 § 1 of the Convention, alleged that the German courts had not had jurisdiction to convict him of genocide. He further argued that, due, in particular, to the domestic courts’ refusal to call any witness for the defence who would have had to be summoned abroad he had not had a fair trial within the meaning of Article 6 §§ 1 and 3 (d) of the Convention. Moreover, he complained that his conviction for genocide was in breach of Article 7 § 1 of the Convention in particular because the national courts’ wide interpretation of that crime had no basis in German or public international law....

8. On 16 December 1995 the applicant was arrested when entering Germany and placed in pre-trial detention on the ground that he was strongly suspected of having committed acts of genocide....

³⁰⁹ Jorgic v. Germany, Application no. 74613/01, European Court of Human Rights, 12 July 2007.

18. Furthermore, the court found that the applicant had acted with intent to commit genocide within the meaning of Article 220a of the Criminal Code. Referring to the views expressed by several legal writers, it stated that the “destruction of a group” within the meaning of Article 220a of the Criminal Code meant destruction of the group as a social unit in its distinctiveness and particularity and its feeling of belonging together (“Zerstörung der Gruppe als sozialer Einheit in ihrer Besonderheit und Eigenart und ihrem Zusammengehörigkeitsgefühl”); a biological-physical destruction was not necessary. It concluded that the applicant had therefore acted with intent to destroy the group of Muslims in the North of Bosnia, or at least in the Doboje region...

35. Article 220a of the Criminal Code was inserted into the German Criminal Code by the Act of 9 August 1954 on Germany’s accession to the Genocide Convention and entered into force in 1955. Articles 6 no. 1 and 220a of the Criminal Code ceased to be effective on 30 June 2002 when the Code on Crimes against International Law (Völkerstrafgesetzbuch) entered into force. Pursuant to Article 1 of the new Code, it applies to criminal offences against international law such as genocide (see Article 6 of the new Code) even when the offence was committed abroad and bears no relation to Germany...

99. The Government conceded that in its judgment of 2 August 2001 in the case of *Prosecutor v. Krstić*, the Trial Chamber of the ICTY, as upheld on appeal, had expressly rejected the Federal Constitutional Court’s interpretation of the notion of “intent to destroy” in its judgment in the present case. Relying on the principle of *nullum crimen sine lege*, the ICTY had argued for the first time that the offence of genocide under public international law was restricted to acts aimed at the physical or biological destruction of a group. However, this narrower interpretation of the scope of the crime of genocide by the ICTY in 2001 – which, in the view, was not convincing – did not call into question the fact that it had been foreseeable for the applicant, when he committed his offences in 1992, that these would be qualified as genocide. In any event, the German courts had not qualified ethnic cleansing in general as genocide, but had found that the applicant, in the circumstances of the case, was guilty of genocide as he had intended to destroy a group as a social unit and not merely to expel it...

105. The Court notes that the domestic courts construed the “intent to destroy a group as such” systematically in the context of Article 220a § 1 of the Criminal Code as a whole, having regard notably to alternatives no. 4 (imposition of measures which are intended to prevent births within the group) and no. 5 (forcible transfer of children of the group into another group) of that provision, which did not necessitate a physical destruction of living members of

the group in question. The Court finds that the domestic courts' interpretation of "intent to destroy a group" as not necessitating a physical destruction of the group, which has also been adopted by a number of scholars (see paragraphs 36 and 47 above), is therefore covered by the wording, read in its context, of the crime of genocide in the Criminal Code and does not appear unreasonable...

113. In view of the foregoing, the Court concludes that, while many authorities had favoured a narrow interpretation of the crime of genocide, there had already been several authorities at the material time which had construed the offence of genocide in the same wider way as the German courts. In these circumstances, the Court finds that the applicant, if need be with the assistance of a lawyer, could reasonably have foreseen that he risked being charged with and convicted of genocide for the acts he had committed in 1992. In this context the Court also has regard to the fact that the applicant was found guilty of acts of a considerable severity and duration: the killing of several people and the detention and ill-treatment of a large number of people over a period of several months as the leader of a paramilitary group in pursuit of the policy of ethnic cleansing...

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803. As with other crimes, the crime of genocide requires a finding of both mens rea and actus reus. The mens rea for genocide comprises of the specific intent or *dolus specialis* described in the general clause of Article 2(2) of the Statute – i.e. the commission of a genocidal act 'with intent to destroy, in whole or in part, a national, ethnical, racial or religious group'. And the actus reus consists of any of the five acts listed under Article 2(2) of the Statute, as shown above³¹¹.

Proof of specific intent

804. In determining the specific intent of the crime of genocide it is instructive to consider the following pronouncement of Trial Chamber I in the Akayesu Case:

“[i]ntent is a mental factor which is difficult, even impossible, to determine. This is the reason why, in the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact. The Chamber considers that it is possible to deduce the genocidal intent inherent in a particular act charged

³¹⁰ International Criminal Tribunal for Rwanda. Judgment of: 1 December 2003. Case No. ICTR-98-44A-T.

³¹¹ See above: Part IV, Section D.

from the general context of the perpetration of other culpable acts systematically directed against the same group, whether these acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of membership of a particular group, while excluding the members of other groups can enable the Chamber to infer the genocidal intent of a particular act.”³¹²...

806. In *Kayishema and Ruzindana*³¹³, Trial Chamber II also agreed that it may be difficult to find explicit manifestations of intent by perpetrators. In those circumstances, the Chamber held, the perpetrator’s actions, including circumstantial evidence, may provide sufficient evidence of intent³¹⁴. According to the Chamber, some of the indicia of intent may be “[e]vidence such as the physical targeting of the group or of their property; the use of derogatory language toward members of the targeted group; the weapons employed and the extent of bodily injury; the methodical way of planning, the systematic manner of killing.”³¹⁵ In the ICTY *Jeliscic* Judgment, the Commission of Experts Report was quoted to this effect: “[i]f essentially the total leadership of a group is targeted, it could also amount to genocide. Such leadership includes political and administrative leaders, religious leaders, academics and intellectuals, business leaders and others – the totality per se may be a strong indication of genocide regardless of the actual numbers killed.”³¹⁶

To destroy

808. An Accused may be liable under Article 2 if he ‘intends to destroy a [...] group.’ The Trial Chambers of the Tribunal and particularly that in *Semanza* made reference to the Report of the International Law Commission which states that destruction within the meaning of Article 2 is “[t]he material destruction of a group either by physical and biological means and not the destruction of the national, linguistic, religious, cultural or other identity of a particular group.”³¹⁷

³¹² *Akayesu*, Judgment (TC), para. 523.

³¹³ *Kayishema and Ruzindana*, Judgment (TC), para. 93.

³¹⁴ The Chamber drew conclusions from a legal text, which cited the Final Report of Commission of Experts to the effect that the specific intent may be inferred from sufficient facts such as the number of group members affected: see *Kayishema and Ruzindana*, Judgment (TC), para. 93.

³¹⁵ *Kayishema and Ruzindana*, Judgment (TC), para. 93.

³¹⁶ *Jeliscic*, Judgment (TC), 14 December 1999, para. 82.

³¹⁷ See “ILC Report 1996; Draft Code of Crimes Against the Peace and Security of

In whole or in part

809. Under Article 2, an accused may be liable if he ‘intends to destroy in whole or in part a ... group.’ As has been explained in judgments of this Tribunal, in order to establish an intent to destroy ‘in whole or in part’, it is not necessary to show that the perpetrator intended to achieve the complete annihilation of a group from every corner of the globe. Nevertheless, the perpetrator must have intended to destroy more than an imperceptible number of the targeted group³¹⁸. In effect, the Semanza Trial Chamber was correct in observing that while the Prosecution must establish, beyond reasonable doubt, the intent of the perpetrator to destroy the target group in whole or in part, there is no numeric threshold of victims necessary to establish genocide.³¹⁹...

Protected groups

811. It is required to show under Article 2 that the Accused, in committing genocide intended to destroy ‘a national, ethnical, racial or religious’ group. Trial Chambers of this Tribunal have noted that the said concept enjoys no generally or internationally accepted definition, rather each concept must be assessed in the light of a particular political, social, historical and cultural context³²⁰. Accordingly, “[f]or purposes of applying the Genocide Convention, membership of a group is, in essence, a subjective rather than an objective concept [where] the victim is perceived by the perpetrator of genocide as belonging to a group slated for destruction.”³²¹ A determination of the categorized groups should be made on a case-by-case basis, by reference to both objective and subjective criteria.³²²

The actus reus

812. The actus reus for the crime of genocide is provided for under Article 2(2) of the Statute. As the issues arising in the present case are so limited, the Chamber shall only review the meaning of the requirements: (a) “killing members of the group”; and (b) “causing serious bodily or mental harm to members of the group.”

Mankind,” p. 90; Semanza, Judgment (TC), 15 May 2003, para. 315; Kayishema and Ruzindana, Judgment (TC), para. 95.

³¹⁸ See “ILC Report 1996; Draft Code of Crimes Against the Peace and Security of Mankind,” p. 90; Bagilishema, Judgment (TC), para. 64; Kayishema and Ruzindana, Judgment (TC), para. 96; Akayesu, Judgment (TC), para. 496 - 499; Semanza, Judgment (TC), para. 316.

³¹⁹ Semanza, Judgment (TC), para. 316.

³²⁰ Bagilishema, Judgment (TC), para. 65; Musema, Judgment (TC), para. 161.

³²¹ Rutaganda, Judgment (TC), para. 56; Musema, Judgment (TC), para. 161; Semanza, Judgment (TC), para. 317.

³²² Semanza, Judgment (TC), para. 317.

843. The Chamber finds beyond a reasonable doubt that the Accused is criminally responsible for the acts of genocide (killing of members of the Tutsi ethnic group) committed by his subordinates in Mukingo and Nkuli Communes and at the Ruhengeri Court of Appeal in Kigombe Commune, pursuant to Article 6(3) of the Statute.

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6. Article 4 of the Tribunal's Statute, like the Genocide Convention,³²⁴ covers certain acts done with "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." The Indictment in this case alleged, with respect to the count of genocide, that Radislav Krstic "intend[ed] to destroy a part of the Bosnian Muslim people as a national, ethnical, or religious group."³²⁵ The targeted group identified in the Indictment, and accepted by the Trial Chamber, was that of the Bosnian Muslims.³²⁶ The Trial Chamber determined that the Bosnian Muslims were a specific, distinct national group, and therefore covered by Article 4.³²⁷ This conclusion is not challenged in this appeal.³²⁸

7. As is evident from the Indictment, Krstic was not alleged to have intended to destroy the entire national group of Bosnian Muslims, but only a part of that group. The first question presented in this appeal is whether, in finding that Radislav Krstic had genocidal intent, the Trial Chamber defined the relevant part of the Bosnian Muslim group in a way which comports with the requirements of Article 4 and of the Genocide Convention.

8. It is well established that where a conviction for genocide relies on the intent to destroy a protected group "in part," the part must be a substantial part of that group. The aim of the Genocide Convention is to prevent the intentional destruction of entire human groups, and the part targeted must be significant enough to have an impact on the group as a whole. Although the Appeals Chamber has not yet addressed this issue, two Trial Chambers of this Tribunal have examined it. In *Jeliscic*, the first case to confront the

³²³ International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991. Case No: IT-98-33-A. Date: 19 April 2004.

³²⁴ Article II of the Genocide Convention.

³²⁵ Indictment, para. 21.

³²⁶ See Trial Judgement, para. 558 ("the indictment in this case defined the targeted group as the Bosnian Muslims").

³²⁷ *Ibid.*, paras. 559 - 560.

³²⁸ See Defence Appeal Brief, paras. 28, 38.

question, the Trial Chamber noted that, “[g]iven the goal of the [Genocide] Convention to deal with mass crimes, it is widely acknowledged that the intention to destroy must target at least a substantial part of the group.”³²⁹ The same conclusion was reached by the Sikirica Trial Chamber: “This part of the definition calls for evidence of an intention to destroy a substantial number relative to the total population of the group.”³³⁰ As these Trial Chambers explained, the substantiality requirement both captures genocide’s defining character as a crime of massive proportions and reflects the Convention’s concern with the impact the destruction of the targeted part will have on the overall survival of the group.³³¹...

15. In this case, having identified the protected group as the national group of Bosnian Muslims, the Trial Chamber concluded that the part the VRS Main Staff and Radislav Krstic targeted was the Bosnian Muslims of Srebrenica, or the Bosnian Muslims of Eastern Bosnia. This conclusion comports with the guidelines outlined above....

24. The Defence also argues that the Trial Chamber erred in describing the conduct with which Radislav Krstic is charged as genocide. The Trial Chamber, the Defence submits, impermissibly broadened the definition of genocide by concluding that an effort to displace a community from its traditional residence is sufficient to show that the alleged perpetrator intended to destroy a protected group.³³²

25. The Genocide Convention, and customary international law in general, prohibit only the physical or biological destruction of a human group. The Trial Chamber expressly acknowledged this limitation, and eschewed any broader definition. The Chamber stated: “[C]ustomary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group. [A]n enterprise attacking only the

³²⁹ Jelisić Trial Judgement, para. 82 (citing Report of the International Law Commission on the Work of its Forty-Eighth Session, 6 May – 26 July 1996, G.A.O.R., 51st session, Supp. No. 10 (A/51/10) (1996), p. 89; Nehemiah Robinson, *The Genocide Convention: A Commentary* (1960) (1st ed. 1949), p. 63; Genocide Convention, Report of the Committee on Foreign Relations, U.S. Senate, 18 July 1981), p. 22). The Jelisić Trial Judgement was reversed in part by the Appeals Chamber on other grounds. See Jelisić Appeal Judgement, para. 72. The Trial Chamber’s definition of what constitutes an appropriate part of the group protected by the Genocide Convention was not challenged.

³³⁰ Sikirica Judgement on Defence Motions to Acquit, para. 65.

³³¹ Jelisić Trial Judgement, para. 82; Sikirica Judgement on Defence Motions to Acquit, para. 77.

³³² Defence Appeal Brief, para. 43.

cultural or sociological characteristics of a human group in order to annihilate these elements which give to that group its own identity distinct from the rest of the community would not fall under the definition of genocide.”³³³

26. ...The Trial Chamber found that, in executing the captured Bosnian Muslim men, the VRS did not differentiate between men of military status and civilians.³³⁴ Though civilians undoubtedly are capable of bearing arms, they do not constitute the same kind of military threat as professional soldiers. The Trial Chamber was therefore justified in drawing the inference that, by killing the civilian prisoners, the VRS did not intend only to eliminate them as a military danger. The Trial Chamber also found that some of the victims were severely handicapped and, for that reason, unlikely to have been combatants.³³⁵ This evidence further supports the Trial Chamber’s conclusion that the extermination of these men was not driven solely by a military rationale.

27. Moreover, as the Trial Chamber emphasized, the term “men of military age” was itself a misnomer, for the group killed by the VRS included boys and elderly men normally considered to be outside that range.³³⁶ Although the younger and older men could still be capable of bearing arms, the Trial Chamber was entitled to conclude that they did not present a serious military threat, and to draw a further inference that the VRS decision to kill them did not stem solely from the intent to eliminate them as a threat. The killing of the military aged men was, assuredly, a physical destruction, and given the scope of the killings the Trial Chamber could legitimately draw the inference that their extermination was motivated by a genocidal intent.

³³³ Trial Judgement, para. 580. See also *ibid.*, para. 576 (discussing the conclusion of the International Law Commission, quoted in note 39, *supra*).

³³⁴ *Ibid.*, paras. 547, 594.

³³⁵ *Ibid.*, para. 75 & n. 155.

³³⁶ *Ibid.*, n. 3.

Crimes Against Humanity

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864. The Accused is charged with the acts of Murder, Extermination, Rape, and Other inhumane acts as Crimes against Humanity³³⁸. The commission of any of these acts by the Accused will only amount to a Crime against Humanity, if the Chamber finds that it was committed as part of a widespread or systematic attack on a civilian population on any of the following discriminatory grounds: nationality, political persuasion, ethnicity, race or religion.

865. In relation to each count which charges the Accused with a Crime against Humanity, the Prosecution is required to prove the elements indicated above.

866. An act may form part of the widespread or systematic attack without necessarily sharing all the same features, such as the time and place of commission of the other acts constituting the attack. In determining whether an act forms part of a widespread or systematic attack, the Chamber will consider its characteristics, aims, nature, and consequence.

The General Elements

The Attack

867. The Chamber adopts the accepted definition of “attack” within this Tribunal, where it is generally defined as “an unlawful act, event, or series of events of the kind listed in Article 3(a) through (i) of the Statute.”³³⁹ This definition has remained constant throughout the jurisprudence of the Tribunal³⁴⁰.

868. Moreover, an attack committed on specific discriminatory grounds need not necessarily require the use of armed force, it could also involve other forms of inhumane mistreatment of the civilian population³⁴¹.

³³⁷ International Criminal Tribunal for Rwanda. Judgment of: 1 December 2003. Case No. ICTR-98-44A-T.

³³⁸ The Count 7 on Persecutions on political, racial and religious grounds as a Crime Against Humanity was withdrawn by the Prosecution in its Closing brief (Corrigendum), 19 June 2003, paras. 138 and 139.

³³⁹ Semanza, Judgment (TC), para. 327.

³⁴⁰ Musema, Judgment (TC), para. 205; Rutaganda, Judgment (TC), para. 70; Akayesu, Judgment (TC), para. 581.

³⁴¹ Semanza, Judgment (TC), para. 327; Musema, Judgment (TC), para.205; Rutaganda, Judgment (TC), para. 70; Akayesu, Judgment (TC), para. 581.

The Attack Must be Widespread or Systematic

869. The French and the English language versions of the Statute, equally authentic, do not say the same thing. The French language version has the conjunctive “widespread and systematic”³⁴² whilst the English language version has the disjunctive “widespread or systematic.” The practice of the ICTR and ICTY Tribunals has been to accept the English language version,³⁴³ in line with customary international law³⁴⁴.

870. Trial Chamber III in *Semanza* held that: “The Chamber does not see any reason to depart from the uniform practice of the two Tribunals.”³⁴⁵ This Chamber also adopts this practice, and will use the English language version, where the applicable standard is “widespread or systematic.”

Widespread

871. The term “Widespread,” as an element of the attack within the meaning of Article 3 of the Statute, has been given slightly different meanings within the various Trial Chamber Judgments of the Tribunal. However, all can be said to refer to the scale of the attack, and sometimes the multiplicity of victims³⁴⁶. The Chamber, following broadly the definition given in the

³⁴² The relevant provision of the French text in Article 3 of the Statute reads “généralisée et systématique”.

³⁴³ *Semanza*, Judgment (TC), para. 328; *Ntakirutimana and Ntakirutimana*, Judgment (TC), para. 804; *Bagilishema*, Judgment (TC), para. 77; *Musema*, Judgment (TC), paras. 202-203; *Rutaganda*, Judgment (TC), para. 68; *Kayishema and Ruzindana*, Judgment (TC), para. 123; *Akayesu*, Judgment (TC), para. 579. The same position has been taken in the ICTY, however it must be emphasized that article 5 of ICTY Statute does not contain the requirement that the crimes must be committed as part of a widespread or systematic attack, which has been constructed in ICTY jurisprudence in line with customary international law. *Tadic*, Judgment (TC), paras. 646-648. See also *Kunarac*, Judgment (AC), para. 93; *Tadic*, Judgment (AC), para. 248; *Krnjelac*, Judgment (TC), para. 55; *Krstic*, Judgment (TC), para. 480; *Kordic and Cerkez*, Judgment (TC), para. 178; *Blaskic*, Judgment (TC), para. 202; *Kupreskic*, Judgment (TC), para. 544; *Jelusic*, Judgment (TC), para. 53.

³⁴⁴ For a review of the International practice on this issue see: *Tadic*, Judgment (TC), paras. 646-648.

³⁴⁵ *Semanza*, Judgment (TC), para. 328.

³⁴⁶ *Semanza*, Judgment (TC), para. 329; *Niyitegeka*, Judgment (TC), para. 439; *Ntakirutimana and Ntakirutimana*, Judgment (TC), para. 804; *Bagilishema*, Judgment (TC), para. 33; *Musema*, Judgment (TC), para. 204; *Rutaganda*, Judgment (TC), para. 69; *Kayishema and Ruzindana*, Judgment (TC), para. 123; *Akayesu*, Judgment (TC), para. 580.

Niyitegeka³⁴⁷ and Ntakirutimana³⁴⁸ Judgments, adopts the test of “large scale, involving many victims.”

Systematic

872. There has been some debate in the jurisprudence of this Tribunal about whether or not the term systematic necessarily contains a notion of a policy or a plan³⁴⁹. The Chamber finds that it does not, and adopts the same position as Trial Chamber III in Semanza, where it endorsed the jurisprudence of the Appeals Chamber of the ICTY in Kunarac, that whilst “the existence of a policy or plan may be evidentially relevant, in that it may be useful in establishing that the attack was directed against a civilian population and that it was widespread and systematic, [...] the existence of such a plan is not a separate legal element of the crime”³⁵⁰. The Chamber finds that “Systematic,” as an element of the attack within Article 3 of the Statute, describes the organized nature of the attack. Demonstration of a pattern of conduct will also carry evidential value in the Chamber’s final analysis.

The Attack Must be Directed Against any Civilian Population

873. Akayesu defined the civilian population as:

...people who are not taking any active part in the hostilities, including members of the armed forces who laid down their arms and those persons hors de combat by sickness, wounds, detention or any other cause. Where there are certain individuals within the civilian population who do not come within the definition of civilians, this does not deprive the population of its civilian character³⁵¹.

874. This definition has been consistently followed in the jurisprudence of the Tribunal³⁵². Bagilishema added:

It also follows that, as argued in Blaskic, “the specific situation of the victim at the moment the crimes were committed, rather than his status, must be taken into account in determining his standing as a civilian”³⁵³.

³⁴⁷ Niyitegeka, Judgment (TC), para 439.

³⁴⁸ Ntakirutimana and Ntakiutimana, Judgment (TC), para. 804.

³⁴⁹ Semanza, Judgment, (TC), para. 329; Bagilishema, Judgment (TC), para. 77; Kayishema and Ruzindana, Judgment (TC), para. 123-124.

³⁵⁰ Semanza, Judgment (TC), para. 329; referring to Kunarac, Judgment (AC), para. 98.

³⁵¹ Akayesu, Judgment (TC), para. 582.

³⁵² Rutaganda, Judgment (TC), para. 72; Musema, Judgment (TC), para. 207; Semanza, Judgment (TC), para. 330.

³⁵³ Bagilishema, Judgment (TC), para. 79, referring to Blaskic, Judgment (TC), para. 214.

875. It was also noted in Bagilishema that the term “population” does not require that the crimes against humanity be directed against the entire population of a geographic territory or area³⁵⁴. Semanza further clarified that:

The victim(s) of the enumerated act need not necessarily share geographic or other defining features with the civilian population that forms the primary target of the underlying attack, but such characteristics may be used to demonstrate that the enumerated act forms part of the attack.³⁵⁵...

The Attack Must be Committed on Discriminatory Grounds

877. Article 3 of the Statute provides that the attack against the civilian population be committed on “national, political, ethnical, racial or religious grounds.” This provision is jurisdictional in nature, limiting the jurisdiction of the Tribunal to a narrower category of Crimes, and not intended to alter the definition of Crimes Against Humanity in International Law. The distinction is a fine one. The Appeals Chamber in the Akayesu Appeals clarified the position:

In the opinion of the Appeals Chamber, except in the case of persecution, a discriminatory intent is not required by international humanitarian law as a legal ingredient for all crimes against humanity. To that extent, the Appeals Chamber endorses the general conclusion and review contained in Tadic, as discussed above. However, though such is not a requirement for the crime per se, all crimes against humanity, may, in actuality, be committed in the context of a discriminatory attack against a civilian population. As held in Tadic: “[i]t is true that in most cases, crimes against humanity are waged against civilian populations which have been specifically targeted for national, political, ethnic, racial or religious reasons.” It is within this context, and in light of the nature of the events in Rwanda (where a civilian population was actually the target of a discriminatory attack), that the Security Council decided to limit the jurisdiction of the Tribunal over crimes against humanity solely to cases where they were committed on discriminatory grounds. This is to say that the Security Council intended thereby that the Tribunal should not prosecute perpetrators of other possible crimes against humanity.

The Mental Element for Crimes Against Humanity

880. The clearest statement of the Mental Element of Crimes Against Humanity so far is to be found in the Semanza Judgment:

³⁵⁴ Bagilishema, Judgment (TC), para. 80, following Tadic, Judgment (TC), para. 644.

³⁵⁵ Semanza, Judgment (TC), para. 330.

The accused must have acted with knowledge of the broader context of the attack and knowledge that his act formed part of the attack on the civilian population³⁵⁶.

881. The Chamber fully endorses this position.

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216. The Prosecution challenges the Trial Chamber's non-entry, as impermissibly cumulative, of Radislav Krstic's convictions for extermination and persecution of the Bosnian Muslims of Srebrenica between 13 and 19 July 1995, and for murder and inhumane acts as crimes against humanity committed against the Bosnian Muslim civilians in Potocari between 10 and 13 July 1995. The Trial Chamber disallowed convictions for extermination and persecution as impermissibly cumulative with Krstic's conviction for genocide. It also concluded that the offences of murder and inhumane acts as crimes against humanity are subsumed within the offence of persecution where murder and inhumane acts form the underlying acts of the persecution conviction.

217. The Defence urges a dismissal of the Prosecution's appeal because the Prosecution does not seek an increase of the sentence in the event its appeal is successful³⁵⁸. As the Appeals Chamber emphasised, however, the import of cumulative convictions is not limited to their impact on the sentence. Cumulative convictions impose additional stigma on the accused and may imperil his eligibility for early release³⁵⁹. On the other hand, multiple convictions, where permissible, serve to describe the full culpability of the accused and to provide a complete picture of his criminal conduct³⁶⁰. The Prosecution's appeal is therefore admissible notwithstanding the fact that it does not challenge the sentence....

³⁵⁶ Semanza, Judgment (TC), para. 332; Ntakirutimana and Ntakirutimana, Judgment (TC), para. 803; Bagilishema, Judgment (TC), para. 94; Musema, Judgment (TC), para. 206; Kayishema and Ruzindana, Judgment (TC), para. 134.

³⁵⁷ International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991. Case No: IT-98-33-A. 19 April 2004.

³⁵⁸ Defence Response, para. 7.

³⁵⁹ See Kunarac et al. Appeal Judgement, para. 169; Mucic et al. Judgement on Sentence Appeal, para. 25.

³⁶⁰ Kunarac et al. Appeal Judgement, para. 169.

219. The first vacated conviction that the Prosecution seeks to reinstate is the conviction for extermination under Article 5 based on the killing of the Bosnian Muslim men of Srebrenica³⁶¹. The Trial Chamber held that this conviction was impermissibly cumulative with Radislav Krstic's conviction for genocide under Article 4, which was based on the same facts³⁶². The Prosecution argues that this decision rests on an erroneous premise, namely that Article 5's requirement for the enumerated crimes to be part of a widespread or systematic attack against a civilian population is subsumed within the statutory elements of genocide³⁶³.

220. This issue was confronted by the ICTR Appeals Chamber in *Musema*. There, the Appeals Chamber arrived at a conclusion contrary to the one reached by the Trial Chamber in this case. Echoing the Prosecution's argument here, the ICTR Appeals Chamber permitted convictions for genocide and extermination based on the same conduct because "[g]enocide requires proof of an intent to destroy, in whole or in part, a national, ethnical, racial or religious group, [which] is not required by extermination," while "[e]xtermination as a crime against humanity requires proof that the crime was committed as a part of a widespread or systematic attack against a civilian population, which proof is not required in the case of genocide."³⁶⁴

221. The Trial Chamber in this case concluded that the requirement of a widespread and systematic attack against a civilian population was subsumed within the genocide requirement that there be an intent to destroy, in whole or in part, a national, ethnical, racial or religious group.³⁶⁵ In the Trial Chamber's opinion, in order to satisfy this intent requirement, a perpetrator of genocide must commit the prohibited acts "in the context of a manifest pattern of similar conduct," or those acts must "themselves constitute a conduct that could in itself effect the destruction of the group, in whole or part, as such."³⁶⁶ Because this requirement excluded "random or isolated acts," the Trial Chamber concluded that it duplicated the requirement of Article 5 that a crime against humanity, such as extermination, form a part of a widespread or systematic attack against a civilian population³⁶⁷....

³⁶¹ Prosecution Appeal Brief, paras. 1.6, 3.38.

³⁶² Trial Judgement, paras. 682, 685 - 686.

³⁶³ Prosecution Appeal Brief, para. 3.34.

³⁶⁴ *Musema* Appeal Judgement, para. 366. At the Appeal hearing, the Defence conceded that, under the reasoning of *Musema*, convictions for extermination and genocide are not impermissibly cumulative. See AT, p. 281.

³⁶⁵ Trial Judgement, para. 682.

³⁶⁶ *Ibid.*

³⁶⁷ *Ibid.*

223. The offence of extermination as a crime against humanity requires proof that the proscribed act formed a part of a widespread or systematic attack on the civilian population, and that the perpetrator knew of this relationship³⁶⁸. These two requirements are not present in the legal elements of genocide. While a perpetrator's knowing participation in an organized or extensive attack on civilians may support a finding of genocidal intent, it remains only the evidentiary basis from which the fact-finder may draw this inference. The offence of genocide, as defined in the Statute and in international customary law, does not require proof that the perpetrator of genocide participated in a widespread and systematic attack against civilian population³⁶⁹....

225. The Trial Chamber also concluded that the definitions of intent for extermination and genocide "both require that the killings be part of an extensive plan to kill a substantial part of a civilian population."³⁷⁰ The Appeals Chamber has explained, however, that "the existence of a plan or policy is not a legal ingredient of the crime" of genocide.³⁷¹ While the existence of such a plan may help to establish that the accused possessed the requisite genocidal intent, it remains only evidence supporting the inference of intent, and does not become a legal ingredient of the offence³⁷². Similarly, the Appeals Chamber has rejected the argument that the legal elements of crimes against humanity (which include extermination) require a proof of the existence of a plan or policy to commit these crimes³⁷³. The presence of such a plan or policy may be important evidence that the attack against a civilian population was widespread or systematic, but it is not a legal element of a crime against humanity. As neither extermination nor genocide requires the proof of a plan or policy to carry out the underlying act, this factor cannot support the Trial Chamber's conclusion that the offence of extermination is subsumed in genocide.

³⁶⁸ Tadic Appeal Judgement, para. 248; see also Kunarac et al. Appeal Judgement, paras. 85, 96, 102.

³⁶⁹ See, e.g., 1 *The Rome Statute of the International Criminal Court: A Commentary* (Antonio Cassese, Paola Gaeta, John R.W.D. Jones, eds, 2002), at p. 340 (under customary international law, "it is only for crimes against humanity [and not for genocide] that knowledge of the widespread or systematic practice is required").

³⁷⁰ Trial Judgement, para. 685.

³⁷¹ Jelusic Appeal Judgement, para. 48.

³⁷² See *ibid.*

³⁷³ Kunarac et al. Appeal Judgement, para. 98

Prosecutor v. Tadic³⁷⁴

271. The Trial Chamber correctly recognised that crimes which are unrelated to widespread or systematic attacks on a civilian population should not be prosecuted as crimes against humanity. Crimes against humanity are crimes of a special nature to which a greater degree of moral turpitude attaches than to an ordinary crime. Thus to convict an accused of crimes against humanity, it must be proved that the crimes were related to the attack on a civilian population (occurring during an armed conflict) and that the accused knew that his crimes were so related....

285. As rightly submitted by the Prosecution, the interpretation of Article 5 in the light of its object and purpose bears out the above propositions. The aim of those drafting the Statute was to make all crimes against humanity punishable, including those which, while fulfilling all the conditions required by the notion of such crimes, may not have been perpetrated on political, racial or religious grounds as specified in paragraph (h) of Article 5. In light of the humanitarian goals of the framers of the Statute, one fails to see why they should have seriously restricted the class of offences coming within the purview of “crimes against humanity,” thus leaving outside this class all the possible instances of serious and widespread or systematic crimes against civilians on account only of their lacking a discriminatory intent. For example, a discriminatory intent requirement would prevent the penalization of random and indiscriminate violence intended to spread terror among a civilian population as a crime against humanity. A fortiori, the object and purpose of Article 5 would be thwarted were it to be suggested that the discriminatory grounds required are limited to the five grounds put forth by the Secretary-General in his Report and taken up (with the addition, in one case, of the further ground of gender) in the statements made in the Security Council by three of its members.³⁴⁷ Such an interpretation of Article 5 would create significant lacunae by failing to protect victim groups not covered by the listed discriminatory grounds. The experience of Nazi Germany demonstrated that crimes against humanity may be committed on discriminatory grounds other than those enumerated in Article 5 (h), such as physical or mental disability, age or infirmity, or sexual preference. Similarly, the extermination of “class enemies” in the Soviet Union during the 1930s (admittedly, as in the case of Nazi conduct before the Second World War, an occurrence that took place

³⁷⁴ International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Case No. IT-94-1-A. Date: 15 July 1999.

in times of peace, not in times of armed conflict) and the deportation of the urban educated of Cambodia under the Khmer Rouge between 1975-1979, provide other instances which would not fall under the ambit of crimes against humanity based on the strict enumeration of discriminatory grounds suggested by the Secretary-General in his Report...

292. This warrants the conclusion that customary international law, as it results from the gradual development of international instruments and national case-law into general rules, does not presuppose a discriminatory or persecutory intent for all crimes against humanity...

305. The Prosecution was correct in submitting that the Trial Chamber erred in finding that all crimes against humanity require a discriminatory intent. Such an intent is an indispensable legal ingredient of the offence only with regard to those crimes for which this is expressly required, that is, for Article 5 (h), concerning various types of persecution.

War Crimes

Trial of General Tomoyuki Yamashita³⁷⁵

The crimes alleged to have been permitted by the accused in violation of the laws of war may be grouped into three categories:

(1) Starvation, execution or massacre without trial and maladministration generally of civilian internees and prisoners of war;

(2) Torture, rape, murder and mass execution of very large numbers of residents of the Philippines, including women and children and members of religious orders, by starvation, beheading, bayoneting, clubbing, hanging, burning alive, and destruction by explosives;

(3) Burning and demolition without adequate military necessity of large numbers of homes, places of business, places of religious worship, hospitals, public buildings, and educational institutions. In point of time, the offences extended throughout the period the accused was in command of Japanese troops in the Philippines. In point of area, the crimes extended throughout

³⁷⁵ US Military Commission, Case No. 21. Manila. (8th October – 7th December, 1945), and U.S. Supreme Court of the (Judgments delivered on 4th February, 1946) at 8, 14.

the Philippine Archipelago, although by far the most of the incredible acts occurred on Luzon.

This accused is an officer of long years of experience, broad in its scope, who has had extensive command and staff duty in the Imperial Japanese Army in peace as well as war in Asia, Malaya, Europe, and the Japanese Home Islands. Clearly, assignment to command military troops is accompanied by broad authority and heavy responsibility. This has been true in all armies throughout recorded history. It is absurd, however, to consider a commander a murderer or rapist because one of his soldiers commits a murder or a rape. Nevertheless, where murder and rape and vicious, revengeful actions are widespread offences, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them. Should a commander issue orders which lead directly to lawless acts, the criminal responsibility is definite and has always been so understood. The Rules of Land Warfare, Field Manual 27-10, United States Army, are clear on these points. It is for the purpose of maintaining discipline and control, among other reasons, that military commanders are given broad powers of administering military justice. The tactical situation, the character, training and capacity of staff officers and subordinate commanders as well as the traits of character, and training of his troops are other important factors in such cases. These matters have been the principal considerations of the Commission during its deliberations.”

The Commission concludes: (1) That a series of atrocities and other high crimes have been committed by members of the Japanese armed forces under your command against people of the United States, their allies and dependencies throughout the Philippine Islands; that they were not sporadic in nature but in many cases were methodically supervised by Japanese officers and non-commissioned officers; (2) That during the period in question you failed to provide effective control of your troops as was required by the circumstances.

The German High Command Trial³⁷⁶

Count I - Crimes against Peace

1. All of the defendants, with divers other persons, including the co-participants listed in Appendix A, during a period of years preceding 8th May, 1945, committed Crimes against Peace as defined in Article II of Control

³⁷⁶ Trial of Wilhelm Von Leeb and thirteen others. US Military Tribunal, Case NO. 72, Nuremberg, 30th December, 1947 – 28th October, 1948.

Council Law No. 10, in that they participated in the initiation of invasions of other countries and wars of aggression in violation of international laws and treaties, including but not limited to the planning, preparation, initiation, and waging of wars of aggression, and wars in violation of international treaties, agreements and assurances.

2. The defendants held high military positions in Germany and committed Crimes against Peace in that they were principals in, accessories to, ordered, abetted, took a consenting part in, were connected with plans and enterprises involving, and were members of organizations and groups connected with, the commission of Crimes against Peace...

Count II—War Crimes and Crimes against Humanity: Crimes against Enemy Belligerents and Prisoners of War

45. Between September, 1939, and May, 1945, all of the defendants herein, with divers other persons including the co-participants listed in Appendix A, committed War Crimes and Crimes against Humanity, as defined in Article II of Control Council Law No. 10, in that they participated in the commission of atrocities and offences against prisoners of war and members of armed forces of nations then at war with the Third Reich or under the belligerent control of or military occupation by Germany, including but not limited to murder, ill-treatment, denial of status and rights, refusal of quarter, employment under inhumane conditions and at prohibited labour of prisoners of war and members of military forces, and other inhumane acts and violations of the laws and customs of war. The defendants committed War Crimes and Crimes against Humanity in that they were principals in, accessories to, ordered, abetted, took a consenting part in, were connected with plans and enterprises involving, and were members of organizations and groups connected with, the commission of War Crimes and Crimes against Humanity.

46. Unlawful orders initiated, drafted, distributed and executed by the defendants directed that certain enemy troops be refused quarter and be denied the status and rights of prisoners of war, and that certain captured members of the military forces of nations at war with Germany be summarily executed. Such orders further directed that certain members of enemy armed forces be designated and treated by troops of the German armed forces, subordinate to the defendants, either as ‘partisans, communists, bandits, terrorists’ or by other terms denying them the status and rights of prisoners of war. Prisoners of war were compelled to work in war operations and in work having a direct relation to war operations, including the manufacture, transport and loading of arms and munitions, and the building of fortifications. This work was ordered within the combat zone as well as in rear areas. Pursuant to a

‘total war’ theory and as part of a programme to exploit all non-German peoples, prisoners of war were denied rights to which they were entitled under conventions and the laws and customs of war. Soldiers were branded, denied adequate food, shelter, clothing and care, subjected to all types of cruelties and unlawful reprisals, tortured and murdered. Special screening and extermination units, such as Einsatz Groups of the Security Police and Sicherheitsdienst (commonly known as the ‘SD’), operating with the support and under the jurisdiction of the Wehrmacht, selected and killed prisoners of war for religious, political and racial reasons. Many recaptured prisoners were ordered executed. The crimes described in paragraphs 45 and 46 included, but were not limited to, those set forth hereafter in this Count....

Count III-War Crimes and Crimes against Humanity: Crimes against Civilians

59. Between September, 1939, and May, 1945, all of the defendants herein, with divers other persons including the co-participants listed in Appendix A, committed War Crimes and Crimes against Humanity as defined in Article II of Control Council Law No. 10, in that they participated in atrocities and offences, including murder, extermination, ill-treatment, torture, conscription to forced labour, deportation to slave labour or for other purposes, imprisonment without cause, killing of hostages, persecutions on political, racial and religious grounds, plunder of public and private property, wanton destruction of cities, towns and villages, devastation not justified by military necessity, and other inhumane and criminal acts against German nationals and members of the civilian populations of countries and territories under the belligerent occupation of, or otherwise controlled by Germany. The defendants committed War Crimes and Crimes against Humanity, in that they were principals in, accessories to, ordered, abetted, took a consenting part in, were connected with plans and enterprises involving, and were members of organizations and groups which were connected with, the commission of War Crimes and Crimes against Humanity.

CHAPTER 5 INTERNATIONAL ENVIRONMENTAL LAW

*Historical Overview*³⁷⁷

Although the Charter of the United Nations does not specifically mention the environment or sustainable development, the Preamble to the Charter states that the United Nations is determined “to promote social progress and better standards of life in larger freedom,” while Chapter 1 declares that one of the basic purposes of the United Nations is “to achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.”

The United Nations first considered environmental issues at the 45th session of the Economic and Social Council (ECOSOC), when in resolution 1346 (XLV) of 30 July 1968 it recommended that the General Assembly consider convening a United Nations conference on “problems of the human environment.”

At its 23rd session the General Assembly adopted resolution 2398 (XXIII) of 3 December 1968 convening a United Nations Conference on the Human Environment noting the “continuing and accelerating impairment of the quality of the human environment” and its “consequent effects on the condition of man, his physical, mental and social well-being, his dignity and his enjoyment of basic human rights, in developing as well as developed countries,” thus relating the Charter to emerging environmental issues. The resolution also recognized that “the relationship between man and his environment is undergoing profound changes in the wake of modern scientific and technological developments.”

The United Nations Conference on the Human Environment took place in Stockholm from 5 to 16 June 1972 and led to the establishment of the

³⁷⁷ U.N. Commission on Sustainable Development, <http://www.uncsd2012.org/rio20/index.php?menu=17>.

United Nations Environment Programme (UNEP, the lead programme within the UN working on environmental issues.

In 1983 the General Assembly by resolution 38/161 of 19 December 1983 welcomed the establishment of a special commission to report on “environment and the global problematique to the year 2000 and beyond.” In 1987 the World Commission on Environment and Development (WCED) submitted its report (also known as the “Brundtland report”) to the General Assembly. The report, based on a four-year study, developed the theme of sustainable development, the type of development that “meets the needs of the present generation without compromising the ability of future generations to meet their own needs.”

Pursuant to the report of the World Commission, the General Assembly adopted resolution 44/228 of 20 December 1988, convening the United Nations Conference on Environment and Development (also known as the “Rio Conference” or the “Earth Summit”) to “elaborate strategies and measures to halt and reverse the effects of environmental degradation.” The resolution listed nine areas “of major concern in maintaining the quality of the Earth’s environment and especially in achieving environmentally sound and sustainable development in all countries.”

The United Nations Conference on Environment and Development (UNCED), which took place in Rio de Janeiro from 3 to 14 June 1992, led to the establishment of the Commission on Sustainable Development. At the Conference three major agreements were adopted: Agenda 21 a global plan of action to promote sustainable development; the Rio Declaration on Environment and Development, a series of principles defining the rights and responsibilities of States and the Statement of Forest Principles, a set of principles to underpin the sustainable management of forests worldwide. In addition, two legally binding instruments were opened for signature: the United Nations Framework Convention on Climate Change and the Convention on Biological Diversity. The Earth Summit called for several major initiatives in other key areas of sustainable development, such as, a global conference on Small Island Developing States; negotiations began for a Convention to Combat Desertification and for an agreement on highly migratory and straddling fish stocks...

During its 55th session the General Assembly adopted resolution 55/199 of 20 December 2000, convening the World Summit on Sustainable Development (WSSD) (also known as “Rio + 10”), a ten-year review of progress achieved since 1992 in the implementation of Agenda 21. The World Summit was held in Johannesburg from 26 August to 4 September 2002 and its report

(A/Conf.199/20 + Corr.1) includes a Political Declaration, in which Member States assumed “a collective responsibility to advance and strengthen the interdependent and mutually reinforcing pillars of sustainable development, economic development, social development and environmental protection at the local, national, regional and global levels” and a Plan of Implementation, in which Member States committed themselves “to undertaking concrete actions and measures at all levels and to enhancing international cooperation.” (See, U.N. Library, <http://www.un.org/Depts/dhl/resguide/specenv.htm#intro>).

The United Nations Conference on Sustainable Development (UNCSD) is being organized in pursuance of General Assembly Resolution 64/236 (A/RES/64/236). The Conference will take place in Brazil on 4-6 June 2012 to mark the 20th anniversary of the 1992 United Nations Conference on Environment and Development (UNCED), in Rio de Janeiro, and the 10th anniversary of the 2002 World Summit on Sustainable Development (WSSD) in Johannesburg. It is envisaged as a Conference at the highest possible level, including Heads of State and Government or other representatives. The Conference will result in a focused political document. The objective of the Conference is to secure renewed political commitment for sustainable development, assess the progress to date and the remaining gaps in the implementation of the outcomes of the major summits on sustainable development, and address new and emerging challenges. The Conference will focus on two themes: (a) a green economy in the context of sustainable development and poverty eradication; and (b) the institutional framework for sustainable development. (See, UN Commission on Sustainable Development, RIO+20 site at: <http://www.uncsd2012.org/rio20/index.html>).

Principles of International Environment and Sustainable Development Law³⁷⁸

International Environmental Law

International environmental law is distinct from, but related to sustainable development law. The goal of international environmental law, broadly stated, is protection of the environment. Many multilateral environmental agreements (MEAs) have two objectives. They focus both on conservation and protection of the environment, and also on a second (less studied) ob-

³⁷⁸ Marie-Claire Cordonier Segger and Ashfaq Khalfan, *Sustainable Development Law: Principles, Practices, and Prospects*, pp. 78-84 and 99-106 (Oxford: Oxford University Press, 2004), reprinted with permission from the authors and Oxford University Press.

jective related to “sustainable use” or “sustained economic growth”³⁷⁹. This section will focus on the first “environmental preservation, conservation and protection” objectives of these treaties, as well as the principles and regimes that surround them. Together, these form the existing body of international law for the protection of the environment.³⁸⁰

The framework of international environmental law is based on several key principles, implemented through MEAs and national regulatory instruments, and coordinated through a system of international environmental governance (IEG). This section briefly mentions certain key judgments and principles, identifies certain “clusters” of significant international treaties in this field, surveys relevant national environmental management techniques, and summarizes recent efforts to strengthen and enhance international environmental institutions.

Environmental law is a relatively new field. However, certain precepts date from over a century ago. One of the first recorded international legal processes relating to the conservation of the environment was the Pacific Fur Seal Arbitration of 1893, when a dispute arose between the United States and the United Kingdom regarding the right of the United Kingdom to hunt migratory fur seals on the high seas, just outside the three-mile limit

³⁷⁹ As discussed above, sustainable development law focuses on integration of environmental, social and economic norms for development that can last. According to both the 1992 Rio Declaration, and the 1987 Brundtland Report, sustainable development centres on human beings and their communities, seeking to satisfy the needs of present generations, without compromising the ability of future generations to meet their own needs. Sustainable development law involves poverty eradication, social cohesion, sustained use of natural and other resources, and equitable sharing of benefits. It is about empowering human beings and their communities to improve their quality of life, though in order to be sustainable, this must be done in a way that respects environmental limits. Environmental law, in contrast, focuses on preservation, conservation and protection of the environment. It involves the needs of all species and natural systems, which it values for their intrinsic worth. Both are valuable and essential areas of international law with significant overlaps and intersections, but they should not be artificially conflated. See M. C. Cordonier Segger, “Significant Developments in Sustainable Development Law and Governance: A Proposal” (2004) United Nations Natural Resources Forum 283. See also M.-C. Cordonier Segger and CG. Weeramantry, eds., *Sustainable Justice* (Leiden: Martima Nijhoff, 2004).

³⁸⁰ For further resources, see D. Hunter, J. Sommer and S. Vaughan, *Concepts and Principles of International Law* (Nairobi: UNEP, 1998). See also N. de Sadeleer, *Environmental Principals – From Political Slogans to Legal Rules* (Oxford: Oxford University Press, 2002).

of US territorial waters.³⁸¹ The USA argued that it held rights of property and protection in the seals, and consequently the right to take conservation measures extraterritorially as trustees “for the benefit of mankind.” The US position was overwhelmingly rejected by the arbitral tribunal in favour of UK arguments on freedom of fishing on the high seas.³⁸² However, the tribunal also “adopted regulations for the protection and preservation of fur seals,” effectively establishing a 60-mik radius safe haven for the seals.³⁸³ In another leading case, the 1938 Trail Smelter Arbitration between the United States and Canada, sulphur dioxide fumes from a smelter in British Columbia were found to be damaging agricultural and timberland in the State of Washington. The tribunal resolved the dispute by setting a strict limit on the permissible output of sulphur dioxide from the smelter, and held that under the principles of international law, as well as rill’ law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury in or to the territory of another or the properties of persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.³⁸⁴ Such cases illustrate the central tenets of international environmental law: trans-boundary preservation and protection of the environment.³⁸⁵

Principles of International Environmental Law

The principles of international environmental law have gained increasing recognition over the past decades; while some are still considered influential “soft law,” others are increasingly emerging as “norms of customary international environmental law.” Principles of environmental law have also been “codified” in key MEAs, which as treaties, are binding upon their state Parties in international law.

A widely accepted principle of international environmental law is that States are required to ensure that activities within their jurisdiction or control do not damage the environment of other States or areas beyond national jurisdiction.³⁸⁶ The duty not to allow damage is often written to require States

³⁸¹ 1 Moore’s Int’l Arb. Awards 755.

³⁸² See A. Cassese, *International Law* (Oxford: Oxford University Press, 2001) 376.

³⁸³ *Ibid.*

³⁸⁴ Trail Smelter Arbitration (United States v Canada), 3 R. Int’l Arb. Awards 1911 (1938), reprinted in 33 AJIL 182 (1939), 3 R. Int’l Arb. Awards 19938 (1941), reprinted in 35 AJIL 684 (1941) (further note omitted).

³⁸⁵ See further X. Hanqin, *Transboundary Damage in International Law* (Cambridge: Cambridge University Press, 2003).

³⁸⁶ As provided in Principle 21 of the Stockholm Declaration on the Human Envi-

to take all “practicable” steps to avoid or prevent harm.³⁸⁷ The reliance on a standard of “practicable” steps suggests that the duty to prevent harm may not be absolute, but requires at least that States diligently and in good faith make all reasonable efforts to avoid such environmental damage. This principle has been accepted in many treaties, and as an international customary norm by the International Court of Justice and other tribunals.³⁸⁸ It is related to respect for the jurisdiction of other states that is embodied in the concept of sovereignty.³⁸⁹

A second, related principle involves the duty to prevent pollution, which can be considered a specific articulation of the general duty to avoid environmental damage. Avoiding or reducing pollution is almost always less expensive than attempting to restore a contaminated area, especially since it can be impossible to remedy certain types of environmental damage.³⁹⁰ The International Court of Justice has recognized this principle, specifically as it relates to environmental protection....³⁹¹

ronment, UN Doc. Ale. 48/14 (1972), 11 ILM 1461 (1972) (and, more recently, Principle 2 of the Rio Declaration, *supra* note 5), “States have, in accordance with the Charter of the United Nations and the principles of international law,... the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction. For further analysis and critical commentary, see M. Bowman and A. Boyle, *Environmental Damage in International and Comparative Law - Problems of Definition and Valuation* (Oxford: Oxford University Press, 2002).

³⁸⁷ See, e.g., the 1991 Convention on Environmental Impact Assessment in a Transboundary Context (25 Feb. 1991) 30 ILM 800, 803 at Art. 21(1), or the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention) (opened for signature 22 March 1989, entered into force 5 May 1992) (1989) 28 ILM 649 at Art. 2(8).

³⁸⁸ Advisory Opinion on the Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, [1996] I.C.J. Rep. 226. See also the United Nations Convention on the Law of the Sea, 10 December 1982, UN Doc. A/CONF.62/122; 21 ILM 1245 (entered into force 16 November 1994) at Pan XII and the IUCN, Draft International Covenant on Environment and Development (Gland, Switzerland: IUCN, 1995) at Article 11. See also the 1985 ASEAN Agreement on the Conservation of Nature and Natural Resources (9 July 1985, Kuala Lumpur) at Art. 20.

³⁸⁹ See F. Perrez, “The Relationship Between Permanent Sovereignty and the Obligation Not to Cause Transboundary Environmental Damage” (1996) 26 *Environmental Law* 1187. See also F. Perrez, *Cooperative Sovereignty: From Independence to Interdependence in International Environmental Law* (London: Kluwer Law International, 2000).

³⁹⁰ N. de Sadeleer, *Environmental Principles - From Political Slogans to Legal Rules* (Oxford: Oxford University Press, 2002).

³⁹¹ Case Concerning Gabcikovo-Nagymaros [Project (Hungary v Slovakia)], para. 140,

A third principle is that of “common heritage” of humankind. Areas beyond the limits of national jurisdiction -the high seas, the sea-bed, Antarctica, outer space, and possibly the outer atmosphere (such as the ozone layer) are part of the, environment and frequently referred to as the “global commons.” Several important preservation-focused treaties have been negotiated in order to recognise, preserve and manage an area beyond sovereign control of any State, as “common heritage”³⁹² of humanity. The principle implies that States will avoid appropriating such heritage, that it will be internationally managed and its benefits will be shared by humanity, and that it will be used only for peaceful purposes.³⁹³

A fourth principle of international environmental law is a general obligation on States to cooperate in identifying, investigating and avoiding transboundary environmental harms. The duty to cooperate is a general principle of international law as recognized in Article 1.3 of the Charter of the United Nations, and the 1970 United Nations Declaration on Principles of International Law.³⁹⁴ When used in environmental law, this general obligation can lead to specific duties relating, for example, to the exchange of information, the need to notify and consult with potentially affected States, and the requirement to coordinate international scientific research. It may also, in certain circumstances, incur an obligation to conduct an environmental impact assessment if a project seems likely to result in transboundary effects.³⁹⁵ It is

I.C.J. Reports 7 (1997)] (note omitted).

³⁹² This principle is recognized in the UNESCO 1972 Convention Concerning the Protection of World Cultural and Natural Heritage 11 ILM 1358 at the Preamble, and also in the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (27 Jan. 1967) 610 UNTS 205 (1967); and in the Agreement Concerning the Activities of States On the Moon and Other Celestial Bodies (5 Dec. 1979), at Art. I. It was also recognized in the 1982 United Nations Convention on the Law of the Sea, 10 December 1982, UN Doc. NCONE62J122; 21 ILM 1245 (entered into force 16 November 1994) at Arrick, 136, 137 and 140, on the deep-sea bed, though it was later removed to convince the USA to join the Convention. It was also recognised in the 1959 Antarctic Treaty (1 December 1959) 402 UNTS 71, and its 1991 Protocol on Environmental Protection on Antarctica (21 June 1991).

³⁹³ D. Hunter, J. Salzman & D. Zaelke, *International Environmental Law and Policy* (New York: Foundation Press 2003).

³⁹⁴ United Nations Declaration of Principles on International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations (24 Oct. 1970) 9 ILM 1292.

³⁹⁵ See UNEP, *Goals and Principles of Environmental Impact Assessment* (Nairobi: UNEP, 1987). See also IBRD, *International Bank for Reconstruction and Develop-*

at the core of many international treaties on environmental matters, and it has been recognized by the International Court of Justice in leading cases.³⁹⁶

A fifth principle, precaution, can apply both in general environmental law, and also in the law relating to specific sustainable development law issues such as health, sustainable use of biodiversity and natural resources. This is a key principle of international environmental law, as it is central to the prevention of environmental damage.³⁹⁷ The precautionary principle underlies a number of international legal instruments. It also applies in a variety of contexts from protecting endangered species to preventing pollution. The precautionary principle evolved from the growing recognition that scientific certainty often comes too late to design effective legal and policy responses to potential environmental threats. In essence, it switches the burden of proof necessary for triggering policy responses. The far-reaching implications of the precautionary principle for sustainable development are considered more fully in Part III, *The Principles*, which also discusses its status in international law.

The “polluter pays principle” is also widely recognized. This principle implies that the polluter should bear the expenses of carrying out pollution prevention measures or paying for damage caused by pollution.³⁹⁸ Instituting

ment Operational Policy 4.01 (Washington: IBRD, 1999) at 15-16, which requires public consultations and disclosure of any adverse effects, as a pre-condition to the granting of international loans for development projects.

³⁹⁶ This principle is found with related concepts, in Principle 27 and Principle 19 of the 1992 Rio Declaration. It is embodied in the Convention on the Protection of the Environment Between Denmark, Finland, Norway and Sweden (19 Feb 1974) 13 ILM 591, and recognized by the International Court of Justice in both the *Lac Lanoux Arbitration (France v. Spain)* [1957] 24 ILR 101 & the *Gabcikovo-Nagymaros Case*, supra note 3.

³⁹⁷ As set forth in the Rio Declaration, supra note 5 at Principle 15, the precautionary principle states that: “Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation.” See A. Trouwborst, *Evolution and Status of the Precautionary Principle in International Law* (The Hague: Kluwer Law International, 2002). And see T. O’Riordan, A. Jordan & J. Cameron, eds., *Reinterpreting the Precautionary Principle* (London: Cameron May, 2001).

³⁹⁸ Originally recommended by the OECD Council in May 1972, the polluter pays principle has been increasingly accepted as an international environmental principle. It has been explicitly adopted in several bilateral and multilateral resolutions and declarations, including Principle 16 of the Rio Declaration, supra note 5, which provides: “National authorities should endeavour to promote the internalisation of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with

the polluter pays principle ensures that the prices of goods reflect the costs of producing that good, including costs associated with pollution, resource degradation, and environmental harm. Environmental costs are reflected (or “internalized”) in the price of every good. The result is that goods that pollute less will cost less, and consumers may switch to less polluting substitutes. This will result in a more efficient use of resources and less pollution.

It is doubtful that these principles have all been accepted as international customary law, and neither is this brief survey intended to be viewed as an exhaustive list. For example, the principle of common but differentiated responsibility, which will be discussed below, has been proposed as a principle of international environmental law,³⁹⁹ as have principles related to subsidiarity, access to environmental information, public participation in environmental decision-making, and a duty to assess environmental impacts.⁴⁰⁰ Some authors perceive sustainable development itself as a principle of international environmental law,⁴⁰¹ though this is not the approach adopted in this book. The issue of whether there is a broad principle of State responsibility and liability for environmental harm remains contested. A distinction continues to emerge in international environmental law between international “responsibility” and international “liability”: the former arises from unlawful acts, the latter can arise from the consequences of otherwise lawful acts (although it is still used at times with reference to unlawful acts).⁴⁰² There is a concern that imposing liability for acts not prohibited by international law irrespective of fault or the lawfulness of the activity will emphasize the

due regard to the public interest and without distorting international trade and investment.”

³⁹⁹ See, e.g., P. Sands, *Principles of International Environmental Law* 2nd ed (Cambridge: Cambridge University Press, 2003) at 285.

⁴⁰⁰ D. Hunter, J., Salzman & D. Zaelke, *International Environmental Law and Policy* (New York: Foundation Press 2003) at 379-438.

⁴⁰¹ See, P. Sands, *Principles of International Environmental Law* 2nd ed (Cambridge: Cambridge University Press, 2003) at 252. But see V. Lowe, “Sustainable Development and Unsustainable Arguments” in *International Law and Sustainable Development: Past Achievements and Future Challenges*, A. Boyle and D. Freestone, eds. (Oxford: Oxford University Press, 1999) at 19-37. [Other citations omitted].

⁴⁰² Under the rubric of State responsibility, the recent Articles on State Responsibility, adopted by the International Law Commission, establish that the obligation to make reparations is premised on “injury” or “damage,” but there is no requirement that an international dispute be premised on the fact of harm, This is particularly evident in the analysis of damage in], Crawford, *The International Law Commission’s Articles on State Responsibility -Introduction, Texts & Commentaries* (Cambridge: Cambridge University Press, 2002) 29-31.

harm, rather than the conduct. Traditional principles of State responsibility can merge with the concept of State liability, particularly in instances such as ultra-hazardous activities where States must meet such a strict standard of care that for all practical purposes they will be “responsible” for any activity leading to harm.⁴⁰³ In any case, liability for pollution-related injuries is also addressed, albeit generally, in many treaties...

New Delhi Declaration of Principles of International Law Relating to Sustainable Development

The Duty of States to Ensure Sustainable Use of Natural Resources

It is a well-established principle that, in accordance with international law, all States have the sovereign right to manage their own natural resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause significant damage to the environment of other States or of areas beyond the limits of national jurisdiction.

States are under a duty to manage natural resources, including natural resources solely within their own territory or jurisdiction, in a rational, sustainable and safe way so as to contribute to the development of their peoples, with particular regard for the rights of indigenous peoples, and to the conservation and sustainable use of natural resources and the protection of the environment, including ecosystems. States must take into account the needs of future generations in determining the rate of use of natural resources. All relevant actors (including States, industrial concerns and other components of civil society) are under a duty to avoid wasteful use of natural resources and promote waste minimization policies.

The protection, preservation and enhancement of the natural environ-

⁴⁰³ The new Articles are highly relevant to cases of environmental harm attributable to a State, in particular where the obligations breached are peremptory norms of international law (such as the prohibition on “massive pollution” of the atmosphere and seas) or obligations owed to the international community as a whole (such as an obligation aimed at protection of the marine environment, the obligation to refrain from massive pollution of the sea and atmosphere, or even a general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States (and of areas beyond national control), recognized by the I.C.J. in the Nuclear Weapons case and reiterated in the Gabcikovo-Nagymaros case), See L. Brownlie, *Principles of Public International Law* (New York: Oxford University Press, 1998) 288 [hereinafter Brownlie]; (Gabcikovo-Nagymaros decision, para, 53; Advisory Opinion on the Legality of the Use by a State of Nuclear Weapons in Armed Conflict.

ment, particularly the proper management of climate system, biological diversity and fauna and flora of the Earth, are the common concern of humankind. The resources of outer space and celestial bodies and of the sea-bed, ocean floor and subsoil thereof beyond the limits of national jurisdiction are the common heritage of humankind.

The principle of equity and the eradication of poverty

The principle of equity is central to the attainment of sustainable development. It refers to both inter-generational equity (the rights of future generations to enjoy a fair level of the common patrimony) and intra-generational equity (the rights of all peoples within the current generation of fair access to the current generation's entitlement to the Earth's natural resources).

The present generation has a right to use and enjoy the resources of the Earth but is under an obligation to take into account the long-term impact of its activities and to sustain the resource base and the global environment for the benefit of future generations of humankind. "Benefit" in this context is to be understood in its broadest meaning as including, inter alia, economic, environmental, social and intrinsic benefit.

The right to development must be implemented so as to meet developmental and environmental needs of present and future generations in a sustainable and equitable manner. This includes the duty to cooperate for the eradication of poverty in accordance with Chapter IX on International Economic and Social Co-operation of the Charter of the United Nations and the Rio Declaration on Environment and Development as well as the duty to cooperate for global sustainable development and the attainment of equity in the development opportunities of developed and developing countries.

Whilst it is the primary responsibility of the State to aim for conditions of equity within its own population and to ensure, as a minimum, the eradication of poverty, all States which are in a position to do so have a further responsibility, as recognised by the Charter of the United Nations and the Millennium Declaration of the United Nations, to assist States in achieving this objective.

The principle of common but differentiated responsibilities

States and other relevant actors have common but differentiated responsibilities. All States are under a duty to cooperate in the achievement of global sustainable development and the protection of the environment. International organizations, corporations (including in particular transnational corporations), non-governmental organizations and civil society should cooperate in and contribute to this global partnership. Industrial concerns have also responsibilities pursuant to the polluter pays principle.

Differentiation of responsibilities, whilst principally based on the contribution that a State has made to the emergence of environmental problems, must also take into account the economic and developmental situation of the State, in accordance with paragraph 3.3.

The special needs and interests of developing countries and of countries with economies in transition, with particular regard to least developed countries and those affected adversely by environmental, social and developmental considerations, should be recognized.

Developed countries bear a special burden of responsibility in reducing and eliminating unsustainable patterns of production and consumption and in contributing to capacity building in developing countries, inter alia by providing financial assistance and access to environmentally sound technology. In particular, developed countries should play a leading role and assume primary responsibility in matters of relevance to sustainable development.

The principle of the precautionary approach to human health, natural resources and ecosystems

A precautionary approach is central to sustainable development in that it commits States, international organizations and the civil society, particularly the scientific and business communities, to avoid human activity which may cause significant harm to human health, natural resources or ecosystems, including in the face of scientific uncertainty.

Sustainable development requires that a precautionary approach with regard to human health, environmental protection and sustainable utilization of natural resources should include accountability for harm caused (including, where appropriate, State responsibility), planning based on clear criteria and well-defined goals, consideration of all possible means in an environmental impact assessment to achieve an objective (including, in certain instances, not proceeding with an envisaged activity) and, in respect of activities which may cause serious long-term or irreversible harm, establishing an appropriate burden of proof on the person or persons carrying out (or intending to carry out) the activity.

Decision-making processes should endorse a precautionary approach to risk management and in particular should proceed to the adoption of appropriate precautionary measures even when the absence of risk seems scientifically assured.

Precautionary measures should be based on up-to-date and independent scientific judgment and be transparent. They should not result in economic protectionism. Transparent structures should be established which involve all

interested parties, including nonstate actors, in the consultation process. Appropriate review by a judicial body or administrative action should be available.

The principle of public participation and access to information and justice

Public participation is essential to sustainable development and good governance in that it is a condition of responsive, transparent and accountable governments as well a condition for the active engagement of equally responsive, transparent and accountable civil society organizations, including industrial concerns and trade unions. The vital role of women in sustainable development should be recognized.

Public participation in the context of sustainable development requires effective protection of the human right to hold and express opinions and to seek, receive and impart ideas. It also requires a right of access to appropriate, comprehensible and timely information held by governments and commerce on economic and social policies regarding the sustainable use of natural resources and the protection of the environment, without imposing undue financial burdens upon the applicants and with due consideration for privacy and adequate protection of business confidentiality.

The empowerment of peoples in the context of sustainable development requires access to effective judicial or administrative procedures in the State where the measure has been taken to challenge such measure and to claim compensation. States should ensure that where transboundary harm has been, or is likely to be, caused, individuals and peoples affected have non-discriminatory access to the same judicial and administrative procedures as would individuals and peoples of the State from which the harm is caused if such harm occurred in that State.

The principle of good governance

The principle of good governance is essential to the progressive development and codification of international law relating to sustainable development. It commits States and international organizations:

- (a) to adopt democratic and transparent decision-making procedures and financial accountability;
- (b) to take effective measures to combat official or other corruption;
- (c) to respect due process in their procedures and to observe the rule of law and human rights; and

- (d) to implement a public procurement approach according to the WTO Code on Public Procurement.

Civil society and non-governmental organizations have a right to good governance by States and international organizations. Non-state actors should be subject to internal democratic governance and to effective accountability.

Good governance requires full respect for the principles of the 1992 Rio Declaration on Environment and Development as well as the full participation of women in all levels of decision-making. Good governance also calls for corporate social responsibility and socially responsible investments as conditions for the existence of a global market aimed at a fair distribution of wealth among and within communities.

The principle of integration and interrelationship, in particular in relation to human rights and social, economic and environmental objectives

The principle of integration reflects the interdependence of social, economic, financial, environmental and human rights aspects of principles and rules of international law relating to sustainable development as well as of the needs of current and future generations of humankind.

All levels of governance -global, regional, national, sub-national and local -and all sectors of society should implement the integration principle, which is essential to the achievement of sustainable development.

States should strive to resolve apparent conflicts between competing economic, financial, social and environmental considerations, whether through existing institutions or through the establishment of appropriate new ones.

In their interpretation and application, the above principles are inter-related and each of them should be construed in the context of the other principles of this Declaration. Nothing in this Declaration shall be construed as prejudicing in any manner the provisions of the Charter of the United Nations and [he rights of peoples under that Charter.

After the World Summit for Sustainable Development, greater attention is being paid to these international principles as they can offer substantive guidance when it seems difficult to integrate environmental, economic and social development objectives and regimes. This section will examine these principles in greater detail, from the perspective that they form part of an emerging body of law that can deliver on the objective of sustainable development, with sources in environmental, human rights, and economic law.

The principle of integration and interrelationship will be considered first, as it provides a conceptual framework for “integrated thinking” in

international law relating to sustainable development, which can guide consideration of the other principles. The integration of environmental, economic and social law in international regimes is part of an incremental, nuanced process. It is not a matter of joining three areas of law into one. There is no one chronological linear progression toward integration, nor is there necessarily a single “pull” toward greater integration as such, except in certain specific situations. Rather, there are particular patterns to this weaving of social, environmental and economic bodies of law, patterns that are also greatly influenced by different conditions, requirements and policy choices of each specific context.

The Principle of Integration and Interrelationship in Relation to Social, Economic, and Environmental Objectives

The concept of sustainable development integrates economic, environmental and social (including human rights) priorities. As a point of departure, international sustainable development law addresses the area of intersection between three fields of international economic, environmental and social law. As such not all aspects of international environmental law are international sustainable development law. For example, as noted by Alan Boyle and David Freestone, animal rights, the conservation of “charismatic megafauna,” and trans-boundary environmental disputes do not necessarily deal with issues of sustainable development.⁴⁰⁴ The same may be true for various aspects of international trade, tax, financial or investment law in the economic field, or certain specific laws for the international protection of human rights, social development or humanitarian assistance in the social field. As not all international law in these three areas is (or even needs to be) integrated, the term “sustainable development law” refers to a specific, narrower set of legal instruments and provisions where environment, social and economic considerations are integrated to varying degrees in different circumstances. And by extension, the principle of integration is fundamental to sustainable development law.

The need for integration was strongly reinforced and highlighted in the 2002 World Summit on Sustainable Development (WSSD). Indeed, in the 2002 Johannesburg Declaration on Sustainable Development, states assumed “a collective responsibility to advance and strengthen the interdependent and mutually reinforcing pillars of sustainable development -economic development, social development and environmental protection” In the Johannesburg Plan of Implementation (JPOI), this recognition also appears

⁴⁰⁴ A. Boyle and D. Freestone, “Past Achievements and Future Challenges” in Lang (citation omitted).

in numerous instances, for example at paragraph 2, stating the objectives of the JPOI, governments accord that it “will promote the integration of the three components of sustainable development -economic development, social development and environmental protection -as interdependent and mutually reinforcing pillars.”⁴⁰⁵

Is a “collective responsibility” to “promote the integration of the three components of sustainable development” also a legal norm, though? What would be the formulation of such a rule? Is there a formulation of “fundamentally norm-creating character,” and if so, is there enough practice, and *opinio juris*, to allow it to be described as an emerging customary norm?

There may be a useful normative formulation of this principle. In the negative, it would be based on a three-fold obligation relating specifically to the need to take all three aspects into account in development decision-making. As such, the norm would hold that States must “ensure that social and economic development decisions do not disregard environmental considerations, and not undertake environmental protection without taking into account relevant social and economic implications.” While the exact formulation and application of this norm would vary according to the circumstances of its use, its general purpose would be to ensure the necessary integration between social, economic and environmental policies and laws, responding to the “collective responsibility” assumed by States in the Johannesburg Declaration.

From this obligation would flow several increasingly accepted procedures, practices and instruments of sustainable development law. For example, the use of sustainability or “integrated” impact assessments, described in more detail in Part III, can ensure that economic development decisions (including decisions about policies, plans, programmes or projects) consider, and do not ignore, their potential social and environmental impacts. From this principle, too, would stem the reverse sustainable development obligations for environmental protection not to be carried out without consideration of relevant social and economic aspects. For example, decision-making bodies for conservation projects, such as large parks, should ensure that their plans provide for, or even have the prior informed consent of, local peoples and other socially vulnerable groups who could be affected by the new park

⁴⁰⁵ See Johannesburg Declaration on Sustainable Development, in Report of the World Summit on Sustainable Development, Johannesburg, South Africa, 26 Aug.-4 Sept. 2002, NCONF.199/20 (New York: United Nations, 2002). See also Johannesburg Plan of Implementation, Report of the World Summit on Sustainable Development, Johannesburg, South Africa, 4 Sept. 2002, UN Doc. A/CONF.199 http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POIToc.htm.

boundaries and restrictions. A project that did not do so would be violating the second part of this principle, the obligation not to consider environmental protection in isolation from its social and economic implications. The creation of “inter-locking mechanisms,” such as environmental or social units in international development organizations, or the World Bank Inspection Panel, to monitor and investigate the social and environmental implications of their economic development projects, would be likewise encouraged, supported and even potentially required by this norm.

Emergence of the principle

The need for the integration of social and economic development and environmental policy permeates soft law, including the 1972 Stockholm Declaration, the 1992 Rio Declaration and Agenda 21, and, as mentioned above, the 2002 Johannesburg Declaration and Plan of Implementation.

Principle 4 of the 1992 Rio Declaration States that “in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it”⁴⁰⁶ As a consensus statement negotiated and signed by over 160 countries, this indicates that States agree that social and economic development should integrate environmental protection.⁴⁰⁷ The Principle 4 argument that environmental protection cannot be considered in isolation advocates integrated consideration of these fields at the international level, in policy and in law. This view is supported by the language of Chapter 39 of Agenda 21, where States commit to focus on the “further development of international law on sustainable development, giving special attention to the delicate balance between environmental and developmental concerns”; and recognize an important “need to clarify and strengthen the relationship between existing international instruments or agreements in the field of environment and relevant social and economic agreements or instruments, taking into account the special needs of the developing countries.”⁴⁰⁸ After the Rio de Janeiro Earth Summit, integration of laws and policies in these areas was directly addressed in many global treaties, using different textual formulations depending on the context and purpose of the instruments. It is a keystone provision in two of the 1992 Rio Conventions (the UN Frame-

⁴⁰⁶ Rio Declaration, supra note 1, Principle 4. See also the Stockholm Declaration on the Human Environment, UN Doc. Ale. 48114 (1972), 11 ILM 1461 (1972) Principle 13 [hereinafter Stockholm Declaration].

⁴⁰⁷ European Commission, *The Law of Sustainable Development* (Brussels: EC, 2001).

⁴⁰⁸ Agenda 21, Report of the UNCED, I (1992) UN Doc. Af/CONF.151126I Rev.1, (1992), 31 ILM 874, para. 39.1 [hereinafter Agenda 21], ch. 39.1, Objectives (a) and (b).

work Convention on Climate Change and the UN Convention on Biological Diversity).⁴⁰⁹ Most of the post-Rio environmental conventions contain specific substantive provisions which aim to address relevant social and economic considerations related to their purpose and object. Some even do it to the extent that they move away from being simply environmental conventions at all, and can be considered sustainable development conventions instead, whose integrated social, economic and environmental purpose focuses on the development of a resource or address a development challenge, in a sustainable way. Examples of such treaties might include the 1994 United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, and the 1997 United Nations Convention on the Non-Navigational Uses of International Watercourses. [Citations omitted].

International scholarship in various fields notes a trend toward integration, at the international level. This refers to integration in the sense that economies and societies are becoming more integrated, on the international level (also sometimes called the “globalization” phenomenon). For example, according to Alexandre Kiss:

“[e]vidence of global integration abounds: regional trading units; regional political and economic organizations ... international regimes covering issues ranging from banking and trade to human rights, environmental protection, and arms control; and the spread of financial markets. The information revolution, the rapid technological advances, global environmental problems, liberalized trade, and other economic and other interdependencies compel greater interdependency and greater integration.”⁴¹⁰

Such a trend is clearly emerging. However, there is a second meaning to integration, one that seems closer to what is intended in the 1992 Rio Declaration, which looks to integration between economic and social law and policy, and environmental law and policy. This type of integration is not simply a trend or a “coming together,” on the international level, but rather, a need to undertake

⁴⁰⁹ See the Climate Change Convention, *supra* note 2, Art. 3(4), with Kyoto Protocol to the United Nations Framework Convention on Climate Change, 10 Dec. 1997, 37 ILM 22 (1998), Art. 4(1) (f) [hereinafter Kyoto Protocol]; and the Biodiversity Convention [citation omitted].

⁴¹⁰ A. Kiss, “The Implications of Global Change for the International Legal System” in E. Brown, Weiss, ed., *Environmental Change and International Law* (Tokyo: United Nations University Press, 1992) 319, 345.

development in a way that fully takes into account, and combines, its social, economic and environmental aspects. It is a challenging requirement for research, planning, law-making and judicial decision-making. Indeed, as noted by one commentator, “if there is no longer much doubt about whether integrative approaches to research are needed in support of a sustainability transition, how to achieve such integration in rigorous and useful programs remains problematic.”⁴¹¹

Selected Treaty Bodies

Principal Environmental Bodies⁴¹²

Intergovernmental Panel on Climate Change (IPCC). United Nations negotiations on climate change are supported by the work of the Intergovernmental Panel on Climate Change (IPCC), a worldwide network of 2,500 leading scientists and experts who review scientific research on the issue. The full text of reports is available on the Panel website.

Governing Council of the United Nations Environment Programme (UNEP). The Governing Council, the policy-making organ of UNEP, was established by General Assembly resolution 2997 (XXVII) of 15 December 1972. The Council meets annually and reports to the General Assembly (GA).

Commission on Sustainable Development. The General Assembly, in its resolution 47/191 of 22 December 1992, requested the Economic and Social Council to establish, as a functional commission of the Council, a high-level Commission on Sustainable Development to ensure effective follow-up to the Conference on Environment and Development (UNCED). Therefore, while General Assembly resolution 47/191 contains its mandate, the Commission was established by Economic and Social Council decision 1993/207 of 12 February 1993. The Commission meets annually and reports to the Economic and Social Council.

United Nations Forum on Forests. The United Nations Forum on Forests was established by ECOSOC resolution 2000/35 of 18 Oct. 2000 to “strengthen political commitment to the management, conservation and sustainable development of all types of forests.” The Forum meets annually and reports to the Economic and Social Council.

⁴¹¹ W.C. Clark “A Transition towards Sustainability” (200] Symposium: Environment 2000 –New Issues for a New Century, Sustainable Science for a Sustainable Environment (2001) 27 Ecology L.Q. 1021.

⁴¹² See, United Nations Organizations, at <http://www.un.org/depts/dhl/resguide/specenv.htm#environmental>.

Inter-governmental Forum on Forests (IFF). The Inter-governmental Forum on Forests (IFF) was established by ECOSOC resolution 1997/65 of 25 July 1997. The Forum met annually from 1997 to 2000 and reported to the Economic and Social Council.

Ad hoc Inter-governmental Panel on Forests. The Ad hoc Inter-governmental Panel on Forests was established by ECOSOC decision 1995/226 of 1 June 1995. The Forum met at irregular intervals between 1995 and 1997 and reported to the Economic and Social Council.

Selected Treaty Bodies⁴¹³

Conference of the Parties to the United Nations Framework Convention on Climate Change (UNFCCC). The Conference of the Parties, the “supreme body,” was established pursuant to Article 7 of the United Nations Framework Convention on Climate Change. The Conference meets annually. States Parties to the Convention are required by Article 12 to report on the steps they are taking to implement the Convention.

Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol. The Conference of the Parties serving as the meeting of the Parties was established pursuant to Article 13 of the Kyoto Protocol to review the implementation of the Protocol. The meeting of the Parties takes place annually.

Meeting of the Parties to the Montreal Protocol. The Meeting of the Parties was established pursuant to Article 11 of the Montreal Protocol to review the implementation of the Protocol. The current status of the Protocol is posted on the UNEP website. The Meeting takes place annually.

Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal. The Conference of the Parties was established pursuant to Article 15 of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal to review the implementation of the Convention.

The Conference of the Parties to the Convention on Biological Diversity. The Conference of the Parties was established pursuant to Article 23 of the Convention on Biological Diversity to review the implementation of the Convention. The current status of the Convention is posted on the Convention website. The Conference meets annually.

⁴¹³ See, United Nations Organizations, at <http://www.un.org/depts/dhl/resguide/specenv.htm#treaty>.

The Conference of the Parties to the Convention to Combat Desertification. The Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa was adopted in Paris on 17 June 1994 and opened for signature there on 14-15 October 1994. It entered into force on 26 December 1996, 90 days after the fiftieth ratification was received. 193 countries were Parties as at August 2009. The Conference of the Parties (COP), which is the Convention's supreme governing body, held its first session in October 1997 in Rome, Italy. The ninth session of the conference of the Parties was held in Buenos Aires, Argentina from 21 September to 2 October 2009.

Water Resources

Pulp Mills on the River Uruguay (Uruguay v. Argentina), 2010⁴¹⁴

[On 4 May 2006 Argentina filed a suit against Uruguay in respect of a dispute concerning the breach, allegedly committed by Uruguay of obligation under the Statute of the River Uruguay, a treaty signed and ratified by Argentina and Uruguay. The breach arose out of the authorization, construction and future commissioning of two pulp mills on the River Uruguay, with reference in particular to the effects of such activities on the quality of the waters of the River Uruguay and on the areas affected by the river.]

1. The obligation to contribute to the optimum and rational utilization of the river (Article 1)

170. According to Argentina, Uruguay has breached its obligation to contribute to the “optimum and rational utilization of the river” by failing to co-ordinate with Argentina on measures necessary to avoid ecological change, and by failing to take the measures necessary to prevent pollution. Argentina also maintains that, in interpreting the 1975 Statute (in particular Articles 27, 35, and 36 thereof) according to the principle of equitable and reasonable use, account must be taken of all pre-existing legitimate uses of the river, including in particular its use for recreational and tourist purposes.

⁴¹⁴ Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010, p. 14.

171. For Uruguay, the object and purpose of the 1975 Statute is to establish a structure for co-operation between the Parties through CARU in pursuit of the shared goal of equitable and sustainable use of the water and biological resources of the river. Uruguay contends that it has in no way breached the principle of equitable and reasonable use of the river and that this principle provides no basis for favouring pre-existing uses of the river, such as tourism or fishing, over other, new uses...

175. The Court considers that the attainment of optimum and rational utilization requires a balance between the Parties' rights and needs to use the river for economic and commercial activities on the one hand, and the obligation to protect it from any damage to the environment that may be caused by such activities, on the other. The need for this balance is reflected in various provisions of the 1975 Statute establishing rights and obligations for the Parties, such as Articles 27, 36, and 41. The Court will therefore assess the conduct of Uruguay in authorizing the construction and operation of the Orion (Botnia) mill in the light of those provisions of the 1975 Statute, and the rights and obligations prescribed therein...

177. Regarding Article 27, it is the view of the Court that its formulation reflects not only the need to reconcile the varied interests of riparian States in a transboundary context and in particular in the use of a shared natural resource, but also the need to strike a balance between the use of the waters and the protection of the river consistent with the objective of sustainable development. The Court has already dealt with the obligations arising from Articles 7 to 12 of the 1975 Statute which have to be observed, according to Article 27, by any Party wishing to exercise its right to use the waters of the river for any of the purposes mentioned therein insofar as such use may be liable to affect the régime of the river or the quality of its waters. The Court wishes to add that such utilization could not be considered to be equitable and reasonable if the interests of the other riparian State in the shared resource and the environmental protection of the latter were not taken into account. Consequently, it is the opinion of the Court that Article 27 embodies this interconnectedness between equitable and reasonable utilization of a shared resource and the balance between economic development and environmental protection that is the essence of sustainable development...

3. The obligation to co-ordinate measures to avoid changes in the ecological balance (Article 36)

181. Argentina contends that Uruguay has breached Article 36 of the 1975 Statute, which places the Parties under an obligation to co-ordinate through CARU the necessary measures to avoid changing the ecological balance of

the river. Argentina asserts that the discharges from the Orion (Botnia) mill altered the ecological balance of the river, and cites as examples the 4 February 2009 algal bloom, which, according to it, provides graphic evidence of a change in the ecological balance, as well as the discharge of toxins, which gave rise, in its view, to the malformed rotifers whose pictures were shown to the Court....

183. It is recalled that Article 36 provides that “[t]he parties shall co-ordinate, through the Commission, the necessary measures to avoid any change in the ecological balance and to control pests and other harmful factors in the river and the areas affected by it”....

185. In the view of the Court, the purpose of Article 36 of the 1975 Statute is to prevent any transboundary pollution liable to change the ecological balance of the river by coordinating, through CARU, the adoption of the necessary measures. It thus imposes an obligation on both States to take positive steps to avoid changes in the ecological balance. These steps consist not only in the adoption of a regulatory framework, as has been done by the Parties through CARU, but also in the observance as well as enforcement by both Parties of the measures adopted. As the Court emphasized in the *Gabcikovo-Nagymaros* case:

“in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage” (*Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 78, para. 140)....

188. This vigilance and prevention is all the more important in the preservation of the ecological balance, since the negative impact of human activities on the waters of the river may affect other components of the ecosystem of the watercourse such as its flora, fauna, and soil. The obligation to co-ordinate, through the Commission, the adoption of the necessary measures, as well as their enforcement and observance, assumes, in this context, a central role in the overall system of protection of the River Uruguay established by the 1975 Statute. It is therefore of crucial importance that the Parties respect this obligation.

189. In light of the above, the Court is of the view that Argentina has not convincingly demonstrated that Uruguay has refused to engage in such co-ordination as envisaged by Article 36, in breach of that provision....

4. The obligation to prevent pollution and preserve the aquatic environment (Article 41)

191. Argentina claims that by allowing the discharge of additional nutrients into a river that is eutrophic and suffers from reverse flow and stagnation, Uruguay violated the obligation to prevent pollution, as it failed to prescribe appropriate measures in relation to the Orion (Botnia) mill, and failed to meet applicable international environmental agreements, including the Biodiversity Convention and the Ramsar Convention. It maintains that the 1975 Statute prohibits any pollution which is prejudicial to the protection and preservation of the aquatic environment or which alters the ecological balance of the river. Argentina further argues that the obligation to prevent pollution of the river is an obligation of result and extends not only to protecting the aquatic environment proper, but also to any reasonable and legitimate use of the river, including tourism and other recreational uses.

192. Uruguay contends that the obligation laid down in Article 41 (a) of the 1975 Statute to “prevent ... pollution” does not involve a prohibition on all discharges into the river. It is only those that exceed the standards jointly agreed by the Parties within CARU in accordance with their international obligations, and that therefore have harmful effects, which can be characterized as “pollution” under Article 40 of the 1975 Statute. Uruguay also maintains that Article 41 creates an obligation of conduct, and not of result, but that it actually matters little since Uruguay has complied with its duty to prevent pollution by requiring the plant to meet best available technology (“BAT”) standards.

193. Before turning to the analysis of Article 41, the Court recalls that:

“The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.” (Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I), pp. 241-242, para. 29.)

194. The Court moreover had occasion to stress, in the Gabcikovo-Nagymaros Project case, that “the Parties together should look afresh at the effects on the environment of the operation of the Gabcikovo power plant” (Gabcikovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997, p. 78, para. 140). The Court is mindful of these statements in taking up now the examination of Article 41 of the 1975 Statute.

195. In view of the central role of this provision in the dispute between the Parties in the present case and their profound differences as to its interpretation

and application, the Court will make a few remarks of a general character on the normative content of Article 41 before addressing the specific arguments of the Parties. First, in the view of the Court, Article 41 makes a clear distinction between regulatory functions entrusted to CARU under the 1975 Statute, which are dealt with in Article 56 of the Statute, and the obligation it imposes on the Parties to adopt rules and measures individually to “protect and preserve the aquatic environment and, in particular, to prevent its pollution.” Thus, the obligation assumed by the Parties under Article 41, which is distinct from those under Articles 36 and 56 of the 1975 Statute, is to adopt appropriate rules and measures within the framework of their respective domestic legal systems to protect and preserve the aquatic environment and to prevent pollution. This conclusion is supported by the wording of paragraphs (b) and (c) of Article 41, which refer to the need not to reduce the technical requirements and severity of the penalties already in force in the respective legislation of the Parties as well as the need to inform each other of the rules to be promulgated so as to establish equivalent rules in their legal systems...

197. Thirdly, the obligation to “preserve the aquatic environment, and in particular to prevent pollution by prescribing appropriate rules and measures” is an obligation to act with due diligence in respect of all activities which take place under the jurisdiction and control of each party. It is an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators, to safeguard the rights of the other party. The responsibility of a party to the 1975 Statute would therefore be engaged if it was shown that it had failed to act diligently and thus take all appropriate measures to enforce its relevant regulations on a public or private operator under its jurisdiction. The obligation of due diligence under Article 41 (a) in the adoption and enforcement of appropriate rules and measures is further reinforced by the requirement that such rules and measures must be “in accordance with applicable international agreements” and “in keeping, where relevant, with the guidelines and recommendations of international technical bodies.” This requirement has the advantage of ensuring that the rules and measures adopted by the parties both have to conform to applicable international agreements and to take account of internationally agreed technical standards...

(a) Environmental Impact Assessment

203. The Court will now turn to the relationship between the need for an environmental impact assessment, where the planned activity is liable to cause harm

to a shared resource and transboundary harm, and the obligations of the Parties under Article 41 (a) and (b) of the 1975 Statute. The Parties agree on the necessity of conducting an environmental impact assessment. The Parties disagree, however, with regard to the scope and content of the environmental impact assessment that Uruguay should have carried out with respect to the Orion (Botnia) mill project.

204. It is the opinion of the Court that in order for the Parties properly to comply with their obligations under Article 41 (a) and (b) of the 1975 Statute, they must, for the purposes of protecting and preserving the aquatic environment with respect to activities which may be liable to cause transboundary harm, carry out an environmental impact assessment. As the Court has observed in the case concerning the Dispute Regarding Navigational and Related Rights, “there are situations in which the parties’ intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used - or some of them - a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law” (Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment of 13 July 2009, para. 64). In this sense, the obligation to protect and preserve, under Article 41 (a) of the Statute, has to be interpreted in accordance with a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource. Moreover, due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning works liable to affect the régime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works.

205. The Court observes that neither the 1975 Statute nor general international law specify the scope and content of an environmental impact assessment. Consequently, it is the view of the Court that it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment. The Court also considers that an environmental impact assessment must be conducted prior to the implementation of a project. Moreover, once operations have started and, where necessary, throughout the life of the project, continuous monitoring of its effects on the environment shall be undertaken.

United Nations Law of the Sea “UNCLOS”⁴¹⁵

Third United Nations Conference on the Law of the Sea⁴¹⁶

On 1 November 1967, Malta’s Ambassador to the United Nations, Arvid Pardo, asked the nations of the world to look around them and open their eyes to a looming conflict that could devastate the oceans, the lifeline of man’s very survival. In a speech to the United Nations General Assembly, he spoke of the super-Power rivalry that was spreading to the oceans, of the pollution that was poisoning the seas, of the conflicting legal claims and their implications for a stable order and of the rich potential that lay on the seabed. Pardo ended with a call for “an effective international regime over the seabed and the ocean floor beyond a clearly defined national jurisdiction.” “It is the only alternative by which we can hope to avoid the escalating tension that will be inevitable if the present situation is allowed to continue,” he said.

Pardo’s urging came at a time when many recognized the need for updating the freedom-of-the-seas doctrine to take into account the technological changes that had altered man’s relationship to the oceans. It set in motion a process that spanned 15 years and saw the creation of the United Nations Seabed Committee, the signing of a treaty banning nuclear weapons on the seabed, the adoption of the declaration by the General Assembly that all resources of the seabed beyond the limits of national jurisdiction are the common heritage of mankind and the convening of the Stockholm Conference on the Human Environment.... These were some of the factors that led to the convening of the Third United Nations Conference on the Law of the Sea, to write a comprehensive treaty for the oceans.

The Conference was convened in New York in 1973. It ended nine years later with the adoption in 1982 of a constitution for the seas - the United Nations Convention on the Law of the Sea. During those nine years, shuttling back and forth between New York and Geneva, representatives of more than 160 sovereign States sat down and discussed the issues, bargained and traded national rights and obligations in the course of the marathon negotiations that produced the Convention.

⁴¹⁵ United Nations Convention on the Law of the Sea (UNCLOS), Dec. 10, 1982, 1833, U.N.T.S. 397, entered into force Nov. 16, 1994.

⁴¹⁶ U.N. Division of Ocean Affairs and Law of the Sea, Historical Perspective, UNCLOS, at: http://www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm#Historical%20Perspective.

The Convention

Navigational rights, territorial sea limits, economic jurisdiction, legal status of resources on the seabed beyond the limits of national jurisdiction, passage of ships through narrow straits, conservation and management of living marine resources, protection of the marine environment, a marine research regime and, a more unique feature, a binding procedure for settlement of disputes between States - these are among the important features of the treaty. In short, the Convention is an unprecedented attempt by the international community to regulate all aspects of the resources of the sea and uses of the ocean, and thus bring a stable order to mankind's very source of life.

"Possibly the most significant legal instrument of this century" is how the United Nations Secretary-General described the treaty after its signing. The Convention was adopted as a "Package deal," to be accepted as a whole in all its parts without reservation on any aspect. The signature of the Convention by Governments carries the undertaking not to take any action that might defeat its objects and purposes. Ratification of, or accession to, the Convention expresses the consent of a State to be bound by its provisions. The Convention came into force on 16 November 1994, one year after Guyana became the 60th State to adhere to it...

The definition of the territorial sea has brought relief from conflicting claims. Navigation through the territorial sea and narrow straits is now based on legal principles. Coastal States are already reaping the benefits of provisions giving them extensive economic rights over a 200-mile wide zone along their shores. The right of landlocked countries of access to and from the sea is now stipulated unequivocally.

Kyrgyz Transboundary Water Commission with Neighbor States⁴¹⁷

In the world history, the Aral Sea basin is among the most ancient centers of civilization.

Amudarya and Syrdarya — two main rivers in the basin. [These] water resources which are allocated to arid lands irrigation and the Aral Sea with their tributaries Vakhsh, Pyandj, Surkhandarya, Kafirnigan, Zerafshan, Naryn, Chirchik, Karadarya and others form a large water system, [that is part] of the Aral Sea basin.

⁴¹⁷ Interstate Commission for Water Coordination of Central Asia <http://www.icwc-aral.uz/>.



Five independent states of CIS — the Republic of Kazakhstan, the Kyrgyz Republic, the Republic of Tajikistan, Turkmenistan and the Republic of Uzbekistan — and part of Afghanistan are entirely and partly situated on the territory of the basin.

After collapse of the Soviet Union, to prevent arising of conflicts and serious complications in water resources management and to put water allocation, limitation and account in order, the Ministers of five Central Asian independent states...[after]... negotiations, meetings and discussions adopted at the conference in Tashkent on October 10-12, 1991 the Statement, ...based on historical community of Central Asian peoples, [on] their equal rights and responsibility for ensuring rational water resources use in the region, and... they recognized that only joint actions in coordination and management can help to effectively solve the region's water problems in a context of increasing ecological and social tension.

On February 18, 1992 five Ministers of Water Resources of Central Asian states (N. Kipshakbayev, M. Zulpuyev, A. Nurov, A. Ilamanov, R. Giniyatullin) signed in Almaty an "Agreement on cooperation in joint management, use and protection of interstate sources of water resources." Actually, this agreement founded a united body Interstate Coordination Water Commission (ICWC). This Agreement was confirmed by the Decision of the Presidents, Kzyl-Orda, March 26, 1993 and their "Agreement on joint actions on resolving the problems related to the Aral Sea and its coastal zone on environmental sanitation and social-economic development in the Aral Sea region," and later by Agreement of the region's five countries of April 9, 1999 "On status of IFAS and its organizations."

The Interstate Commission for Water Coordination (ICWC) is a collective body of Central Asian States acting on the basis of equity, equality and consensus. According to the Decision by the Heads of State of March 23, 1993,

ICWC was included in the International Fund for saving the Aral Sea (IFAS) and has the status of an international organization.

Hazardous Waste and Toxics

Overview of Basel Convention on Control of Transboundary Movement of Waste⁴¹⁸

Awakening environmental awareness and corresponding tightening of environmental regulations in the industrialized world in the 1970s and 1980s had led to increasing public resistance to the disposal of hazardous wastes – in accordance with what became known as the NIMBY (Not In My Back Yard) syndrome – and to an escalation of disposal costs. This in turn led some operators to seek cheap disposal options for hazardous wastes in Eastern Europe and the developing world, where environmental awareness was much less developed and regulations and enforcement mechanisms were lacking. It was against this background that the Basel Convention was negotiated in the late 1980s, and its thrust at the time of its adoption was to combat the “toxic trade,” as it was termed. The Convention entered into force in 1992.

Objective

The overarching objective of the Basel Convention is to protect human health and the environment against the adverse effects of hazardous wastes. Its scope of application covers a wide range of wastes defined as “hazardous wastes” based on their origin and/or composition and their characteristics, as well as two types of wastes defined as “other wastes” - household waste and incinerator ash.

Aims and provisions

The provisions of the Convention center around the following principal aims:

- the reduction of hazardous waste generation and the promotion of environmentally sound management of hazardous wastes, wherever the place of disposal;

⁴¹⁸ The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, adopted 22 March 1989, 28 ILM 652, entered into force May 5, 1992. Summary provided at: <http://www.basel.int/TheConvention/Overview/tabid/1271/Default.aspx>.

- the restriction of transboundary movements of hazardous wastes except where it is perceived to be in accordance with the principles of environmentally sound management; and
- a regulatory system applying to cases where transboundary movements are permissible.

The first aim is addressed [by]...requiring States to observe the fundamental principles of environmentally sound waste management (article 4). A number of prohibitions are designed to attain the second aim: hazardous wastes may not be exported to Antarctica, to a State not party to the Basel Convention, or to a party having banned the import of hazardous wastes (article 4). Parties may, however, enter into bilateral or multilateral agreements on hazardous waste management with other parties or with non-parties, provided that such agreements are “no less environmentally sound” than the Basel Convention (article 11). In all cases where transboundary movement is not, in principle, prohibited, it may take place only if it represents an environmentally sound solution, if the principles of environmentally sound management and non-discrimination are observed and if it is carried out in accordance with the Convention’s regulatory system.

The regulatory system is...[b]ased on the concept of prior informed consent, it requires that, before an export may take place, the authorities of the State of export notify the authorities of the prospective States of import and transit, providing them with detailed information on the intended movement. The movement may only proceed if and when all States concerned have given their written consent (articles 6 and 7). The Basel Convention also provides for cooperation between parties, ranging from exchange of information on issues relevant to the implementation of the Convention to technical assistance, particularly to developing countries (articles 10 and 13). The Secretariat is required to facilitate and support this cooperation.... In the event of a transboundary movement of hazardous wastes having been carried out illegally, i.e. in contravention of the provisions of articles 6 and 7, or cannot be completed as foreseen, the Convention attributes responsibility to one or more of the States involved, and imposes the duty to ensure safe disposal, either by re-import into the State of generation or otherwise (articles 8 and 9).

U.N. Special Rapporteur on Toxics Report on Kyrgyzstan⁴¹⁹

Summary

At the invitation of the Government, the Special Rapporteur conducted a country visit to Kyrgyzstan from 30 September to 9 October 2009. The purpose of the mission was to examine existing problems related to the movement and dumping of toxic and dangerous products and wastes and their adverse effects on human rights. In particular, the visit focused on three areas: uranium tailings; obsolete or banned pesticides; and mercury waste. During the mission, the Special Rapporteur met with a wide range of Government representatives and non-State actors, and visited dump sites or storage facilities for hazardous chemicals or wastes in Orlovka, Kara-Balta and Kant.

The Special Rapporteur welcomes the progress made by the country in addressing the serious transboundary threats that uranium tailings pose to the health and the environment of Central Asian countries, as well as in attracting international support for a long-term solution to this problem. He also notes with satisfaction the efforts undertaken by the Government of Kyrgyzstan to promote and protect the human rights of individuals and communities living in the vicinity of tailings sites and storage facilities for obsolete chemicals. These measures include the elaboration of a national plan to protect human health and the environment from the adverse effects of persistent organic pollutants (POPs) and the implementation, with the support of the international community, of urgent recovery measures for high-priority tailings sites.

Despite the progress made, the Special Rapporteur identifies a number of key challenges in the areas of radioactive waste and chemicals management. He formulates several recommendations on measures to eliminate, or reduce to a minimum, the adverse effects that radioactive waste and hazardous substances, including pesticides, pose to the health and the environment of affected individuals and communities.

These recommendations include:

- (a) Relocation of the most dangerous uranium tailings and POP pesticides to more secure locations;
- (b) Rehabilitation of abandoned mines, uranium tailings and waste storage facilities to prevent environmental contamination and unauthorized access;

⁴¹⁹ U.N. Human Rights Council, Fifteenth session, June 24, 2010. Report on Mission to Kyrgyzstan by the Special Rapporteur Okechukwu Ibeanu (30 September to 9 October 2009).

- (c) Comprehensive assessment of the harmful impact of radioactive and hazardous substances on the health of individuals and communities living close to tailings sites and storage facilities for hazardous chemicals;
- (d) Improvement of the existing regulatory framework on radioactive waste and chemicals management in order to ensure its consistency with international norms and standards;
- (e) Clarification of the roles and functions of the different ministries and State agencies with responsibilities in the areas of radioactive waste and chemicals management, and creation of appropriate mechanisms to ensure better coordination and cooperation among these institutions;
- (f) Organization of public information campaigns and awareness-raising initiatives on the risks that radioactive and hazardous waste storage facilities pose to local populations and the environment and on safety measures to reduce these risks.

Cote d'Ivoire: The Toxic Dumping Case Against Trafigura⁴²⁰

On 19 August 2006 the ship *Probo Koala* unloaded a waste shipment at Abidjan, Cote d'Ivoire (Ivory Coast). This waste was disposed of at open air sites around Abidjan. The ship was chartered by the London office of Trafigura, a Dutch international petroleum trader. The *Probo Koala* had attempted to discharge this waste at the port of Amsterdam, but the port service would not accept the waste without an additional handling charge because of the waste's alleged toxicity. The ship left the port of Amsterdam without discharging its waste. After the waste from the ship was discharged in Abidjan, people living near the discharge sites began to suffer from a range of illnesses (nausea, diarrhea, vomiting, breathlessness, headaches, skin damage, and swollen stomachs). Sixteen people have died, allegedly from exposure to this waste, and more than 100,000 have sought medical attention.

Trafigura sent two of its executives to Abidjan in August 2006 to investigate what happened. These executives and a representative from a Trafigura

⁴²⁰ Reprinted with permission from Business and Human Rights Resource Center, London, <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuits-regulatoryaction/LawsuitsSelectedcases/TrafiguralawsuitsreCtedIvoire>, visited May 4, 2012.

subsidiary, Puma Energy, were arrested by Ivorian authorities and imprisoned. On 12 February 2007 the Government of Cote d'Ivoire signed a settlement agreement with Trafigura in which the company agreed to pay \$198 million to the Ivorian government for a compensation fund, the construction of a waste treatment plant and to assist in the recovery operations. However, the company stressed this payment was not "damages" and that it did not admit liability. Cote d'Ivoire agreed to drop any prosecutions or claims, now or in the future, against Trafigura. After this settlement agreement was made, the Trafigura executives and the Puma Energy representative were released from prison.

In November 2006, the High Court of Justice in London agreed to hear a group action by about 30,000 claimants from Cote d'Ivoire against Trafigura over the alleged dumping of toxic waste from the Probo Koala. Applicants allege that the waste had high levels of caustic soda, as well as a sulphur compound and hydrogen sulphide making it hazardous waste as defined by the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes. Trafigura denies the waste was toxic and claims the waste was standard waste from onboard operations of ships ("slops" as defined by the International Convention for the Prevention of Pollution From Ships). Trafigura is alleged to have shipped the untreated chemical waste to Cote d'Ivoire with knowledge that there were no facilities to treat this waste. Trafigura has denied responsibility, stating that they had entrusted the waste to an Ivorian disposal company, Tommy, which was established a few weeks before the ship's arrival. Trafigura claims it had no grounds for suspecting that Tommy would improperly dispose of the waste. Trafigura denies the number of applicants/victims and avers that only 69 people suffered significant injury. On 23 March 2009, the court granted the plaintiffs a temporary injunction barring Trafigura from contacting any of the claimants in the case. This injunction came after counsel for the claimants presented evidence that the company had been contacting individual claimants urging them to change their sworn statements. In September 2009, the parties to the UK lawsuit reached a settlement agreement in which Trafigura agreed to pay each of the 30,000 claimants a certain amount, approximately \$1500. In October 2009 an individual, Claude Gohourou, came forward claiming to represent the victims through his organization - National Coordination of Toxic Waste Victims of Cote d'Ivoire. Mr. Gohourou succeeded in freezing the bank account in which the settlement funds were being held. The claimants' lawyers dispute the authenticity of this organization and Mr. Gohourou's authority to distribute the funds to the claimants. On 22 January 2010, the Court of Appeals in Abidjan ruled in favour of Mr. Gohourou and his organization and

ordered the settlement funds be transferred to him. In mid-February 2010 the parties reached an agreement about the distribution of the settlement funds, and the compensation was distributed to the victims in March 2010.

In February 2008, Dutch prosecutors served notice that they intend to file criminal charges against Trafigura, among others, for its alleged part in the disposal of waste in Cote d'Ivoire. In June 2008 an Amsterdam court began hearing evidence in this case. The Dutch trial started in June 2010. The Dutch prosecutors accused Trafigura of illegally exporting hazardous waste to Cote d'Ivoire. The allegations against the company are that it breached Dutch export and environmental laws as well as forging official documents. Trafigura rejected these charges. In July 2010 the Dutch court ruled that the company had concealed the dangerous nature of the waste aboard the Probo Koala and fined the company €1 million. The Dutch court also convicted a Trafigura employee and the Ukrainian captain of the Probo Koala for their roles in the matter. In April 2011, an appeal court in The Hague ruled that the public prosecution department is not required to prosecute Trafigura for the dumping of the waste in Cote d'Ivoire. Greenpeace had taken action to try to compel the public prosecutor to prosecute the company for more than just the export of hazardous waste.

In July 2008, three French victims of the Probo Koala incident filed a complaint against Trafigura before an examining magistrate in Paris alleging corruption, involuntary homicide and physical harm leading to death.

Wildlife and Biodiversity

Conservation of Wildlife and Protection of Biodiversity⁴²¹

'Biodiversity' can be used as a synonym for living nature, with an emphasis on its complexity, at genetic, species and ecosystem levels. This complexity is vital in the maintenance of healthy ecosystem functioning, and it is important to recognise this when developing policies to protect the natural environment.

The genetic diversity inherent in most species provides the raw material to respond rapidly to changed circumstances. Change is, of course, the normal state of affairs in the living world. What makes our present situation unique is the rapidity and scale of the change. Our fragmentation and destruc-

⁴²¹ U.N. Environment Programme, http://www.unep-wcmc.org/about-biodiversity_133.html.

tion of habitats constitutes a massive uncontrolled experiment in ecology and genetics. Knowledge of population structures, i.e. the distribution and amount of genetic variation, of a wide range of organisms is necessary, as is a much deeper understanding of the biological significance of different sorts of variation.

Although much debate on biodiversity focuses on ‘species’,... this is not a standard unit. The way species are defined differs between groups and between taxonomists. However, despite these ambiguities, measures of species richness and distribution are important tools in assessing the state of the environment and the direction and speed of change. The number of described species is now around 1.7 million. The estimated total number of species in existence ranges in order of magnitude from around 10 million to 100 million.

Threats to Biodiversity⁴²²

These include:

- The unsustainable harvesting of natural resources, including plants, animals and marine species.
- The loss, degradation or fragmentation of ecosystems through land conversion for agriculture, forest clearing etc.
- Invasive non-native or ‘alien’ species being introduced to ecosystems to which they are not adapted i.e. where they have no, or not enough, predators, to maintain an ecological balance.
- Pollution
- Climate change

The first two have taken place throughout human history, although not on the current scale. The introduction of invasive species is certainly facilitated, if not caused, by the level of international transport and traffic of goods of our trade system. The latter two are definitely products of an industrial age.

The U.N. Convention on Biological Diversity⁴²³

The Earth’s biological resources are vital to humanity’s economic and social development. As a result, there is a growing recognition that biological diversity is a global asset of tremendous value to present and future genera-

⁴²² Id. at http://www.unep-wcmc.org/threats-to-biodiversity_52.html.

⁴²³ Overview by CBD Secretariat, <http://www.cbd.int/history/>.

tions. At the same time, the threat to species and ecosystems has never been so great as it is today. Species extinction caused by human activities continues at an alarming rate.

In response, the United Nations Environment Programme (UNEP) convened the Ad Hoc Working Group of Experts on Biological Diversity in November 1988 to explore the need for an international convention on biological diversity. Soon after, in May 1989, it established the Ad Hoc Working Group of Technical and Legal Experts to prepare an international legal instrument for the conservation and sustainable use of biological diversity. The experts were to take into account “the need to share costs and benefits between developed and developing countries” as well as “ways and means to support innovation by local people.”

By February 1991, the Ad Hoc Working Group had become known as the Intergovernmental Negotiating Committee. Its work culminated on 22 May 1992 with the Nairobi Conference for the Adoption of the Agreed Text of the Convention on Biological Diversity.

The Convention was opened for signature on 5 June 1992 at the United Nations Conference on Environment and Development (the Rio “Earth Summit”). It remained open for signature until 4 June 1993, by which time it had received 168 signatures. The Convention entered into force on 29 December 1993, which was 90 days after the 30th ratification. The first session of the Conference of the Parties was scheduled for 28 November – 9 December 1994 in the Bahamas.

The Convention on Biological Diversity was inspired by the world community’s growing commitment to sustainable development. It represents a dramatic step forward in the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of benefits arising from the use of genetic resources.

Consider Selected Convention Articles:

Article 6. General Measures for Conservation and Sustainable Use

Each Contracting Party shall, in accordance with its particular conditions and capabilities:

(a) Develop national strategies, plans or programmes for the conservation and sustainable use of biological diversity or adapt for this purpose existing strategies, plans or programmes which shall reflect, inter alia, the measures set out in this Convention relevant to the Contracting Party concerned; and

(b) Integrate, as far as possible and as appropriate, the conservation and

sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies.

Article 7. Identification and Monitoring

Each Contracting Party shall, as far as possible and as appropriate, in particular for the purposes of Articles 8 to 10:

(a) Identify components of biological diversity important for its conservation and sustainable use having regard to the indicative list of categories set down in Annex I;

(b) Monitor, through sampling and other techniques, the components of biological diversity identified pursuant to subparagraph (a) above, paying particular attention to those requiring urgent conservation measures and those which offer the greatest potential for sustainable use;

(c) Identify processes and categories of activities which have or are likely to have significant adverse impacts on the conservation and sustainable use of biological diversity, and monitor their effects through sampling and other techniques; and...

Article 14. Impact Assessment and Minimizing Adverse Impacts

1. Each Contracting Party, as far as possible and as appropriate, shall:

(a) Introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and, where appropriate, allow for public participation in such procedures;

(b) Introduce appropriate arrangements to ensure that the environmental consequences of its programmes and policies that are likely to have significant adverse impacts on biological diversity are duly taken into account; ...

Article 15. Access to Genetic Resources

1. Recognizing the sovereign rights of States over their natural resources, the authority to determine access to genetic resources rests with the national governments and is subject to national legislation.

2. Each Contracting Party shall endeavour to create conditions to facilitate access to genetic resources for environmentally sound uses by other Contracting Parties and not to impose restrictions that run counter to the objectives of this Convention.

3. For the purpose of this Convention, the genetic resources being provided by a Contracting Party, as referred to in this Article and

Articles 16 and 19, are only those that are provided by Contracting Parties that are countries of origin of such resources or by the Parties that have acquired the genetic resources in accordance with this Convention.

4. Access, where granted, shall be on mutually agreed terms and subject to the provisions of this Article.

5. Access to genetic resources shall be subject to prior informed consent of the Contracting Party providing such resources, unless otherwise determined by that Party.

6. Each Contracting Party shall endeavour to develop and carry out scientific research based on genetic resources provided by other Contracting Parties with the full participation of, and where possible in, such Contracting Parties.

7. Each Contracting Party shall take legislative, administrative or policy measures, as appropriate, and in accordance with Articles 16 and 19 and, where necessary, through the financial mechanism established by Articles 20 and 21 with the aim of sharing in a fair and equitable way the results of research and development and the benefits arising from the commercial and other utilization of genetic resources with the Contracting Party providing such resources. Such sharing shall be upon mutually agreed terms...

Article 21. Financial Mechanism

1. There shall be a mechanism for the provision of financial resources to developing country Parties for purposes of this Convention on a grant or concessional basis the essential elements of which are described in this Article. The mechanism shall function under the authority and guidance of, and be accountable to, the Conference of the Parties for purposes of this Convention. ... For purposes of this Convention, the Conference of the Parties shall determine the policy, strategy, programme priorities and eligibility criteria relating to the access to and utilization of such resources. The contributions shall be such as to take into account the need for predictability, adequacy and timely flow of funds referred to in Article 20 in accordance with the amount of resources needed to be decided periodically by the Conference of the Parties and the importance of burden-sharing among the contributing Parties included in the list referred to in Article 20, paragraph 2. Voluntary contributions may also be made by the developed country Parties and by other countries and sources. The mechanism shall operate within a democratic and transparent system of governance...

Protection of the Meridian Frog, Decision of the European Court of Justice, 2007⁴²⁴

Facts: The Conservation Association HARITZALDE turned to International Court of Environmental Arbitration and Conciliation to issue a consultative opinion with regard to protection of Meridian Frog (*Hyla Meridionalis*) and its habitats. The Meridian Frog is considered the only amphibian endangered of extinction of the Basque Country according to the Basque Catalogue of Endangered Wild Fauna and Flora. Reproduction of *Hyla Meridionalis* is effective only in the Gurelesa dam, where 85% of adults are concentrated. The lands of the Gurelesa dam were sold to a company for the construction of industrial pavilion.

Several regulations of some international conventions are fully applicable to the given case. It is necessary to underline, that these regulations are aimed predominately on preventive measures. The sense of these regulations is to protect directly endangered species and their habitats which are necessary for their life and reproduction, any forms of possible danger, in present time or in the future. Presumption of the applicability of regulations contained in international conventions is of course the fact that Spain is a Contracting Party.

For example, consider the Convention on the Conservation of European Wildlife and Natural Habitats (Bern, 19 September 1979). The aims of this Convention are to conserve wild flora and fauna and their natural habitats. Particular emphasis is given to endangered and vulnerable species (Article 1, par.2). Article 2 binds the Contracting Parties to take measures to maintain the population of wild flora and fauna.

Fully applicable for the protection of *Hyla Meridionalis* is Article 3, par. 1: "Each Contracting Party shall take steps to promote national policies for the conservation of wild flora, wild fauna and natural habitats, with particular attention to endangered and vulnerable species, especially endemic ones, and endangered habitats, in accordance with the provisions of this Convention."

As derives from the background of this case, *Hyla Meridionalis* is an endangered species, vulnerable species, endemic species and its natural habitat is now seriously endangered.

Chapter II of the Convention deals with the protection of habitats. For the case of *Hyla Meridionalis* are provisions of this chapter of highest importance,

⁴²⁴ International Court of Environmental Arbitration and Conciliation, Opinion, Dec. 2000. The International Court of Environmental Arbitration and Conciliation was established in Mexico D.F. (Distrito Federal) in November 1994, by 28 lawyers from 22 different countries. Their opinions are recommendatory.

because the whole problem of the case consists at this moment predominately in assuring full protection of the natural habitat of *Hyla Meridionalis* as presumption of future development of the protected species.

Endangered natural habitats are protected by provisions of Article 4, par. 1: “Each Contracting Party shall take appropriate and necessary legislative and administrative measures to ensure the conservation of the habitats of wild flora and fauna, especially those specified in the Appendices I and the conservation of endangered habitats.”

Appendix II of the Convention contains the list of strictly protected fauna species. Only three species of frogs are included into this list –*Hyla Meridionalis* among them (besides *Hyla Arborea* and *Hyla Sarda*). That means that *Hyla Meridionalis* and its habitats is considered as an object of highest protection in all the actions which could influence the development and existence of that species.

Another obligation is clearly formulated in Article 4, par. 2, which states: “The Contracting Parties in their planning and development policies shall have regard to the conservation requirements of the areas protected under preceding paragraph, so as to avoid or minimise as far as possible any deterioration of such areas.”

In case of *Hyla Meridionalis* living in the dam Gurelesa, whether its habitat should be completely destroyed by the construction of business area does not come into consideration eventual minimalisation of damage. The only possibility in this case is to avoid “deterioration” (in this case complete destruction), to conserve present natural habits of this species.

Chapter III of the Convention contains regulations aimed at the protection of the species. Each Contracting Party has undertaken the obligation (Article 6) to take appropriate and necessary legislative and administrative measures to ensure the special protection of the wild fauna species specified in Appendix II.

For the cases of protection of *Hyla Meridionalis*, as a strictly protected species, the following provisions of this Article can be applied:

-para. b -the deliberate damage to or destruction of breeding or resting sites is in particular prohibited,

-para. c -the deliberate disturbance of wild fauna, particularly during the period of breeding, rearing and hibernation, insofar as disturbance would be significant in relation to the objectives of this Convention, is in particular prohibited.

The intended construction of a business area over the present natural habitat of *Hyla Meridionalis* could not be considered otherwise than an intended violation of Bern Convention from two points of view: violation of provisions aimed at protection of habitats and violation of provisions aimed at protection of species. By virtue these considerations the petition of Conservationist Association HATITZALDE can be considered as justified for the following reasons:

A) the object of the petition, species of *Hyla Meridionalis* (as well as its natural habitat) is a strictly protected fauna species (Convention on the Conservation of European Wildlife and Natural Habitats). The planned destruction of *Hyla Meridionalis* in the Basque Country; and

B) the intended construction of a business park over existing natural habitat of *Hyla Meridionalis* would mean the violation of more legal provisions aimed at the protection of this strictly protected species and which are fully applicable on given case (Order 167/1996, Basque Catalogue of Endangered Species of Wild Fauna and Flora; Act 16/1994, on Nature Conservation of the Basque Country; Convention on the Conservation of European Wildlife and Natural Habitats; and Convention on Biological Diversity.

Conservationist association HARITZALDE may request that the competent Authorities change the land use plan of the area of Berio and Gurelesa and declare this area as a protected area, natural habitat of *Hyla Meridionalis*.

Conservationist association HARITZALDE may prepare, in due co-operation with competent Authorities, status of mentioned protected area, in which appropriate and necessary legislative and administrative measures to ensure the conservation of habitat of *Hyla Meridionalis* and conditions of undisturbed the development of that species shall be regulated.

Climate Change

UN Framework Convention on Climate Change and Kyoto Protocol⁴²⁵

Over a decade ago, most countries joined an international treaty – the United Nations Framework Convention on Climate Change (UNFCCC) -- to begin to consider what can be done to reduce global warming and to cope with whatever temperature increases are inevitable. More recently, a number of nations approved an addition to the treaty: the Kyoto Protocol which has more powerful (and legally binding) measures. The UNFCCC Secretariat supports all institutions involved in the climate change process, particularly the COP, the subsidiary bodies and their Bureau.

The Kyoto Protocol is an international agreement linked to the United Nations Framework Convention on Climate Change. The major feature of the Kyoto Protocol is that it sets binding targets for 37 industrialized countries and the European community for reducing greenhouse gas (GHG) emissions. These amount to an average of five per cent against 1990 levels over the five-year period 2008-2012.

The major distinction between the Protocol and the Convention is that while the Convention encouraged industrialised countries to stabilize GHG emissions, the Protocol commits them to do so.

Recognizing that developed countries are principally responsible for the current high levels of GHG emissions in the atmosphere as a result of more than 150 years of industrial activity, the Protocol places a heavier burden on developed nations under the principle of “common but differentiated responsibilities.”

The Kyoto Protocol Mechanisms

Under the Treaty, countries must meet their targets primarily through national measures. However, the Kyoto Protocol offers them an additional means of meeting their targets by way of three market-based mechanisms.

⁴²⁵ Background from the United Nations Framework Convention on Climate Change Secretariat, at http://unfccc.int/essential_background/items/6031.php. The Kyoto Protocol was adopted in Kyoto, Japan, on 11 December 1997 and entered into force on 16 February 2005. The detailed rules for the implementation of the Protocol were adopted at COP 7 in Marrakesh in 2001, and are called the “Marrakesh Accords.”

The Kyoto mechanisms are:

- Emissions trading – known as “the carbon market”.
- Clean development mechanism (CDM).
- Joint implementation (JI).

The mechanisms help stimulate green investment and help Parties meet their emission targets in a cost-effective way.

Monitoring emission targets

Under the Protocol, countries’ actual emissions have to be monitored and precise records have to be kept of the trades carried out.

Registry systems track and record transactions by Parties under the mechanisms. The UN Climate Change Secretariat, based in Bonn, Germany, keeps an international transaction log to verify that transactions are consistent with the rules of the Protocol.

Reporting is done by Parties by way of submitting annual emission inventories and national reports under the Protocol at regular intervals.

A compliance system ensures that Parties are meeting their commitments and helps them to meet their commitments if they have problems doing so.

Adaptation

The Kyoto Protocol, like the Convention, is also designed to assist countries in adapting to the adverse effects of climate change. It facilitates the development and deployment of techniques that can help increase resilience to the impacts of climate change.

The Adaptation Fund was established to finance adaptation projects and programmes in developing countries that are Parties to the Kyoto Protocol. The Fund is financed mainly with a share of proceeds from CDM project activities.

The Road Ahead

The Kyoto Protocol is generally seen as an important first step towards a truly global emission reduction regime that will stabilize GHG emissions, and provides the essential architecture for any future international agreement on climate change.

By the end of the first commitment period of the Kyoto Protocol in 2012, a new international framework needs to have been negotiated and ratified that can deliver the stringent emission reductions the Intergovernmental Panel on Climate Change has clearly indicated are needed.

Republic of Estonia v. European Commission⁴²⁶

3. The United Nations Framework Convention on Climate Change ('the Framework Convention') was adopted in New York on 9 May 1992, with the ultimate objective of stabilising greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. On 11 December 1997 the parties to the Framework Convention adopted, pursuant to the convention, the Kyoto Protocol to the United Nations Framework Convention on Climate Change ('the Kyoto Protocol'), which entered into force on 16 February 2005.

4. The objective of the Kyoto Protocol is to reduce overall emissions of six greenhouse gases, including carbon dioxide (CO₂), by at least 5% below 1990 levels in the period 2008 to 2012. The parties included in Annex I to the Framework Convention have committed themselves to ensuring that their greenhouse gas emissions do not exceed the percentages assigned them by the Kyoto Protocol; the parties can fulfil their obligations jointly. The overall commitment entered into by the European Community and its Member States under the Kyoto Protocol relates to a total reduction of greenhouse gas emissions by 8% compared with their 1990 levels during the period of commitment mentioned above.

Community law

5. The Council of the European Union approved on behalf of the Community, first, the Framework Convention, by Decision 94/69/EC of 15 December 1993 concerning the conclusion of the United Nations Framework Convention on Climate Change (OJ 1994 L 33, p. 11), and, second, the Kyoto Protocol, by Decision 2002/358/EC of 25 April 2002 concerning the approval, on behalf of the European Community, of the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the joint fulfilment of commitments thereunder (OJ 2002 L 130, p. 1). In accordance with the first paragraph of Article 2 of the latter decision, the Community and its Member States are to fulfil their overall commitment under the Kyoto Protocol jointly...

7. On the basis of Article 175(1) EC, the Commission presented on 23 October 2001 a proposal for a directive of the European Parliament and of the Council

⁴²⁶ *Societe Arcelor Atlantique et Lorraine and others v. Premier Ministre, Ministre de l'Economie, des Finances et de l'Industrie, Ministre de l'Ecologie et du Developpement Durable*, Case C-127/07, Official Journal of the European Union, 26/5/2007, C117/8. Decision in favor of applicant and Estonia, and against European Commission on appeal. See, Case C 505/09 P, *European Commission v. Republic of Estonia* (2009).

establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (COM (2001) 581 final; ‘the Commission Proposal’), which led to the adoption of Directive 2003/87.

8. As stated in recital 5 in its preamble, that directive aims to make an effective contribution to fulfilling the commitments of the Community and its Member States under the Kyoto Protocol to reduce anthropogenic greenhouse gas emissions, in accordance with Decision 2002/358, through an efficient European market in greenhouse gas emission allowances (‘allowances’), with the least possible diminution of economic development and employment...

National law

19. Directive 2003/87 was transposed into French law by Regulation No 2004 330 establishing a scheme for greenhouse gas emission allowance trading of 15 April 2004, which introduced inter alia Articles L.229 5 to L.229 19 of the Code of the Environment. The detailed rules for the application of those articles were laid down by Decree No 2004 832 of 19 August 2004. The annex to Decree No 2004 832 simply reproduced Annex I to Directive 2003/87.

20. The applicants in the main proceedings are undertakings in the steel sector. They requested the competent French authorities to repeal Article 1 of Decree No 2004 832 in so far as it made the decree applicable to installations in the steel sector. As their requests remained unanswered, they brought an action before the Conseil d’Etat for judicial review of the implied decisions rejecting those requests, asking for those authorities to be ordered to effect the repeal in question. In support of their application, they relied on breach of several constitutional principles, such as the right to property, the freedom to carry on a business, and the principle of equal treatment.

21. The Conseil d’Etat rejected the pleas in law put forward by the applicants in the main proceedings, with the exception of the plea of breach of the constitutional principle of equal treatment as a result of the different treatment of comparable situations. On that point, it observed in its order for reference that the plastics and aluminium industries emitted greenhouse gases identical to those whose emission Directive 2003/87 aimed to restrict, and that those industries produced materials which could be substituted in part for those produced by the steel industry, with which they were therefore in competition. It considered that, even if the decision not immediately to include the plastics and aluminium industries in the allowance trading scheme had been taken because of their relative share of total emissions of greenhouse gases and the need to ensure that comprehensive legislation was implemented gradually, the issue of whether the different treatment of the industries concerned was objectively justified raised a real problem.

22. In the light of those considerations, the Conseil d'Etat decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'[Is Directive 2003/87 valid] in the light of the principle of equal treatment, in so far as it makes the ... allowance trading scheme applicable to installations in the steel sector without including in its scope the aluminium and plastics industries[?]'

23. The general principle of equal treatment, as a general principle of Community law, requires that comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified (see, *inter alia*, Case 106/83 *Sermide* [1984] ECR 4209, paragraph 28; Joined Cases C 133/93, C 300/93 and C 362/93 *Crispoltoni and Others* [1994] ECR I 4863, paragraphs 50 and 51; and Case C 313/04 *Franz Egenberger* [2006] ECR I 6331, paragraph 33).

24. Since it takes the view that the steel, plastics and aluminium sectors are in a comparable situation, the national court wishes to know whether, by excluding the plastics and aluminium sectors from the scope of Directive 2003/87, the Community legislature breached that principle with respect to the steel sector. The reference for a preliminary ruling therefore relates solely to the question whether the Community legislature breached that principle by applying unjustifiable different treatment to comparable situations....

28. Under Article 1 of Directive 2003/87, the aim of the directive is to establish a Community scheme for allowance trading. According to points 4.2 and 4.3 of the Green Paper, the Community's intention was to introduce, by the directive, such a system at the level of companies, thus referring to economic activities.

29. According to recital 5 in the preamble to Directive 2003/87, its objective is to establish that scheme in order to contribute to fulfilling the commitments of the Community and its Member States under the Kyoto Protocol, which aims to reduce greenhouse gas emissions in the atmosphere to a level that prevents dangerous anthropogenic interference with the climate system, with the ultimate objective of protection of the environment.

30. Community policy on the environment, to which the legislative act at issue in the main proceedings relates, and one of whose principal objectives is the protection of the environment, aims, in accordance with Article 174(2) EC, at a high level of protection and is based in particular on the precautionary principle, the principle that preventive action should be taken, and the polluter-pays principle (see Case C 157/96 *National Farmers' Union*

and Others [1998] ECR I 2211, paragraph 64, and Joined Cases C 14/06 and C 295/06 Parliament and Denmark v Commission [2008] ECR I 0000, paragraph 75 and the case-law cited).

31. While the ultimate objective of the allowance trading scheme is the protection of the environment by means of a reduction of greenhouse gas emissions, the scheme does not of itself reduce those emissions but encourages and promotes the pursuit of the lowest cost of achieving a given amount of emissions reductions, as appears *inter alia* from point 3 of the Green Paper and point 2 of the statement of reasons in the Commission Proposal. The benefit for the environment depends on the stringency of the total quantity of allowances allocated, which represents the overall limit on emissions allowed by the scheme.

32. It also appears that the economic logic of the allowance trading scheme consists in ensuring that the reductions of greenhouse gas emissions required to achieve a predetermined environmental outcome take place at the lowest cost. By allowing the allowances that have been allocated to be sold, the scheme is intended to encourage a participant in the scheme to emit quantities of greenhouse gases that are less than the allowances originally allocated him, in order to sell the surplus to another participant who has emitted more than his allowance.

33. So, for the allowance trading scheme to function properly, there must be a supply and demand for allowances on the part of the participants in the scheme, which also means that the potential for reduction of emissions attributable to the activities covered by the scheme may vary, even considerably. Moreover, according to the Green Paper, the wider the scope of the system, the greater will be the variation in the costs of compliance of individual undertakings, and the greater the potential for lowering costs overall.

34. It follows that, in relation to the subject-matter of Directive 2003/87, the objectives of that directive referred to in paragraph 29 above, and the principles on which Community policy on the environment is based, the different sources of greenhouse gas emissions relating to economic activities are in principle in a comparable situation, since all emissions of greenhouse gases are liable to contribute to dangerous interference with the climate system and all sectors of the economy which emit such gases can contribute to the functioning of the allowance trading scheme.

35. Furthermore, it should be pointed out, first, that recital 25 in the preamble to Directive 2003/87 states that policies and measures should be implemented across all sectors of the economy of the Union in order to generate substantial emissions reductions and, second, that Article 30 of Directive

2003/87 provides that a review is to be carried out with a view to including other sectors in the scope of the directive.

36. It follows that, as regards the comparability of the sectors in question from the point of view of Directive 2003/87, the possible existence of competition between those sectors cannot constitute a decisive criterion, as the Advocate General observes in point 43 of his Opinion.

37. Nor, contrary to the arguments of the institutions which have submitted observations to the Court, is the quantity of CO₂ emitted by each sector essential for assessing their comparability, in view in particular of the objectives of Directive 2003/87 and the functioning of the allowance trading scheme, as described in paragraphs 31 to 33 above.

38. The steel, chemical and non-ferrous metal sectors are therefore, for the purposes of examining the validity of Directive 2003/87 from the point of view of the principle of equal treatment, in a comparable position while being treated differently....

60. In the present case, it is common ground, first, that the allowance trading scheme introduced by Directive 2003/87 is a novel and complex scheme whose implementation and functioning could have been disturbed by the involvement of too great a number of participants, and, second, that the original definition of the scope of the directive was dictated by the objective of attaining the critical mass of participants necessary for the scheme to be set up....

63. However, as the Advocate General notes *inter alia* in point 48 of his Opinion, the Community legislature's discretion as regards a step-by-step approach could not, in the light of the principle of equal treatment, dispense it from having recourse, for determining the sectors it thought suitable for inclusion in the scope of Directive 2003/87 from the outset, to objective criteria based on the technical and scientific information available at the time of adoption of the directive.

64. As regards, first, the chemical sector, it may be seen from the history of Directive 2003/87 that that sector has an especially large number of installations, of the order of 34 000, not only in terms of the emissions they produce but also in relation to the number of installations currently included in the scope of the directive, which is of the order of 10 000.

65. The inclusion of that sector in the scope of Directive 2003/87 would therefore have made the management of the allowance trading scheme more difficult and increased the administrative burden, so that the possibility that the functioning of the scheme would have been disturbed at the time of its

implementation as a result of that inclusion cannot be excluded. Moreover, the Community legislature was able to take the view that the advantages of excluding the whole sector at the start of the implementation of the allowance trading scheme outweighed the advantages of including it for attaining the objective of Directive 2003/87. It follows that the Community legislature has shown to the requisite legal standard that it made use of objective criteria to exclude the entire chemical sector from the scope of Directive 2003/87 in the first stage of implementation of the allowance trading scheme.

66. The argument of the applicants in the main proceedings that the inclusion in the scope of Directive 2003/87 of undertakings in that sector emitting a quantity of CO₂ above a certain threshold would not have caused administrative problems cannot call into question the above assessment.

67. The statistics they refer to concern data on 'facilities', as is apparent from Article 1 of Commission Decision 2000/479/EC of 17 July 2000 on the implementation of a European pollutant emission register (EPER) according to Article 15 of Council Directive 96/61/EC concerning integrated pollution prevention and control (IPPC) (OJ 2000 L 192, p. 36). A facility within the meaning of that decision does not constitute an installation within the meaning of Directive 2003/87, since, according to the definitions in Annex A4 to that decision, such a facility is an '[i]ndustrial complex with one or more installations on the same site, where one operator carries out one or more Annex I activities'. The data relied on by the applicants in the main proceedings thus refer only to facilities, the number of installations not being stated.

68. Consequently, the data produced by the applicants in the main proceedings in support of their abovementioned argument do not enable the Court to verify the assertion that a small number of installations in the chemical sector were responsible for a large part of the total CO₂ emissions of the sector, so that the Community legislature should have included it in part in the scope of Directive 2003/87.

69. In the light of the foregoing and having regard to the step-by-step approach on which Directive 2003/87 is based, in the first stage of implementation of the allowance trading scheme, the difference in treatment between the chemical sector and the steel sector may be regarded as justified.

70. As regards, second, the non-ferrous metal sector, it appears from the scientific report mentioned in paragraph 52 above, which, according to the observations of the Parliament, the Council and the Commission, the Community legislature made use of in drafting and adopting Directive 2003/87, that direct emissions from that sector amounted to 16.2 million tonnes of CO₂ in 1990, while the steel sector emitted 174.8 million tonnes of CO₂.

71. In view of its intention of defining the scope of Directive 2003/87 in such a way as not to upset the administrative feasibility of the allowance trading scheme in its initial stage by involving too many participants, the Community legislature was not required to have recourse solely to the method of introducing, for each sector of the economy that emitted CO₂, a threshold for emissions in order to attain its objective. Thus, in circumstances such as those in which Directive 2003/87 was adopted, it could when introducing the scheme legitimately delimit its scope by means of a sectoral approach without exceeding the bounds of its discretion.

72. The difference in the levels of direct emissions between the two sectors concerned is so substantial that the different treatment of those sectors may, in the first stage of implementation of the allowance trading scheme and in view of the step-by-step approach on which Directive 2003/87 is based, be regarded as justified without there having been any need for the Community legislature to take into consideration the indirect emissions attributable to the various sectors.

73. Accordingly, the Community legislature did not infringe the principle of equal treatment by treating comparable situations differently when it excluded the chemical and non-ferrous metal sectors from the scope of Directive 2003/87.

74. In the light of all the above considerations, the answer to the national court's question must be that consideration of Directive 2003/87 from the point of view of the principle of equal treatment has disclosed nothing to affect its validity in so far as it makes the greenhouse gas emission allowance trading scheme applicable to the steel sector without including the chemical and non-ferrous metal sectors in its scope.

Human Rights and the Environment

Dubetska and Others v. Ukraine, Decision of the European Court of Human Rights, 2011⁴²⁷

[The applicants, eleven Ukrainian nationals lodged a suit against Ukraine for failure to protect their home, private and family life from excessive pollution generated by two state owned industrial coal mining and coal processing facilities.]

⁴²⁷ *Dubetska and Others v. Ukraine*, Application no. 30499/03, European Court of Human Rights, 10 February 2011.

105. The Court refers to its well-established case-law that neither Article 8 nor any other provision of the Convention guarantees the right to preservation of the natural environment as such (see *Kyrtatos v. Greece*, no. 41666/98, § 52, ECHR 2003-VI). Likewise, no issue will arise if the detriment complained of is negligible in comparison to the environmental hazards inherent in life in every modern city. However, an arguable claim under Article 8 may arise where an environmental hazard attains a level of severity resulting in significant impairment of the applicant's ability to enjoy his home, private or family life. The assessment of that minimum level is relative and depends on all the circumstances of the case, such as the intensity and duration of the nuisance and its physical or mental effects on the individual's health or quality of life (see, among other authorities, *Fadeyeva*, cited above, §§ 68-69).

106. While there is no doubt that industrial pollution may negatively affect public health in general and worsen the quality of an individual's life, it is often impossible to quantify its effects in each individual case. As regards health impairment for instance, it is hard to distinguish the effect of environmental hazards from the influence of other relevant factors, such as age, profession or personal lifestyle. "Quality of life" in its turn is a subjective characteristic which hardly lends itself to a precise definition (see *Ledyayeva and Others v. Russia*, nos. 53157/99, 53247/99, 53695/00 and 56850/00, § 90, 26 October 2006)...

108. In addition, in order to determine whether or not the State could be held responsible under Article 8 of the Convention, the Court must examine whether a situation was a result of a sudden and unexpected turn of events or, on the contrary, was long-standing and well known to the State authorities (see *Fadeyeva*, cited above, §§ 90-91); whether the State was or should have been aware that the hazard or the nuisance was affecting the applicant's private life (see *Lopez Ostra v. Spain*, 9 December 1994, §§ 52-53, Series A no. 303-C) and to what extent the applicant contributed to creating this situation for himself and was in a position to remedy it without a prohibitive outlay (see *Ledyayeva*, cited above, § 97).

109. The Court reiterates that the present case concerns an allegation of adverse effects on the applicants' Article 8 rights on account of industrial pollution emanating from two State-owned facilities – the Vizeyska coal mine and the Chervonogradska coal-processing factory (in particular, its waste heap, which is 60 metres high).

110. The applicants' submissions relate firstly to deterioration of their health on account of water, air and soil pollution by toxic substances in excess

of permissible concentrations. In addition, these submissions likewise concern the worsening of the quality of life in view of the damage to the houses by soil subsidence and persistent difficulties in accessing non-contaminated water, which have adversely affected the applicants' daily routine and interactions between family members.

111. In assessing to what extent the applicants' health was affected by the pollution complained about, the Court agrees with the Government that there is no evidence making it possible to establish quantifiable harm in the present case. It considers, however, that living in the area marked by pollution in clear excess of applicable safety standards exposed the applicants to an elevated risk to health.

112. As regards the quality of the applicants' life, the Court notes the applicants' photographs of water and their accounts of their daily routine and communications (see paragraphs 24-30 above), which appear to be palpably affected by environmental considerations.

113. It notes that, as suggested by the Government, there may be different natural factors affecting the quality of water and causing soil subsidence in the applicants' case (see, for instance, paragraph 21 above). Moreover, at the present time the issue of accessing fresh water appears to have been resolved by the recent opening of a centralised aqueduct. At the same time, the case file contains sufficient evidence that the operation of the mine and the factory (in particular their spoil heaps) have contributed to the above problems for a number of years, at least to a certain extent...

115. While agreeing with the Government that the statutory definitions do not necessarily reflect the actual levels of pollution to which the applicants were exposed, the Court notes that the applicants in the present case have presented a substantial amount of data in evidence that the actual excess of polluting substances within these distances from the facilities at issue has been recorded on a number of occasions (see paragraphs 17-18 and 22-23 above).

116. In deciding on whether the damage (or risk of damage) suffered by the applicants in the present case was such as to attract guarantees of Article 8, the Court also has regard to the fact that at various times the authorities considered resettling the applicants. The need to resettle the Dubetska-Nayda family was ultimately confirmed in a final judgment given by the Chervonograd Court on 26 December 2005...

118. Consequently, it appears that for a period exceeding twelve years since the entry of the Convention into force in respect of Ukraine, the applicants were living permanently in an area which, according to both the

legislative framework and empirical studies, was unsafe for residential use on account of air and water pollution and soil subsidence resulting from the operation of two State-owned industrial facilities.

119. In these circumstances the Court considers that the environmental nuisance complained about attained the level of severity necessary to bring the complaint within the ambit of Article 8 of the Convention....

123. In the Court's opinion the combination of all these factors shows a strong enough link between the pollutant emissions and the State to raise an issue of the State's responsibility under Article 8 of the Convention....

155. The Court appreciates that tackling environmental concerns associated with the operation of two major industrial polluters, which had apparently been malfunctioning from the start and piling up waste for over fifty years, was a complex task which required time and considerable resources, the more so in the context of these facilities' low profitability and nationwide economic difficulties, to which the Government have referred. At the same time, the Court notes that these industrial facilities were located in a rural area and the applicants belonged to a very small group of people (apparently not more than two dozen families) who lived nearby and were most seriously affected by pollution. In these circumstances the Government has failed to adduce sufficient explanation for their failure to either resettle the applicants or find some other kind of effective solution for their individual burden for more than twelve years.

156. There has therefore been a breach of Article 8 of the Convention in the present case.

Budayeva v. Russia, Decision of the European Court of Human Rights, 2008⁴²⁸

1. Background facts

13. The town of Tyrnauz is situated in the mountain district adjacent to Mount Elbrus, in the central Caucasus. Its population is about 25,000 inhabitants. The general urban plan of the town was developed in the 1950s as part of a large-scale industrial construction project. Two tributaries of the

⁴²⁸ *Budayeva v. Russia*, Application nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, European Court of Human Rights, 20 March 2008.

Baksan River passing through Tyrnauz, the Gerhozhansu and the Kamyksu, are known to be prone to causing mudslides.

14. The first documentary evidence of a mudslide in the Gerhozhansu River dates back to 1937. Subsequently mudslides were registered almost every year; occasionally they hit the town, causing damage. The heaviest mudslides registered prior to 2000 occurred on 1 August 1960, on 11 August 1977 and on 20 August 1999. According to the Government, the series of mudslides of 18-25 July 2000 were the strongest and most destructive of all.

15. The inhabitants and authorities of Tyrnauz are generally aware of the hazard, and are accustomed to the mudslides which usually occur in the summer and early autumn....

2. The condition of the dam in the summer of 2000

18. On 20 August 1999 a mud and debris flow hit the dam, seriously damaging it.

19. On 30 August 1999 the director of the Mountain Institute, a state agency whose mandate included monitoring weather hazards in high-altitude areas, called for an independent survey of the damage caused to the dam by the mudslide. He made recommendations to the Minister responsible for Disaster Relief of the KBR concerning the composition of a State Commission for the survey.

20. On the same day he also sent a letter to the President of the KBR, calling for emergency clean-up and restoration work to the dam and for an early warning system to be set up to raise the alarm in the event of a mudslide....

21. On 17 January 2000 the acting director of the Mountain Institute sent a letter to the Prime Minister of the KBR, warning about the increased risk of mudslides in the coming season. He stated that the dam was seriously damaged,... the only way to avoid casualties and mitigate the damage was to establish observation posts to warn civilians in the event of a mudslide, for which he requested a mandate and financial support (see the full text in Section C below).

22. On 7 March 2000 the Head of the Elbrus District Administration sent a letter to the Prime Minister of the KBR in which he referred to the imminent large-scale mudslide and requested financial aid to carry out certain emergency work on the dam. In his request he invoked possible "record losses" and casualties (see the full text in Section C below).

23. On 7 July 2000 the assistant director and the head of research of the Mountain Institute attended a session at the Ministry for Disaster Relief of the KBR. At the meeting they reiterated the warning about the risk of mudslides....

24. On 10 July 2000 the assistant director of the Mountain Institute reported to the agency director that he had warned the Ministry for Disaster Relief of the KBR of the forthcoming mudslide and requested the setting up of twenty-four hour observation posts.

25. It would appear that none of the above measures were ever implemented.

3. The mudslide of 18-25 July 2000

26. At about 11 p.m. on 18 July 2000 a flow of mud and debris hit the town of Tyrnauz and flooded some of the residential quarters.

27. According to the Government, this first wave caused no casualties. However, the applicants alleged ...to have witnessed the death of her neighbour Ms. B, born in 1934, who was trapped in the debris and drowned in the mud before anybody could help her. She also alleged that she had witnessed a Zhiguli vehicle with four men in it being carried away by the mudslide.

28. According to the Government, following the mudslide of 18 July 2000 the authorities ordered the emergency evacuation of the residents of Tyrnauz. The police and local officials went round people's homes to notify them of the mudslide and to help evacuate the elderly and disabled. In addition, police vehicles equipped with loudspeakers drove round the town, calling on residents to evacuate because of the mud hazard.

29. ...The applicants agreed that the alarm was indeed raised through loudspeakers once the mudslide had struck, but no advance warning was given. They claimed that they had been unaware of the order to evacuate and doubted that any had been issued. They also alleged that there had been no rescue forces or other organised on-the-spot assistance at the scene of the disaster, which became a cauldron of chaos and mass panic.

30. In the morning of 19 July 2000 the mud level lowered and the residents returned to their homes. The Government alleged that they did so in breach of the evacuation order, while the applicants claimed that they were not aware that the mudslide alert was still active, pointing out that there were no barriers or warnings to prevent people from returning to their homes. They did not spot any police or emergency officers near their homes, but could see that their neighbours were all at home and children were playing outside. Water, gas and electricity supplies had been reconnected after being cut off during the night.

31. At 1 p.m. on the same day a second, more powerful, mudslide hit the dam and destroyed it. Mud and debris instantly descended on the town,

sweeping the wreckage of the dam before them. At 17 Otarova Street the mudslide destroyed part of a nine-story block of flats, with four officially reported casualties....

32. The town was hit by a succession of mudslides until 25 July 2000.

33. Eight people were officially reported dead. According to the applicants, a further 19 persons allegedly went missing.

34. According to the Government, on 3 August 2000 the Prosecutor's Office of the Elbrus District decided not to launch a criminal investigation into the accident....

B. The Court's assessment (citations omitted)

1. General principles applicable in the present case

(a) Applicability of Article 2 of the Convention and general principles relating to the substantive aspect of that Article

128. The Court reiterates that Article 2 does not solely concern deaths resulting from the use of force by agents of the State but also,... lays down a positive obligation on States to take appropriate steps to safeguard the lives of those within their jurisdiction...

129. This positive obligation entails above all a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life...

130. This obligation must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake (see *Öneryıldız v. Turkey* [GC],... In particular, it applies to the sphere of industrial risks, or "dangerous activities," such as the operation of waste collection sites in the case of *Öneryıldız*.

131. The obligation on the part of the State to safeguard the lives of those within its jurisdiction has been interpreted so as to include ...a positive obligation to take regulatory measures and to adequately inform the public about any life-threatening emergency, and to ensure that any occasion of the deaths caused thereby would be followed by a judicial enquiry.

132. ... in the particular context of dangerous activities the Court has found that special emphasis must be placed on regulations geared to the special features of the activity in question, particularly with regard to the level of the potential risk to human lives. They must govern the licensing, setting up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures to ensure

the effective protection of citizens whose lives might be endangered by the inherent risks. Among these preventive measures, particular emphasis should be placed on the public's right to information, as established in the case-law of the Convention institutions...

138. The obligations deriving from Article 2 do not end there. Where lives have been lost in circumstances potentially engaging the responsibility of the State, that provision entails a duty for the State to ensure, by all means at its disposal, an adequate response – judicial or otherwise – so that the legislative and administrative framework set up to protect the right to life is properly implemented and any breaches of that right are repressed and punished...

142. ...the judicial system required by Article 2 must make provision for an independent and impartial official investigation procedure that satisfies certain minimum standards as to effectiveness and is capable of ensuring that criminal penalties are applied to the extent that this is justified by the findings of the investigation...

158. In the light of the above findings...the Court concludes that there was no justification for the authorities' omissions in implementation of the land-planning and emergency relief policies in the hazardous area of Tynauz regarding the foreseeable exposure of residents, including all applicants, to mortal risk. Moreover, it finds that there was a causal link between the serious administrative flaws that impeded their implementation and the death of Vladimir Budayev and the injuries sustained by the first and the second applicants and the members of their family.

159. The authorities have thus failed to discharge the positive obligation to establish a legislative and administrative framework designed to provide effective deterrence against threats to the right to life as required by Article 2 of the Convention.

160. Accordingly, there has been a violation of Article 2 of the Convention in its substantive aspect.

Corporate Responsibility for Environmental Harm

U.N. Guiding Principles on Business and Human Rights⁴²⁹

The United Nations Human Rights Council endorsed the “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework” on June 16, 2011. These principles were proposed by the U.N. Special Representative John Ruggie and adopted by the Human Rights Council in the following resolution.

17/4 Human rights and transnational corporations and other business enterprises

The Human Rights Council,

Recognizing that proper regulation, including through national legislation, of transnational corporations and other business enterprises and their responsible operation can contribute to the promotion, protection and fulfilment of and respect for human rights and assist in channeling the benefits of business towards contributing to the enjoyment of human rights and fundamental freedoms,

Concerned that weak national legislation and implementation cannot effectively mitigate the negative impact of globalization on vulnerable economies, fully realize the benefits of globalization or derive maximally the benefits of activities of transnational corporations and other business enterprises, and that further efforts to bridge governance gaps at the national, regional and international levels are necessary,...

1. Welcomes the work and contributions of the Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, and endorses the Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, as annexed to the report of the Special Representative;...

3. Commends the Special Representative for developing and raising awareness about the Framework based on three overarching principles of the duty of the State to protect against human rights abuses by, or involving,

⁴²⁹ Human Rights Council resolution 17/4, July 6, 2011, on Human Rights and Transnational Business Enterprises, U.N. Doc. A/HRC/RES/17/4 (2011).

transnational corporations and other business enterprises, the corporate responsibility to respect all human rights, and the need for access to effective remedies, including through appropriate judicial or non-judicial mechanisms;

4. Recognizes the role of the Guiding Principles for the implementation of the Framework, on which further progress can be made, as well as guidance that will contribute to enhancing standards and practices with regard to business and human rights, and thereby contribute to a socially sustainable globalization, without foreclosing any other long-term development, including further enhancement of standards;...

6. Decides to establish a Working Group on the issue of human rights and transnational corporations and other business enterprises, consisting of five independent experts, of balanced geographical representation, for a period of three years, to be appointed by the Human Rights Council at its eighteenth session, and requests the Working Group:

(a) To promote the effective and comprehensive dissemination and implementation of the Guiding Principles;

(b) To identify, exchange and promote good practices and lessons learned on the implementation of the Guiding Principles and to assess and make recommendations there on and, in that context, to seek and receive information from all relevant sources, including Governments, transnational corporations and other business enterprises, national human rights institutions, civil society and rights-holders;

(c) To provide support for efforts to promote capacity-building and the use of the Guiding Principles, as well as, upon request, to provide advice and recommendations regarding the development of domestic legislation and policies relating to business and human rights;

(d) To conduct country visits and to respond promptly to invitations from States;

(e) To continue to explore options and make recommendations at the national, regional and international levels for enhancing access to effective remedies available to those whose human rights are affected by corporate activities, including those in conflict areas;

(f) To integrate a gender perspective throughout the work of the mandate and to give special attention to persons living in vulnerable situations, in particular children;...

(h) To develop a regular dialogue and discuss possible areas of cooperation with Governments and all relevant actors, including relevant

United Nations bodies, specialized agencies, funds and programmes, in particular the Office of the United Nations High Commissioner for Human Rights, the Global Compact, the International Labour Organization, the World Bank and its International Finance Corporation, the United Nations Development Programme and the International Organization for Migration, as well as transnational corporations and other business enterprises, national human rights institutions, representatives of indigenous peoples, civil society organizations and other regional and subregional international organizations;

(i) To guide the work of the Forum on Business and Human Rights established pursuant to paragraph 12 below;

(j) To report annually to the Human Rights Council and the General Assembly;

7. Encourages all Governments, relevant United Nations agencies, funds and programmes, treaty bodies, civil society actors, including non-governmental organizations, as well as the private sector to cooperate fully with the Working Group in the fulfilment of its mandate by, inter alia, responding favourably to visit requests by the Working Group;

8. Invites international and regional organizations to seek the views of the Working Group when formulating or developing relevant policies and instruments;

9. Requests the Secretary-General and the United Nations High Commissioner for Human Rights to provide all the assistance necessary to the Working Group for the effective fulfilment of its mandate;

10. Welcomes the important role of national human rights institutions established in accordance with the Paris Principles in relation to business and human rights, and encourages national human rights institutions to develop further their capacity to fulfil that role effectively, including with the support of the Office of the High Commissioner and in addressing all relevant actors;

11. Requests the Secretary-General to prepare a report on how the United Nations system as a whole...can contribute to the advancement of the business and human rights agenda and the dissemination and implementation of the Guiding Principles,...

12. Decides to establish a Forum on Business and Human Rights under the guidance of the Working Group to discuss trends and challenges in the implementation of the Guiding Principles and promote dialogue and cooperation on issues linked to business and human rights, including challenges

faced in particular sectors, operational environments or in relation to specific rights or groups, as well as identifying good practices;

13. Also decides that the Forum shall be open to the participation of States, United Nations mechanisms, bodies and specialized agencies, funds and programmes, intergovernmental organizations, regional organizations and mechanisms in the field of human rights, national human rights institutions and other relevant bodies, transnational corporations and other business enterprises, business associations, labour unions, academics and experts in the field of business and human rights, representatives of indigenous peoples and non-governmental organizations in consultative status with the Economic and Social Council; the Forum shall also be open to other non-governmental organizations whose aims and purposes are in conformity with the spirit, purposes and principles of the Charter of the United Nations, including affected individuals and groups, based on arrangements, including Economic and Social Council resolution 1996/31 of 25 July 1996, and practices observed by the Commission on Human Rights, through an open and transparent accreditation procedure in accordance with the Rules of Procedure of the Human Rights Council;...

16. Invites the Working Group to include in its report reflections on the proceedings of the Forum and recommendations for future thematic subjects for consideration by the Human Rights Council;...

18. Decides to continue consideration of this question in conformity with the annual programme of work of the Human Rights Council.

33rd meeting

16 June 2011 [Adopted without a vote]

***Guiding Principles on Business and Human Rights:
Implementing the United Nations “Protect, Respect and
Remedy” Framework⁴³⁰***

These Guiding Principles are grounded in recognition of:

(a) States’ existing obligations to respect, protect and fulfil human rights and fundamental freedoms;

(b) The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights;

⁴³⁰ Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, March 21, 2011, Human Rights Council, U.N. Doc. HRC/17/31 (2011).

(c) The need for rights and obligations to be matched to appropriate and effective remedies when breached.

These Guiding Principles apply to all States and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure....

I. The State duty to protect human rights

A. Foundational principles

1. States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication....

II. The Corporate Responsibility to Respect Human Rights

B. Operational principles

Human rights due diligence

18. In order to gauge human rights risks, business enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships. This process should:

(a) Draw on internal and/or independent external human rights expertise;

(b) Involve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation.

Commentary

The initial step in conducting human rights due diligence is to identify and assess the nature of the actual and potential adverse human rights impacts with which a business enterprise may be involved. The purpose is to understand the specific impacts on specific people, given a specific context of operations. Typically this includes assessing the human rights context prior to a proposed business activity, where possible; identifying who may be affected; cataloguing the relevant human rights standards and issues; and projecting how the proposed activity and associated business relationships could have adverse human rights impacts on those identified. In this process, business enterprises should pay special attention to any particular human rights im-

pacts on individuals from groups or populations that may be at heightened risk of vulnerability or marginalization, and bear in mind the different risks that may be faced by women and men. While processes for assessing human rights impacts can be incorporated within other processes such as risk assessments or environmental and social impact assessments, they should include all internationally recognized human rights as a reference point, since enterprises may potentially impact virtually any of these rights. Because human rights situations are dynamic, assessments of human rights impacts should be undertaken at regular intervals: prior to a new activity or relationship; prior to major decisions or changes in the operation (e.g. market entry, product launch, policy change, or wider changes to the business); in response to or anticipation of changes in the operating environment (e.g. rising social tensions); and periodically throughout the life of an activity or relationship.

International Network for Economic, Social & Cultural Rights (ESCR-Net) and Human Rights Watch – joint statement to UN Human Rights Council, 4 Jun 2010⁴³¹

We would like to address the report of the Special Representative of the Secretary-General (SRSG) on human rights and transnational corporations and other business enterprises...

... [We] agree with the view expressed by the SRSG in his report that one of the major gaps is the failure to enforce existing laws and that “for ‘at-risk’ and vulnerable groups, there may be inadequate legal protection in the first place.”

We also welcome the confirmation in the report that “the corporate responsibility to respect human rights exists independently of States’ duties or capacity [and] constitutes a universally applicable human rights responsibility for all companies, in all situations.” Nevertheless, the SRSG’s work to date has largely attributed the business responsibility to respect human rights to general social norms and market expectations.... That view is open to debate and in any case the law is highly dynamic....

[The] Council’s twin tasks in relation to business and human rights [are]: defending the rights of those affected by corporate abuses around the world and articulating global standards to that end. We would sincerely welcome both elements having a central place in the next mandate.

⁴³¹ Reprinted courtesy of Business and Human Rights Resource Center <http://www.business-humanrights.org/SpecialRepPortal/Home/ReportstoUNHumanRightsCouncil/2010/Comments>.

Annette Hughes, Rachel Nicolson and Catie Shavin, Allens Arthur Robinson Law Firm - 4 May 2010⁴³²

The latest report...details the progress he has made in operationalizing this framework, and in doing so, provides further guidance to corporations on the steps that can be taken to meet their responsibility to respect human rights.

As reported, the Special Representative's efforts over the past 12 months have included working to map corporate law and securities regulation relevant to human rights in more than 40 jurisdictions..., considering the due diligence contents of the corporate responsibility to respect human rights, and further developing and testing the framework's principles on company-based grievance mechanisms.

The report outlines its findings on each pillar of the ["Protect, Respect, Remedy"] framework made by the Special Representative's work to date.

⁴³² Reprinted courtesy of Business and Human Rights Resource Center <http://www.business-humanrights.org/SpecialRepPortal/Home/ReportstoUNHumanRightsCouncil/2010/Comments>.

CHAPTER 6 INTERNATIONAL TRADE LAW

*History and Basic Principles of WTO*⁴³³

The World Trade Organization (WTO) is an international organization designed to govern and regulate trade between different participating states. There are more than 150 states members of the WTO, representing over 95% of world trade. The main purpose of WTO is to liberalize international trade through lowering or eliminating various trade barriers such as customs duties, quotas, import bans and other non-tariff barriers to trade. Among other functions, WTO also serves as a forum for trade negotiations and settlement of trade disputes.

Basic principles of WTO:

1. Most Favored Nations Principle (MFN) is one of the most fundamental principles of WTO that prohibits discrimination between trading partners. MFN obliges the states to extend immediately and unconditionally any advantage, favor, privilege or immunity granted to a product of one contracting party to the like product of any other contracting party.

2. National Treatment Principle is similar to MFN principle. It requires WTO member states to accord equal treatment to domestic and imported like products. It ensures that member states do not afford protection to domestic production through internal taxes, charges, regulations and requirements.

3. Principle of transparency and predictability is another cornerstone of WTO legal system. Once negotiated, WTO member states are not allowed to arbitrarily raise their tariff commitments beyond the negotiated rate. This principle ensures the stability and predictability in multilateral trading system.

Brief overview of history of WTO:

The idea to establish an open and non-discriminatory international trading system emerged after World War II. Countries at that time had sought to create three economic institutions to eliminate economic causes of war: The International Monetary Fund, the World Bank and International Trade Orga-

⁴³³ <http://www.wto.org/>.

nization (ITO). However, due to the fact that US Congress did not approve the ITO charter, the International Trade Organization was never established. In April 1947 at the UN conference in Geneva General Agreement on Trade and Tariffs (GATT 1947) was negotiated between 23 states and package of tariff reductions were adopted. In the absence of international trade organization countries adopted agreement on provisional application of GATT until the formal international organization would be created. GATT 1947 became the organization and agreement for establishing and enforcing the international trade rules. In 1995 the agreement on trade in goods became the World Trade Organization.

Since establishment of GATT 1947 series multilateral trade negotiations known as “trade rounds” took place to achieve further tariff reduction and adoption of additional trade agreements. The first rounds mainly concentrated on tariff reduction. Then, the Kennedy Round brought about a GATT Anti-Dumping and a section on development. The Tokyo Round was the major attempt to tackle non-tariff barriers to trade. The last round, the Uruguay Round led to the establishment of WTO and new set of agreements.

Tariff Binding and GATT Article II

Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items, 1997⁴³⁴

2.1 The great majority of Argentina’s import tariffs are fixed in ad valorem terms. Regarding textiles, clothing and footwear, Argentina maintained a regime of minimum specific import duties as from 1993. Argentina’s had a bound rate of duty of 35 per cent ad valorem with respect to textiles, apparel and footwear imported into Argentina. In parallel, Argentina continued to apply a system of minimum specific import duties in the footwear, textile and apparel sectors. The system operated as follows: for each relevant HS tariff line of textiles, apparels and footwear, Argentina calculated an average import price. Once it had determined the average import price for a particular category, Argentina multiplied that price by the bound rate of 35 per cent, resulting in a specific minimum duty for all products in that category. Upon the importation of cov-

⁴³⁴ Argentina-Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items, World Trade Organization Panel Report, WT/DS56/R (25 Nov 1997) (citations omitted).

ered textiles, apparel or footwear, depending on the customs value of the goods concerned, Argentina applied either the specific minimum duty applicable to those items or the ad valorem rate, whichever was higher...

6.3 This dispute raises, therefore, various legal issues which we have identified and grouped as follows:

B. Article II of GATT. Does the imposition of minimum specific duties by Argentina, which has bound the tariffs at issue at an ad valorem rate, constitute a violation of Article II? Does Argentina's tariff system have the potential to violate Article II and is this potential sufficient to constitute an infringement thereof? Has Argentina imposed duties in excess of its bound rate of 35 per cent ad valorem? How should we treat the issues raised by the parties with regard to proof and evidence submitted to the Panel?

6.22 Article II(1)(a) of GATT reads as follows:

"1. (a) Each Member shall accord to the commerce of the other Members treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement." The issue for the Panel is, therefore, to decide what are the obligations covered by the "treatment no less favourable than that provided for in the appropriate... Schedule."

6.23 The United States claims that the type of duties applied by a WTO Member - even below any bound rate - must conform to that specified in the Schedule of such Member. Since Argentina has bound its tariffs at 35 per cent ad valorem in its Schedule of Concessions (hereafter called "Schedule"), the United States argues that Argentina may only impose ad valorem duties. Argentina responds that as long as the duties it imposes are below the equivalent of 35 per cent ad valorem, it can use any type of duties. Therefore, we have to decide whether the imposition of minimum specific duties by Argentina, which has bound the tariffs at issue at an ad valorem rate, constitutes a violation of Article II.

6.24 The wording of Article II does not seem to address explicitly whether WTO Members have an obligation to use a particular type of duty. However, the wording of Article II must be interpreted in the light of past GATT practice, as mentioned in Article XVI:1 of the WTO Agreement and paragraph 1(b)(iv) of Annex 1A incorporating the GATT 1994 into the WTO Agreement, and indicated by the Appellate Body in *Japan - Taxes on Alcoholic Beverages*. Issues similar to those presented in this case have arisen on a number of occasions...

6.30 The *Bananas II* panel report clearly recognizes the past GATT practice and can be read as concluding that the imposition of specific duties when only ad valorem duties are bound is sufficient to establish a violation of Article II.

6.31 We note that the past GATT practice is clear: a situation whereby a contracting party applies one type of duties while its Schedule refers to bindings of another type of duties constitutes a violation of Article II of GATT, without any obligation for the complaining party to submit further evidence that such variance leads to an effective breach of bindings. The fact that Argentina claims that it is simply following its past practice of using specific duties would not seem to be relevant, since it made ad valorem tariff concessions on the products in question and thus created an obligation for itself to impose such type of duties. As a guarantee for predictability and to ensure the full respect of the negotiations under Article II, GATT practice has generally required that once a Member has indicated the type(s) of duties in specifying its bound rate, it must apply such type(s) of duties. Accordingly, faced with such a variance in the type duties applied by Argentina from that reflected in its Schedule, we consider that we do not have to examine the effects of that variance on possible future imports. Indeed, such a variance undermines the stability and predictability of Members' Schedules.

6.32 We, therefore, find that Argentina, in using a system of specific minimum tariffs although it has bound its tariffs at ad valorem rates only, is violating the provisions of Article II of GATT and that the United States does not have to provide further evidence that the resultant duties exceed the bound tariff rate. Such a variance between Argentina's Schedule and its applied tariffs constitutes a less favourable treatment to the commerce of the other Members than that provided for in Argentina's Schedule, contrary to the provisions of Article II of GATT....

(b) Minimum specific duties necessarily lead to breaches of Argentina's bindings

6.41 The United States submits that the way the minimum specific duties were initially determined by Argentina, i.e. on a "representative international price" based essentially on the US market price, will always lead to breaches of the bound tariff rate of 35 per cent for those exports which are priced sufficiently below such average price. The United States submits the example of soccer shoes which are subject to a specific minimum duty of US\$3.50 and an applied ad valorem duty of 20 per cent. For shoes imported at a value of US\$5.00, the minimum specific duty assessed of US\$3.50 represents a duty of 70 per cent ad valorem. Indeed, all shoes imported at a value below US\$10.00 would be subject to an ad valorem duty above 35 per cent. In other words, every time a good is imported at a price below the "representative international price," the specific duty - which is set on the basis of what Argentina thought the "price should be" and, as argued by Argentina, to counteract the

problem of underpriced imports - would be superior to the normally applicable ad valorem duty, and possibly above the bound rate of 35 per cent ad valorem. For the United States, the purpose of such minimum specific duty scheme is to impose duties in excess of the 35 per cent ad valorem collected on the effective import price because, allegedly, goods are often imported into Argentina at prices below the representative international price so that the bound rate of 35 per cent was not sufficient. The United States further argues that for at least 32 HS headings, the specific duty was set at a rate even greater than 35 per cent of the so-called “representative international price” and referred the Panel to its chart showing on the basis of calculations made by Argentina, the above mentioned instances of violations. Later the United States submitted an additional list of 104 categories of HS lines which demonstrated that the ad valorem equivalents of the specific duties, even when applied on US export prices, were above 35 per cent.

6.42 Argentina’s response is three-fold. First, it argues that the minimum specific duty was always set so as to be below 35 per cent ad valorem of the representative international price of any such item. Thus, if imports were priced at the representative international price, there would be no problems. Second, for Argentina, the US allegations are too general, hypothetical and theoretical and, therefore, not relevant and that the Panel should not consider such “hypothetical” situations without evidence of specific transactions where breaches occurred, since otherwise the dispute settlement system would be abused with frivolous claims. For Argentina, a potential violation would constitute an infringement only if trade was affected and refers the Panel to the Tobacco case where, according to Argentina, the panel refused to sanction mere possibility of violations.

6.43 We understand that the specific duties were set based on representative international prices. In these circumstances, when the specific duties are set so as to be equivalent to a 35 per cent ad valorem rate, it is certain that every time a good is imported at a transaction value below the representative international price, the specific duty level will be more than 35 per cent ad valorem of the transaction value. In the case of specific duties set so as to be equivalent to a tariff rate of less than 35 per cent, if a good is imported at a transaction value sufficiently below the representative international price used to set the duty, the bound rate of 35 per cent ad valorem will also be exceeded. For example, if the representative international price of a product is US\$100.00 and the specific duty is set at US\$20.00 to reflect an ad valorem equivalent of 20 per cent, if the product is imported at a price below US\$57.00, the effective ad valorem rate will always exceed 35 per cent. Thus, in many cases, it seems clear that the specific duties at issue will necessarily result in

a duty in excess of the 35 per cent bound rate when the customs value of a product is below the representative international price for such product.

6.44 We note that customs duties are normally to be imposed on the transaction value of imported goods as defined in the Agreement on the Implementation of Article VII of GATT 1994 (“Customs Valuation Agreement”). The transaction value is defined as “the price actually paid or payable for the goods when sold for export to the country of importation.” Obviously, if the customs value declared by the importer does not represent the price actually paid, the Argentine authorities may take action to counteract a false declaration through, for example, revisions of the customs value declared in specific cases and even criminal prosecutions. However, neither the Customs Valuation Agreement nor any other provision of the WTO Agreement allows the breach of tariff bindings made under Article II of GATT on the grounds of a general suspicion that declared customs values are sometimes understated. We note, therefore, that mechanisms to counteract alleged underpricing practices are not justifications for Article II violation.

6.45 In respect of the Argentine argument that the US claim should not be considered because it addresses only a potential violation - in support of which it refers to the Tobacco panel report - we note that the Argentine measures, the specific duties, are mandatory measures. Argentina admits that its customs officials are obligated to collect the specific duties on all imports. GATT/WTO case law is clear in that a mandatory measure can be brought before a panel, even if such an adopted measure is not yet in effect, and independently of the absence of trade effect of such measure for the complaining party: “[T]he very existence of mandatory legislation providing for an internal tax, without it being applied to a particular imported product, should be regarded as falling within the scope of Article III:2, first sentence.” We are also of the view that the Tobacco panel report merely confirms this principle.

6.46 Moreover, in *Bananas III*¹⁹², the Appellate Body confirmed that the principles developed in *Superfund*¹⁹³ were still much applicable to WTO disputes and that any measure which changes the competitive relationship of Members nullifies any such Members’ benefits under the WTO Agreement. “Article III:2, first sentence, cannot be interpreted to protect expectations on export volumes; it protects expectations on the competitive relationship between imported and domestic products. A change in the competitive relationship contrary to that provision must consequently be regarded *ipso facto* as a nullification or impairment of benefits accruing under the General Agreement.” We consider that this principle is also appropriate when dealing

with the application of the obligations contained in Article II of GATT which requires a “treatment no less favourable than that” provided in a Member’s Schedule. In the present dispute we consider that the competitive relationship of the parties was changed unilaterally by Argentina because its mandatory measure clearly has the potential to violate its bindings, thus undermining the security and the predictability of the WTO system.

6.47 We find, therefore, that the United States has established a presumption that the very nature of the minimum specific duty system maintained by Argentina violates the provisions of Article II of GATT and that, as shown above, this presumption has not been rebutted by Argentina.

National Treatment and GATT Article III

Japan – Taxes on Alcoholic Beverages, 1996⁴³⁵

Japan and the United States appeal from certain issues of law and legal interpretations in the Panel Report, Japan - Taxes on Alcoholic Beverages (the “Panel Report”). That Panel was established to consider complaints by the European Communities, Canada and the United States against Japan relating to the Japanese Liquor Tax Law.

The Panel Report was circulated to the Members of the World Trade Organization (the “WTO”) on 11 July 1996. It contains the following conclusions:

(i) Shochu and vodka are like products and Japan, by taxing the latter in excess of the former, is in violation of its obligation under Article III: 2, first sentence, of the General Agreement on Tariffs and Trade 1994.

(ii) Shochu, whisky, brandy, rum, gin, genever, and liqueurs are “directly competitive or substitutable products” and Japan, by not taxing them similarly, is in violation of its obligation under Article III: 2, second sentence, of the General Agreement on Tariffs and Trade 1994.³

F. Interpretation of Article III

The WTO Agreement is a treaty – the international equivalent of a contract. It is self-evident that in an exercise of their sovereignty, and in pursuit of their own respective national interests, the Members of the WTO have made a bargain. In exchange for the benefits they expect to derive as Members of

⁴³⁵ Japan-Taxes on Alcoholic Beverages, World Trade Organization Appellate Body Report, WT/DS8/AB/R; WT/DS10/AB/R; WT/DS11/AB/R (4 Oct 1996) (citations omitted).

the WTO, they have agreed to exercise their sovereignty according to the commitments they have made in the WTO Agreement.

One of those commitments is Article III of the GATT 1994, which is entitled “National Treatment on Internal Taxation and Regulation.” For the purpose of this appeal, the relevant parts of Article III read as follows:

Article III: National Treatment on Internal Taxation and Regulation

1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.

2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.

A tax conforming to the requirements of the first sentence of paragraph 2 would be considered to be inconsistent with the provisions of the second sentence only in cases where competition was involved between, on the one hand, the taxed product and, on the other hand, a directly competitive or substitutable product which was not similarly taxed.

The broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures. More specifically, the purpose of Article III “is to ensure that internal measures ‘not be applied to imported or domestic products so as to afford protection to domestic production’”. Toward this end, Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products. “[T]he intention of the drafters of the Agreement was clearly to treat the imported products in the same way as the like domestic products once they had been cleared through customs. Otherwise indirect protection could be given.” Moreover, it is irrelevant that “the trade effects” of the tax differential between imported and domestic products, as reflected in the volumes of imports, are insignificant or even non-existent; Article III protects expectations not of any particular trade volume but rather of the

equal competitive relationship between imported and domestic products. Members of the WTO are free to pursue their own domestic goals through internal taxation or regulation so long as they do not do so in a way that violates Article III or any of the other commitments they have made in the WTO Agreement.

The broad purpose of Article III of avoiding protectionism must be remembered when considering the relationship between Article III and other provisions of the WTO Agreement. Although the protection of negotiated tariff concessions is certainly one purpose of Article III the statement in Paragraph 6.13 of the Panel Report that “one of the main purposes of Article III is to guarantee that WTO Members will not undermine through internal measures their commitments under Article II” should not be overemphasized. The sheltering scope of Article III is not limited to products that are the subject of tariff concessions under Article II. The Article III national treatment obligation is a general prohibition on the use of internal taxes and other internal regulatory measures so as to afford protection to domestic production. This obligation clearly extends also to products not bound under Article II. This is confirmed by the negotiating history of Article III.

G. Article III:1

The terms of Article III must be given their ordinary meaning – in their context and in the light of the overall object and purpose of the WTO Agreement. Thus, the words actually used in the Article provide the basis for an interpretation that must give meaning and effect to all its terms. The proper interpretation of the Article is, first of all, a textual interpretation. Consequently, the Panel is correct in seeing a distinction between Article III:1, which “contains general principles,” and Article III:2, which “provides for specific obligations regarding internal taxes and internal charges.” Article III:1 articulates a general principle that internal measures should not be applied so as to afford protection to domestic production. This general principle informs the rest of Article III. The purpose of Article III:1 is to establish this general principle as a guide to understanding and interpreting the specific obligations contained in Article III:2 and in the other paragraphs of Article III, while respecting, and not diminishing in any way, the meaning of the words actually used in the texts of those other paragraphs. In short, Article III:1 constitutes part of the context of Article III:2, in the same way that it constitutes part of the context of each of the other paragraphs in Article III. Any other reading of Article III would have the effect of rendering the words of Article III:1 meaningless, thereby violating the fundamental principle of effectiveness in treaty interpretation. Consistent

with this principle of effectiveness, and with the textual differences in the two sentences, we believe that Article III:1 informs the first sentence and the second sentence of Article III:2 in different ways.

H. Article III:2

1. First Sentence

Article III:1 informs Article III:2, first sentence, by establishing that if imported products are taxed in excess of like domestic products, then that tax measure is inconsistent with Article III. Article III:2, first sentence does not refer specifically to Article III:1. There is no specific invocation in this first sentence of the general principle in Article III:1 that admonishes Members of the WTO not to apply measures “so as to afford protection.” This omission must have some meaning. We believe the meaning is simply that the presence of a protective application need not be established separately from the specific requirements that are included in the first sentence in order to show that a tax measure is inconsistent with the general principle set out in the first sentence. However, this does not mean that the general principle of Article III:1 does not apply to this sentence. To the contrary, we believe the first sentence of Article III:2 is, in effect, an application of this general principle. The ordinary meaning of the words of Article III:2, first sentence leads inevitably to this conclusion. Read in their context and in the light of the overall object and purpose of the WTO Agreement, the words of the first sentence require an examination of the conformity of an internal tax measure with Article III by determining, first, whether the taxed imported and domestic products are “like” and, second, whether the taxes applied to the imported products are “in excess of” those applied to the like domestic products. If the imported and domestic products are “like products,” and if the taxes applied to the imported products are “in excess of” those applied to the like domestic products, then the measure is inconsistent with Article III:2, first sentence.

This approach to an examination of Article III:2, first sentence, is consistent with past practice under the GATT 1947.⁴² Moreover, it is consistent with the object and purpose of Article III:2, which the panel in the predecessor to this case dealing with an earlier version of the Liquor Tax Law, Japan - Customs Duties, Taxes and Labeling Practices on Imported Wines and Alcoholic Beverages (“1987 Japan - Alcohol”), rightly stated as “promoting non-discriminatory competition among imported and like domestic products [which] could not be achieved if Article III:2 were construed in a manner allowing discriminatory and protective internal taxation of imported products in excess of like domestic products.”

(a) “Like Products”

Because the second sentence of Article III:2 provides for a separate and distinctive consideration of the protective aspect of a measure in examining its application to a broader category of products that are not “like products” as contemplated by the first sentence, we agree with the Panel that the first sentence of Article III:2 must be construed narrowly so as not to condemn measures that its strict terms are not meant to condemn. Consequently, we agree with the Panel also that the definition of “like products” in Article III:2, first sentence, should be construed narrowly.

How narrowly is a matter that should be determined separately for each tax measure in each case. We agree with the practice under the GATT 1947 of determining whether imported and domestic products are “like” on a case-by-case basis. The Report of the Working Party on Border Tax Adjustments, adopted by the CONTRACTING PARTIES in 1970, set out the basic approach for interpreting “like or similar products” generally in the various provisions of the GATT 1947:

...the interpretation of the term should be examined on a case-by-case basis. This would allow a fair assessment in each case of the different elements that constitute a “similar” product. Some criteria were suggested for determining, on a case-by-case basis, whether a product is “similar”: the product’s end-uses in a given market; consumers’ tastes and habits, which change from country to country; the product’s properties, nature and quality.

The concept of “likeness” is a relative one that evokes the image of an accordion. The accordion of “likeness” stretches and squeezes in different places as different provisions of the WTO Agreement are applied. The width of the accordion in any one of those places must be determined by the particular provision in which the term “like” is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply. We believe that, in Article III:2, first sentence of the GATT 1994, the accordion of “likeness” is meant to be narrowly squeezed.

The Panel determined in this case that shochu and vodka are “like products” for the purposes of Article III:2, first sentence. We note that the determination of whether vodka is a “like product” to shochu under Article III:2, first sentence, or a “directly competitive or substitutable product” to shochu under Article III:2, second sentence, does not materially affect the outcome of this case.

A uniform tariff classification of products can be relevant in determining what are “like products.” If sufficiently detailed, tariff classification can be a

helpful sign of product similarity. With these modifications to the legal reasoning in the Panel Report, we affirm the legal conclusions and the findings of the Panel with respect to “like products” in all other respects.

(b) “In Excess Of”

The only remaining issue under Article III:2, first sentence, is whether the taxes on imported products are “in excess of” those on like domestic products. If so, then the Member that has imposed the tax is not in compliance with Article III. Even the smallest amount of “excess” is too much. “The prohibition of discriminatory taxes in Article III:2, first sentence, is not conditional on a ‘trade effects test’ nor is it qualified by a *de minimis* standard.” We agree with the Panel’s legal reasoning and with its conclusions on this aspect of the interpretation and application of Article III:2, first sentence.

2. Second Sentence

Article III:1 informs Article III:2, second sentence, through specific reference. Article III:2, second sentence, contains a general prohibition against “internal taxes or other internal charges” applied to “imported or domestic products in a manner contrary to the principles set forth in paragraph 1.” As mentioned before, Article III:1 states that internal taxes and other internal charges “should not be applied to imported or domestic products so as to afford protection to domestic production.” Again, Ad Article III:2 states as follows:

A tax conforming to the requirements of the first sentence of paragraph 2 would be considered to be inconsistent with the provisions of the second sentence only in cases where competition was involved between, on the one hand, the taxed product and, on the other hand, a directly competitive or substitutable product which was not similarly taxed.

Article III:2, second sentence, and the accompanying Ad Article have equivalent legal status in that both are treaty language which was negotiated and agreed at the same time. The Ad Article does not replace or modify the language contained in Article III:2, second sentence, but, in fact, clarifies its meaning. Accordingly, the language of the second sentence and the Ad Article must be read together in order to give them their proper meaning.

Unlike that of Article III:2, first sentence, the language of Article III:2, second sentence, specifically invokes Article III:1. The significance of this distinction lies in the fact that whereas Article III:1 acts implicitly in addressing the two issues that must be considered in applying the first sentence, it acts explicitly as an entirely separate issue that must be addressed along with two other issues that are raised in applying the second sentence. Giving full mean-

ing to the text and to its context, three separate issues must be addressed to determine whether an internal tax measure is inconsistent with Article III:2, second sentence. These three issues are whether:

(1) the imported products and the domestic products are “directly competitive or substitutable products” which are in competition with each other;

(2) the directly competitive or substitutable imported and domestic products are “not similarly taxed”; and

(3) the dissimilar taxation of the directly competitive or substitutable imported domestic products is “applied ... so as to afford protection to domestic production.”

Again, these are three separate issues. Each must be established separately by the complainant for a panel to find that a tax measure imposed by a Member of the WTO is inconsistent with Article III:2, second sentence.

(a) “Directly Competitive or Substitutable Products”

If imported and domestic products are not “like products” for the narrow purposes of Article III:2, first sentence, then they are not subject to the strictures of that sentence and there is no inconsistency with the requirements of that sentence. However, depending on their nature, and depending on the competitive conditions in the relevant market, those same products may well be among the broader category of “directly competitive or substitutable products” that fall within the domain of Article III:2, second sentence. How much broader that category of “directly competitive or substitutable products” may be in any given case is a matter for the panel to determine based on all the relevant facts in that case. As with “like products” under the first sentence, the determination of the appropriate range of “directly competitive or substitutable products” under the second sentence must be made on a case-by-case basis.

In this case, the Panel emphasized the need to look not only at such matters as physical characteristics, common end-uses, and tariff classifications, but also at the “market place.” This seems appropriate. The GATT 1994 is a commercial agreement, and the WTO is concerned, after all, with markets. It does not seem inappropriate to look at competition in the relevant markets as one among a number of means of identifying the broader category of products that might be described as “directly competitive or substitutable.”

Nor does it seem inappropriate to examine elasticity of substitution as one means of examining those relevant markets. The Panel did not say that cross-price elasticity of demand is “the decisive criterion” for determining

whether products are “directly competitive or substitutable.” The Panel stated the following:

In the Panel’s view, the decisive criterion in order to determine whether two products are directly competitive or substitutable is whether they have common end-uses, *inter alia*, as shown by elasticity of substitution. We agree. And, we find the Panel’s legal analysis of whether the products are “directly competitive or substitutable products” in paragraphs 6.28-6.32 of the Panel Report to be correct.

We note that the Panel’s conclusions on “like products” and on “directly competitive or substitutable products” contained in paragraphs 7.1(i) and (ii), respectively, of the Panel Report fail to address the full range of alcoholic beverages included in the Panel’s Terms of Reference. More specifically, the Panel’s conclusions in paragraph 7.1(ii) on “directly competitive or substitutable products” relate only to “shochu, whisky, brandy, rum, gin, genever, and liqueurs,” which is narrower than the range of products referred to the Dispute Settlement Body by one of the complainants, the United States, which included in its request for the establishment of a panel “all other distilled spirits and liqueurs falling within HS heading 2208.”

(b) “Not Similarly Taxed”

To give due meaning to the distinctions in the wording of Article III:2, first sentence, and Article III:2, second sentence, the phrase “not similarly taxed” in the Ad Article to the second sentence must not be construed so as to mean the same thing as the phrase “in excess of” in the first sentence. On its face, the phrase “in excess of” in the first sentence means any amount of tax on imported products “in excess of” the tax on domestic “like products.” The phrase “not similarly taxed” in the Ad Article to the second sentence must therefore mean something else. It requires a different standard, just as “directly competitive or substitutable products” requires a different standard as compared to “like products” for these same interpretive purposes.

Reinforcing this conclusion is the need to give due meaning to the distinction between “like products” in the first sentence and “directly competitive or substitutable products” in the Ad Article to the second sentence. If “in excess of” in the first sentence and “not similarly taxed” in the Ad Article to the second sentence were construed to mean one and the same thing, then “like products” in the first sentence and “directly competitive or substitutable products” in the Ad Article to the second sentence would also mean one and the same thing. This would eviscerate the distinctive meaning that must be respected in the words of the text.

To interpret “in excess of” and “not similarly taxed” identically would deny any distinction between the first and second sentences of Article III:2. Thus, in any given case, there may be some amount of taxation on imported products that may well be “in excess of” the tax on domestic “like products” but may not be so much as to compel a conclusion that “directly competitive or substitutable” imported and domestic products are “not similarly taxed” for the purposes of the Ad Article to Article III:2, second sentence. In other words, there may be an amount of excess taxation that may well be more of a burden on imported products than on domestic “directly competitive or substitutable products” but may nevertheless not be enough to justify a conclusion that such products are “not similarly taxed” for the purposes of Article III:2, second sentence. We agree with the Panel that this amount of differential taxation must be more than *de minimis* to be deemed “not similarly taxed” in any given case. And, like the Panel, we believe that whether any particular differential amount of taxation is *de minimis* or is not *de minimis* must, here too, be determined on a case-by-case basis. Thus, to be “not similarly taxed,” the tax burden on imported products must be heavier than on “directly competitive or substitutable” domestic products, and that burden must be more than *de minimis* in any given case.

In this case, the Panel applied the correct legal reasoning in determining whether “directly competitive or substitutable” imported and domestic products were “not similarly taxed.” However, the Panel erred in blurring the distinction between that issue and the entirely separate issue of whether the tax measure in question was applied “so as to afford protection.” Again, these are separate issues that must be addressed individually. If “directly competitive or substitutable products” are not “not similarly taxed,” then there is neither need nor justification under Article III:2, second sentence, for inquiring further as to whether the tax has been applied “so as to afford protection.” But if such products are “not similarly taxed,” a further inquiry must necessarily be made.

(c) “So As To Afford Protection”

This third inquiry under Article III:2, second sentence, must determine whether “directly competitive or substitutable products” are “not similarly taxed” in a way that affords protection. This is not an issue of intent. It is not necessary for a panel to sort through the many reasons legislators and regulators often have for what they do and weigh the relative significance of those reasons to establish legislative or regulatory intent. If the measure is applied to imported or domestic products so as to afford protection to domestic production, then it does not matter that there may not have been any desire to engage in protectionism in the minds of the legislators or the

regulators who imposed the measure. It is irrelevant that protectionism was not an intended objective if the particular tax measure in question is nevertheless, to echo Article III:1, “applied to imported or domestic products so as to afford protection to domestic production.” This is an issue of how the measure in question is applied.

As in that case, we believe that an examination in any case of whether dissimilar taxation has been applied so as to afford protection requires a comprehensive and objective analysis of the structure and application of the measure in question on domestic as compared to imported products. We believe it is possible to examine objectively the underlying criteria used in a particular tax measure, its structure, and its overall application to ascertain whether it is applied in a way that affords protection to domestic products.

Although it is true that the aim of a measure may not be easily ascertained, nevertheless its protective application can most often be discerned from the design, the architecture, and the revealing structure of a measure. The very magnitude of the dissimilar taxation in a particular case may be evidence of such a protective application, as the Panel rightly concluded in this case. Most often, there will be other factors to be considered as well. In conducting this inquiry, panels should give full consideration to all the relevant facts and all the relevant circumstances in any given case.

Most Favored Nations Treatment and GATT

Indonesia – Certain Measures Affecting the Automobile Industry, 1998⁴³⁶

This dispute concerns a series of measures maintained by Indonesia with respect to motor vehicles and parts and components thereof. Completely Built-Up motor vehicles (“CBUs”) imported into Indonesia are subject to luxury tax, as well as to import duties. The dispute arises from Indonesian National Car Programme which provides for import duty relief and exemption or reduction of luxury tax depending on the local content of motor vehicle. The European Community, Japan and US alleged that the exemption from customs duties and luxury taxes on imports of “national vehicles” and

⁴³⁶ Indonesia-Certain Measures Affecting The Automobile Industry, World Trade Organization Panel Report, WT/DS54/R; WT/DS55/R; WT/DS59/R; WT/DS64/R (2 July 1998) (citations omitted).

components thereof, and related measures were in violation of Indonesia's obligations under Articles I and III of GATT 1994.

2. Criteria for an Article I of GATT violation

14.137. Article I of GATT requires that any privileges granted to imports of any country be accorded immediately and unconditionally to the like products originating in or destined for the territories of all other Members.

"1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."

14.138. The Appellate Body, in *Bananas III*, confirmed that to establish a violation of Article I, there must be an advantage, of the type covered by Article I and which is not accorded unconditionally to all "like products" of all WTO Members. Following this analysis, we shall first examine whether the tax and customs duty benefits are advantages of the types covered by Article I. Second, we shall decide whether the advantages are offered (i) to all like products and (ii) unconditionally.

(a) Are the tax and customs duty benefits of the February and June 1996 car programmes advantages of the types covered by Article I?

14.139. The customs duty benefits of the various Indonesian car programmes are explicitly covered by the wording of Article I. As to the tax benefits of these programmes, we note that Article I:1 refers explicitly to "all matters referred to in paragraphs 2 and 4 of Article III." We have already decided that the tax discrimination aspects of the National Car programme were matters covered by Article III:2 of GATT. Therefore, the customs duty and tax advantages of the February and June 1996 car programmes are of the type covered by Article I of GATT.

(b) Are these advantages offered "unconditionally" to all "like products"?

(i) "like products"

14.140. The European Communities, following the same logic it used for the like product definition in its Article III claims, submit that National Cars

and their parts and components imported from Korea are to be considered “like” any motor vehicle and parts and components imported from other Members. The European Communities argue that imported parts and components and motor vehicles are all like the relevant domestic products since the definition of “National Cars” and their parts and components is not based on any factor which may affect per se the physical characteristics of those cars and parts and components, or their end uses. The United States argues that cars imported in Indonesia are like the Kia Sephia from Korea. Japan argues that parts and components and cars imported from Japan, or any other country, and those imported from Korea constitute “like products.”

14.141. We have found in our discussion of like products under Article III:2 that certain imported motor vehicles are like the National Car. The same considerations justify a finding that such imported vehicles can be considered like National Cars imported from Korea for the purpose of Article I. We also consider that parts and components imported from the complainants are like imports from Korea. Indonesia concedes that some parts and components are exactly the same for all cars. As to the parts and components which arguably are specific to the National Car, Indonesia does not contest that they can be produced by the complainants’ companies. This fact confirms that the parts and components imported for use in the National Car are not unique. As before, we note in addition that the criteria for benefitting from reduced customs duties and taxes are not based on any factor which may affect per se the physical characteristics of those cars and parts and components, or their end uses. In this regard, we note that past panels interpreting Article I have found that a legislation itself may violate that provision if it could lead in principle to less favourable treatment of the same products.

14.142. We find, therefore, that for the purpose of the MFN obligation of Article I of GATT, National Cars and the parts and components thereof imported into Indonesia from Korea are to be considered “like” other similar motor vehicles and parts and components imported from other Members.

(ii) “unconditional advantages”

14.143. We now examine whether the advantages accorded to National Cars and parts and components thereof from Korea are unconditionally accorded to the products of other Members, as required by Article I. The GATT case law is clear to the effect that any such advantage (here tax and customs duty benefits) cannot be made conditional on any criteria that is not related to the imported product itself.

14.144. For instance, in the Panel Report on Belgian Family Allowances, the panel condemned a measure which discriminated against imports depending on the type of family allowances that was in place:

“3. According to the provisions of paragraph 1 of Article I of the General Agreement, any advantage, favour, privilege or immunity granted by Belgium to any product originating in the territory of any country with respect to all matters referred to in paragraph 2 of Article III shall be granted immediately and unconditionally to the like product originating in the territories of all contracting parties. Belgium has granted exemption from the levy under consideration to products purchased by public bodies when they originate in Luxembourg and the Netherlands, as well as in France, Italy, Sweden and the United Kingdom. If the General Agreement were definitively in force in accordance with Article XXVI, it is clear that that exemption would have to be granted unconditionally to all other contracting parties (including Denmark and Norway). The consistency or otherwise of the system of family allowances in force in the territory of a given contracting party with the requirements of the Belgian law would be irrelevant in this respect, and the Belgian legislation would have to be amended insofar as it introduced a discrimination between countries having a given system of family allowances and those which had a different system or no system at all, and made the granting of the exemption dependent on certain conditions.” (emphasis added)

14.145. Indeed, it appears that the design and structure of the June 1996 car programme is such as to allow situations where another Member's like product to a National Car imported by PT PTN from Korea will be subject to much higher duties and sales taxes than those imposed on such National Cars. For example, customs duties as high as 200% can be imposed on finished motor vehicles while an imported National Car benefits from a 0% customs duty. No taxes are imposed on a National Car while an imported like motor vehicle from another Member would be subject to a 35% sales tax. The distinction as to whether one product is subject to 0% duty and the other one is subject to 200% duty or whether one product is subject to 0% sales tax and the other one is subject to a 35% sales tax, depends on whether or not PT TPN had made a “deal” with that exporting company to produce that National Car, and is covered by the authorization of June 1996 with specifications that correspond to those of the Kia car produced only in Korea. In the GATT/WTO, the right of Members cannot be made dependent upon, conditional on or even affected by, any private contractual obligations in place. The existence of these conditions is inconsistent with the provisions of Article I:1 which provides that tax and customs duty benefits accorded to products of one Member (here on Korean products) be accorded to imported like products from other Members “immediately and unconditionally.”

14.146. We note also that under the February 1996 car programme the granting of customs duty benefits to parts and components is conditional to

their being used in the assembly in Indonesia of a National Car. The granting of tax benefits is conditional and limited to the only Pioneer company producing National Cars. And there is also a third condition for these benefits: the meeting of certain local content targets. Indeed under all these car programmes, customs duty and tax benefits are conditional on achieving a certain local content value for the finished car. The existence of these conditions is inconsistent with the provisions of Article I:1 which provides that tax and customs duty advantages accorded to products of one Member (here on Korean products) be accorded to imported like products from other Members “immediately and unconditionally.”

14.147. For the reasons discussed above, we consider that the June 1996 car programme which introduced discrimination between imports in the allocation of tax and customs duty benefits based on various conditions and other criteria not related to the imports themselves and the February 1996 car programme which also introduce discrimination between imports in the allocation of customs duty benefits based on various conditions and other criteria not related to the imports themselves, are inconsistent with the provisions of Article I of GATT.

Environmental Protection and Trade

*United States – Restrictions on Imports of Tuna*⁴³⁷

2.2. In the eastern tropical Pacific Ocean schools of tuna often swim below herds of dolphin that are visible swimming at or near the surface. Tuna fishermen in the eastern tropical Pacific therefore commonly use dolphins to locate schools of tuna, and encircle them intentionally with purse seine nets on the expectation that tuna will be found below the dolphins. Since the 1960's, the practice of intentionally setting purse seine nets on dolphins to catch tuna has resulted in the incidental killing and injury of many dolphins...

2.5. The US Marine Mammal Protection Act of 1972³ prohibits the “taking,” including the harassing, hunting, capturing or killing, of any marine mammal, whether directly, or incidentally in connection with the harvesting of fish. The Act further prohibits the import into the United States of any marine mammal or marine mammal product, and any fish or fish product

⁴³⁷ United States – Restrictions on Imports of Tuna, GATT Panel Report, DS29/R (16 June 1994) (citations omitted).

harvested through the incidental taking of marine mammals. The stated purpose of the Act is to conserve marine mammals which may be in danger of extinction or depletion....

2.9. The Act prohibits the import of any commercial fish or fish products harvested by a method that results in the incidental kill or incidental serious injury of marine mammals in excess of United States standards....

2.12. The Act provides that any nation (“intermediary nation”) that exports yellowfin tuna or yellowfin tuna products to the United States, and that imports yellowfin tuna or yellowfin tuna products that are subject to a direct prohibition on import into the United States, must certify and provide reasonable proof that it has not imported products subject to the direct prohibition within the preceding six months....

C. Article XX(g)

5.11. The Panel noted the United States argument that both the primary and intermediary nation embargoes, even if inconsistent with Articles III or XI, were justified by Article XX(g) as measures relating to the conservation of dolphins, an exhaustible natural resource. The United States argued that there was no requirement in Article XX(g) for the resources to be within the territorial jurisdiction of the country taking the measure. The United States further argued that the measures were taken in conjunction with restrictions on domestic production and consumption.

Finally, it argued that the measures met the requirement of the preamble to Article XX. The EEC and the Netherlands disagreed, stating that the resource to be conserved had to be within the territorial jurisdiction of the country taking the measure. The EEC and the Netherlands were further of the view that the United States measures were not related to the conservation of an exhaustible natural resource under Article XX (g), and were not taken in conjunction with domestic restrictions on production or consumption.

5.12. The Panel proceeded first to examine the text of Article XX(g), which, together with its preamble, states:

“Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;”

The Panel observed that the text of Article XX(g) suggested a three-step analysis:

-- First, it had to be determined whether the policy in respect of which these provisions were invoked fell within the range of policies to conserve exhaustible natural resources.

-- Second, it had to be determined whether the measure for which the exception was being invoked - that is the particular trade measure inconsistent with the obligations under the General Agreement - was “related to” the conservation of exhaustible natural resources, and whether it was made effective “in conjunction” with restrictions on domestic production or consumption.

-- Third, it had to be determined whether the measure was applied in conformity with the requirement set out in the preamble to Article XX, namely that the measure not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or in a manner which would constitute a disguised restriction on international trade.

Conservation of an exhaustible natural resource

5.13. Concerning the first of the above three questions, the Panel noted that the United States maintained that dolphins were an exhaustible natural resource. The EEC disagreed. The Panel, noting that dolphin stocks could potentially be exhausted, and that the basis of a policy to conserve them did not depend on whether at present their stocks were depleted, accepted that a policy to conserve dolphins was a policy to conserve an exhaustible natural resource.

5.14. The Panel noted that the EEC and the Netherlands argued that the exhaustible natural resource to be conserved under Article XX (g) could not be located outside the territorial jurisdiction of the country taking the measure. It based this view on an examination of the Article XX (g) in its context, and in light of the object and purpose of the General Agreement. The United States disagreed, pointing out that there was no textual or other basis for reading such a requirement into Article XX (g).

5.15. The Panel observed, first, that the text of Article XX (g) does not spell out any limitation on the location of the exhaustible natural resources to be conserved. It noted that the conditions set out in the text of Article

XX (g) and the preamble qualify only the trade measure requiring justification (“related to”) or the manner in which the trade measure is applied (“in conjunction with,” “arbitrary or unjustifiable discrimination,” “disguised restriction on international trade”). The nature and precise scope of the policy area named in the Article, the conservation of exhaustible natural resources, is not spelled out or specifically conditioned by the text of the Article, in particular with respect to the location of the exhaustible natural resource to be conserved. The Panel noted that two previous panels have considered Article XX (g) to be applicable to policies related to migratory species of fish, and had made no distinction between fish caught within or outside the territorial jurisdiction of the contracting party that had invoked this provision.

5.16. The Panel then observed that measures providing different treatment to products of different origins could in principle be taken under other paragraphs of Article XX and other Articles of the General Agreement with respect to things located, or actions occurring, outside the territorial jurisdiction of the party taking the measure. An example was the provision in Article XX (e) relating to products of prison labour. It could not therefore be said that the General Agreement proscribed in an absolute manner measures that related to things or actions outside the territorial jurisdiction of the party taking the measure.

5.17. The Panel further observed that, under general international law, states are not in principle barred from regulating the conduct of their nationals with respect to persons, animals, plants and natural resources outside of their territory. Nor are states barred, in principle, from regulating the conduct of vessels having their nationality, or any persons on these vessels, with respect to persons, animals, plants and natural resources outside their territory. A state may in particular regulate the conduct of its fishermen, or of vessels having its nationality or any fishermen on these vessels, with respect to fish located in the high seas.

5.18. The Panel noted that the parties based many of their arguments on the location of the exhaustible natural resource in Article XX (g) on environmental and trade treaties other than the General Agreement. However, it was first of all necessary to determine the extent to which these treaties were relevant to the interpretation of the text of the General Agreement. The Panel recalled that it is generally accepted that the Vienna Convention on the Law of Treaties expresses the basic rules of treaty interpretation (see Annex B attached), and that the parties to the dispute shared this view. It therefore proceeded to examine the treaties in this light.

5.19. The Panel recalled that the Vienna Convention provides for a general rule of interpretation (Article 31) and a supplementary means of interpretation (Article 32). The Panel first examined whether, under the general rule of interpretation of the Vienna Convention, the treaties referred to might be taken into account for the purposes of interpreting the General Agreement. The general rule provides that “any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions” is one of the elements relevant to the interpretation of a treaty. However the Panel observed that the agreements cited by the parties to the dispute were bilateral or plurilateral agreements that were not concluded among the contracting parties to the General Agreement, and that they did not apply to the interpretation of the General Agreement or the application of its provisions. Indeed, many of the treaties referred to could not have done so, since they were concluded prior to the negotiation of the General Agreement. The Panel also observed that under the general rule of interpretation in the Vienna Convention account should be taken of “any subsequent practice in the application of the treaty which established the agreement of the parties regarding its interpretation.” However, the Panel noted that practice under the bilateral and plurilateral treaties cited could not be taken as practice under the General Agreement, and therefore could not affect the interpretation of it. The Panel therefore found that under the general rule contained in Article 31 of the Vienna Convention, these treaties were not relevant as a primary means of interpretation of the text of the General Agreement.

5.20. The Panel then examined whether the treaties referred to might be relevant as a supplementary means of interpretation of the General Agreement under the Vienna Convention. The Panel noted that the supplementary means permitted by Article 32 of the Vienna Convention include “the preparatory work of the treaty and the circumstances of its conclusion.” However, the terms of this provision make clear that its applicability is limited. Preparatory work and other supplementary means of interpretation may only be used “to confirm” an interpretation reached under the general rule of interpretation, or when application of the general rule “leaves the meaning ambiguous or obscure,” or “leads to a result which is manifestly absurd or unreasonable.” Even if interpretation according to the general rule had led to this result, the Panel considered that those cited treaties that were concluded prior to the conclusion of the General Agreement were of little assistance in interpreting the text of Article XX (g), since it appeared to the Panel on the basis of the material presented to it that no direct references were made to these treaties in the text of the General Agreement, the Havana Charter, or in the preparatory work to these instruments. The Panel also found that the statements and

drafting changes made during the negotiation of the Havana Charter and the General Agreement cited by the parties did not provide clear support for any particular contention of the parties on the question of the location of the exhaustible natural resource in Article XX(g). In view of the above, the Panel could see no valid reason supporting the conclusion that the provisions of Article XX (g) apply only to policies related to the conservation of exhaustible natural resources located within the territory of the contracting party invoking the provision. The Panel consequently found that the policy to conserve dolphins in the eastern tropical Pacific Ocean, which the United States pursued within its jurisdiction over its nationals and vessels, fell within the range of policies covered by Article XX (g).

“Related to” the conservation of an exhaustible natural resource; made effective “in conjunction” with restrictions on domestic production or consumption

5.21. The Panel then examined the second of the above three questions, namely whether the primary and intermediary nation embargoes imposed by the United States on yellowfin tuna could be considered to be “related to” the conservation of an exhaustible natural resource within the meaning of Article XX (g), and whether they were made effective “in conjunction with” restrictions on domestic production or consumption. The United States argued that its measures met both requirements. The EEC disagreed, stating the measures had to be “primarily aimed” at the conservation of the exhaustible natural resource, and at rendering effective the restrictions on domestic production or consumption.

5.22. The Panel proceeded first to examine the relationship established by Article XX (g) between the trade measure and the policy of conserving an exhaustible natural resource, and between the trade measure and the restrictions on domestic production or consumption. It noted that a previous panel had stated that the scope of the terms relating to” and “in conjunction with” had to be interpreted in a way that ensured that the scope of provisions under Article XX (g) corresponded to the purposes for which it was included in the General Agreement. That panel had stated that widen the scope for measures serving trade policy purposes but merely to ensure that the commitments under the General Agreement do not hinder the pursuit of policies aimed at the conservation of exhaustible natural resources.” The previous panel had concluded that the term “relating to” should be taken to mean “primarily aimed” at the conservation of natural resources, and that the term “in conjunction with” should be taken to mean “primarily aimed” at rendering effective the restrictions on domestic production or consumption. The

Panel agreed with the reasoning of the previous panel, on the understanding that the words “primarily aimed at” referred not only to the purpose of the measure, but also to its effect on the conservation of the natural resource.

5.23. The Panel then proceeded to examine whether the embargoes imposed by the United States could be considered to be primarily aimed at the conservation of an exhaustible natural resource, and primarily aimed at rendering effective restrictions on domestic production or consumption. In particular, the Panel examined the relationship of the United States measures with the expressed goal of dolphin conservation. The Panel noted that measures taken under the intermediary nation embargo prohibited imports from a country of any tuna, whether or not the particular tuna was harvested in a manner that harmed or could harm dolphins, and whether or not the country had tuna harvesting practices and policies that harmed or could harm dolphins, as long as it was from a country that imported tuna from countries maintaining tuna harvesting practices and policies not comparable to those of the United States. The Panel then observed that the prohibition on imports of tuna into the United States taken under the intermediary nation embargo could not, by itself, further the United States conservation objectives. The intermediary nation embargo could achieve its intended effect only if it were followed by changes in policies or practices, not in the country exporting tuna to the United States, but in third countries from which the exporting country imported tuna.

5.24. The Panel noted also that measures taken under the primary nation embargo prohibited imports from a country of any tuna, whether or not the particular tuna was harvested in a way that harmed or could harm dolphins, as long as the country’s tuna harvesting practices and policies were not comparable to those of the United States. The Panel observed that, as in the case of the intermediary nation embargo, the prohibition on imports of tuna into the United States taken under the primary nation embargo could not possibly, by itself, further the United States conservation objectives. The primary nation embargo could achieve its desired effect only if it were followed by changes in policies and practices in the exporting countries. In view of the foregoing, the Panel observed that both the primary and intermediary nation embargoes on tuna implemented by the United States were taken so as to force other countries to change their policies with respect to persons and things within their own jurisdiction, since the embargoes required such changes in order to have any effect on the conservation of dolphins.

5.25. The Panel then examined whether, under Article XX (g), measures primarily aimed at the conservation of exhaustible natural resources, or pri-

marily aimed at rendering effective domestic restrictions on their production or consumption, could include measures taken so as to force other countries to change their policies with respect to persons or things within their own jurisdictions, and requiring such changes in order to be effective. The Panel noted that the text of Article XX does not provide a clear answer to this question. It therefore proceeded to examine the text of Article XX (g) in the light of the object and purpose of the General Agreement.

5.26. The Panel observed that Article XX provides for an exception to obligations under the General Agreement. The long-standing practice of panels has accordingly been to interpret this provision narrowly, in a manner that preserves the basic objectives and principles of the General Agreement. If Article XX were interpreted to permit contracting parties to deviate from the obligations of the General Agreement by taking trade measures to implement policies, including conservation policies, within their own jurisdiction, the basic objectives of the General Agreement would be maintained. If however Article XX were interpreted to permit contracting parties to take trade measures so as to force other contracting parties to change their policies within their jurisdiction, including their conservation policies, the balance of rights and obligations among contracting parties, in particular the right of access to markets, would be seriously impaired. Under such an interpretation the General Agreement could no longer serve as a multilateral framework for trade among contracting parties.

5.27. The Panel concluded that measures taken so as to force other countries to change their policies, and that were effective only if such changes occurred, could not be primarily aimed either at the conservation of an exhaustible natural resource, or at rendering effective restrictions on domestic production or consumption, in the meaning of Article XX (g). Since an essential condition of Article XX (g) had not been met, the Panel did not consider it necessary to examine whether the United States measures had also met the other requirements of Article XX. The Panel accordingly found that the import prohibitions on tuna and tuna products maintained by the United States inconsistently with Article XI: 1 were not justified by Article XX (g).

United States – Standards for Reformulated and Conventional Gasoline⁴³⁸

I. The United States appeals from certain conclusions on issues of law and certain legal interpretations contained in the Panel Report, United States - Standards for Reformulated and Conventional Gasoline, WT/DS2/R, 29 January 1996 (the “Panel Report”). The dispute arises from the US Clean Air Act which is aimed to control and reduce air pollution in the United States. The Act sets standards for gasoline quality intended to reduce air pollution, including ozone, caused by motor vehicle emissions. The Gasoline Rule applies to refiners, blenders and importers of gasoline. Venezuela and Brazil complained that US Gasoline Regulation discriminated against foreign gasoline importers by setting different baseline establishment rules to comply with the standard....

IV. The Introductory Provisions of Article XX of the General Agreement: Applying the Chapeau of the General Exceptions

Having concluded, in the preceding section, that the baseline establishment rules of the Gasoline Rule fall within the terms of Article XX(g), we come to the question of whether those rules also meet the requirements of the chapeau of Article XX. In order that the justifying protection of Article XX may be extended to it, the measure at issue must not only come under one or another of the particular exceptions - paragraphs (a) to (j) - listed under Article XX; it must also satisfy the requirements imposed by the opening clauses of Article XX. The analysis is, in other words, two-tiered: first, provisional justification by reason of characterization of the measure under XX(g); second, further appraisal of the same measure under the introductory clauses of Article XX.⁴³⁹

The chapeau by its express terms addresses, not so much the questioned measure or its specific contents as such, but rather the manner in which that measure is applied. It is, accordingly, important to underscore that the purpose and object of the introductory clauses of Article XX is generally the prevention of “abuse of the exceptions of [what was later to become] Article [XX].” This insight drawn from the drafting history of Article XX is a valuable one. The chapeau is animated by the principle that while the exceptions of Article XX may be invoked as a matter of legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the General Agreement. If those exceptions

⁴³⁸ United States-Standards for Reformulated and Conventional Gasoline, World Trade Organization Appellate Body Report, WT/DS2/AB/R (29 April 1996).

⁴³⁹ Id. at 22.

are not to be abused or misused, in other words, the measures falling within the particular exceptions must be applied reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned. The burden of demonstrating that a measure provisionally justified as being within one of the exceptions set out in the individual paragraphs of Article XX does not, in its application, constitute abuse of such exception under the chapeau, rests on the party invoking the exception. That is, of necessity, a heavier task than that involved in showing that an exception, such as Article XX(g), encompasses the measure at issue.

The enterprise of applying Article XX would clearly be an unprofitable one if it involved no more than applying the standard used in finding that the baseline establishment rules were inconsistent with Article III:4. That would also be true if the finding were one of inconsistency with some other substantive rule of the General Agreement. The provisions of the chapeau cannot logically refer to the same standard(s) by which a violation of a substantive rule has been determined to have occurred. To proceed down that path would be both to empty the chapeau of its contents and to deprive the exceptions in paragraphs (a) to (j) of meaning. Such recourse would also confuse the question of whether inconsistency with a substantive rule existed, with the further and separate question arising under the chapeau of Article XX as to whether that inconsistency was nevertheless justified. One of the corollaries of the “general rule of interpretation” in the Vienna Convention is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.⁴⁴⁰

The chapeau, it will be seen, prohibits such application of a measure at issue (otherwise falling within the scope of Article XX(g)) as would constitute

(a) “arbitrary discrimination” (between countries where the same conditions prevail);

(b) “unjustifiable discrimination” (with the same qualifier); or

(c) “disguised restriction” on international trade.

The text of the chapeau is not without ambiguity, including one relating to the field of application of the standards it contains: the arbitrary or unjustifiable discrimination standards and the disguised restriction on international trade standard. It may be asked whether these standards do not have different fields of application. Such a question was put to the United States in

⁴⁴⁰ Id. at 23.

the course of the oral hearing. It was asked whether the words incorporated into the first two standards “between countries where the same conditions prevail” refer to conditions in importing and exporting countries, or only to conditions in exporting countries. The reply of the United States was to the effect that it interpreted that phrase as referring to both the exporting countries and importing countries and as between exporting countries. It also said that the language spoke for itself, but there was no reference to third parties; while some thought that this was only between exporting countries *inter se*, there is no support in the text for that view. No such question was put to the United States concerning the field of application of the third standard – disguised restriction on international trade. But the United States put forward arguments designed to show that in the case under appeal, it had met all the standards set forth in the chapeau. In doing so, it clearly proceeded on the assumption that, whatever else they might relate to in another case, they were relevant to a case of national treatment where the Panel had found a violation of Article III:4. At no point in the appeal was that assumption challenged by Venezuela or Brazil. Venezuela argued that the United States had failed to meet all the standards contained in the chapeau. So did Norway and the European Communities as third participants. In short, the field of application of these standards was not at issue.

The assumption on which all the participants proceeded is buttressed by the fact that the chapeau says that “nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures ...” The exceptions listed in Article XX thus relate to all of the obligations under the General Agreement: the national treatment obligation and the most-favoured-nation obligation, of course, but others as well. Effect is more easily given to the words “nothing in this Agreement,” and Article XX as a whole including its chapeau more easily integrated into the remainder of the General Agreement, if the chapeau is taken to mean that the standards it sets forth are applicable to all of the situations in which an allegation of a violation of a substantive obligation has been made and one of the exceptions contained in Article XX has in turn been claimed. Against this background, we see no need to decide the matter of the field of application of the standards set forth in the chapeau nor to make a ruling at variance with the common understanding of the participants.⁴⁴¹

P. 25 “Arbitrary discrimination,” “unjustifiable discrimination” and “disguised restriction” on international trade may, accordingly, be read side-by-side; they impart meaning to one another. It is clear to us that “disguised

⁴⁴¹ *Id.* at 24.

restriction” includes disguised discrimination in international trade. It is equally clear that concealed or unannounced restriction or discrimination in international trade does not exhaust the meaning of “disguised restriction.” We consider that “disguised restriction,” whatever else it covers, may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms of an exception listed in Article XX. Put in a somewhat different manner, the kinds of considerations pertinent in deciding whether the application of a particular measure amounts to “arbitrary or unjustifiable discrimination,” may also be taken into account in determining the presence of a “disguised restriction” on international trade. The fundamental theme is to be found in the purpose and object of avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX.

There was more than one alternative course of action available to the United States in promulgating regulations implementing the CAA. These included the imposition of statutory baselines without differentiation as between domestic and imported gasoline. This approach, if properly implemented, could have avoided any discrimination at all. Among the other options open to the United States was to make available individual baselines to foreign refiners as well as domestic refiners. The United States has put forward a series of reasons why either of these courses was not, in its view, realistically open to it and why, instead, it had to devise and apply the baseline establishment rules contained in the Gasoline Rule.

In explaining why individual baselines for foreign refiners had not been put in place, the United States laid heavy stress upon the difficulties which the EPA would have had to face. These difficulties related to anticipated administrative problems that individual baselines for foreign refiners would have generated.

Thus, according to the United States, imported gasoline was relegated to the more exacting statutory baseline requirement because of these difficulties of verification and enforcement. The United States stated that verification and enforcement of the Gasoline Rule’s requirements for imported gasoline are “much easier when the statutory baseline is used” and that there would be a “dramatic difference” in the burden of administering requirements for imported gasoline if individual baselines were allowed. While the anticipated difficulties concerning verification and subsequent enforcement are doubtless real to some degree, the Panel viewed them as insufficient to justify the denial to foreign refiners of individual baselines permitted to domestic refiners.⁴⁴²

⁴⁴² Id. at 26.

In the view of the Panel, the United States had reasonably available to it data for, and measures of, verification and assessment which were consistent or less inconsistent with Article III:4. For instance, although foreign data may be formally less subject to complete control by US authorities, this did not amount to establishing that foreign data could not in any circumstances be sufficiently reliable to serve U.S. purposes. This, however, was the practical effect of the application of the Gasoline Rule. In the Panel's view, the United States had not demonstrated that data available from foreign refiners was inherently less susceptible to established techniques of checking, verification, assessment and enforcement than data for other trade in goods subject to US regulation. The nature of the data in this case was similar to data relied upon by the United States in other contexts, including, for example, under the application of antidumping laws. In an antidumping case, only when the information was not supplied or deemed unverifiable did the United States turn to other information. If a similar practice were to be applied in the case of the Gasoline Rule, then importers could, for instance, be permitted to use the individual baselines of foreign refiners for imported gasoline from those refiners, with the statutory baseline being applied only when the source of imported gasoline could not be determined or a baseline could not be established because of an absence of data...

We agree with the finding above made in the Panel Report. There are, as the Panel Report found, established techniques for checking, verification, assessment and enforcement of data relating to imported goods, techniques which in many contexts are accepted as adequate to permit international trade - trade between territorial sovereigns - to go on and grow. The United States must have been aware that for these established techniques and procedures to work, cooperative arrangements with both foreign refiners and the foreign governments concerned would have been necessary and appropriate.⁴⁴³

[I]t appears to the Appellate Body, that the United States had not pursued the possibility of entering into cooperative arrangements with the governments of Venezuela and Brazil or, if it had, not to the point where it encountered governments that were unwilling to cooperate. The record of this case sets out the detailed justifications put forward by the United States. But it does not reveal what, if any, efforts had been taken by the United States to enter into appropriate procedures in cooperation with the governments of Venezuela and Brazil so as to mitigate the administrative problems pleaded by the United States.

⁴⁴³ Id. at 27.

In its submissions, the United States also explained why the statutory baseline requirement was not imposed on domestic refiners as well. Here, the United States stressed the problems that domestic refineries would have faced had they been required to comply with the statutory baseline. Clearly, the United States did not feel it feasible to require its domestic refiners to incur the physical and financial costs and burdens entailed by immediate compliance with a statutory baseline. The United States wished to give domestic refiners time to restructure their operations and adjust to the requirements in the Gasoline Rule. This may very well have constituted sound domestic policy from the viewpoint of the EPA and U.S. refiners. At the same time we are bound to note that, while the United States counted the costs for its domestic refiners of statutory baselines, there is nothing in the record to indicate that it did other than disregard that kind of consideration when it came to foreign refiners.⁴⁴⁴

We have above located two omissions on the part of the United States: to explore adequately means, including in particular cooperation with the governments of Venezuela and Brazil, of mitigating the administrative problems relied on as justification by the United States for rejecting individual baselines for foreign refiners; and to count the costs for foreign refiners that would result from the imposition of statutory baselines. In our view, these two omissions go well beyond what was necessary for the Panel to determine that a violation of Article III:4 had occurred in the first place. The resulting discrimination must have been foreseen, and was not merely inadvertent or unavoidable. In the light of the foregoing, our conclusion is that the baseline establishment rules in the Gasoline Rule, in their application, constitute “unjustifiable discrimination” and a “disguised restriction on international trade.” We hold, in sum, that the baseline establishment rules, although within the terms of Article XX(g), are not entitled to the justifying protection afforded by Article XX as a whole.

Regional Trade Agreements⁴⁴⁵

Regional integration is defined as activities of the states to liberalize or facilitate trade on a regional basis by forming free trade areas, customs unions or common markets. According to Article XIV of GATT 1947 free trade area is understood to mean “a group of two or more customs territories in which the duties and other restrictive regulations of commerce are eliminated on substantially all the trade between constituent territories in products origi-

⁴⁴⁴ Id. at 28.

⁴⁴⁵ Nurzat Myrsaliev, unpublished article (excerpts)(2011).

nating in such territories.⁴⁴⁶ Whereas, customs union shall be understood as a free trade area with common external customs tariff duties for trade with third countries.

Today almost all the states in the world are parties to at least one or several regional trade agreements.⁴⁴⁷ However, the level of integration and their success varies considerably from one regional trade agreement to another.⁴⁴⁸ European Union represents by far the most successful model of regional integration process, which not only effectively functions as a customs union and common market, but is also effectively integrated in WTO system and international trade order in general.⁴⁴⁹

Post-Soviet countries just like many countries in the world formed number of regional integration organizations with an attempt to capitalize on benefits of free trade,⁴⁵⁰ one of them being Eurasian Economic Community (EAEC). Members of EAEC are Belarus, Kazakhstan, Kyrgyzstan, Tajikistan, and Russia being the biggest, the strongest and the most influential member. Republics of Moldova, Ukraine and Armenia have the status of observers. The primary goals of EAEC include effective formation of customs union and single market. However, along with these goals EAEC has been also formed in order to better facilitate region's integration into global economy by forming the same position with regard to their entrance into WTO.

Currently EAEC operates as a free trade area, where there are no customs duties or quantitative restrictions on import of goods originating in EAEC member states, and with taxes on imports not exceeding domestic rates. So, the main task to be achieved at the moment is to establish common customs tariff, which requires harmonizing or unifying existing customs duties of member states in trade with all third countries. Core EAEC members, Russia, Kazakhstan and Belarus, have already formed common customs tariff on approximately 62% of tariff lines. Moreover, EAEC members in total adopted around 100 agreements and other documents, aimed at harmonization of foreign trade,

⁴⁴⁶ General Agreement on Tariffs and Trade 1947, Article XXIV, para 8 (b), Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194.

⁴⁴⁷ For the list of registered regional trade agreements visit <http://rtais.wto.org/UI/PublicAllRTAList.aspx>.

⁴⁴⁸ Reasons for failure of regional integration processes in West Africa see: Regional Integration: Comparative Experiences, Heba Shams, 10-SUM L. & Bus. Rev.Am. 457.

⁴⁴⁹ Caribbean Single Market and Economy: What is it and can it deliver?, Andrea Ewart, 11 ILSA J.Int'l & Comp. L. 39, p. 39.

⁴⁵⁰ Regional Integration in the Post-USSR: Legal and Institutional Aspects, Roman Petrov, 10 SUM L. & Bus.Rev.Am. 631.

tax, customs and tariff/non-tariff legislation, as well as currency regulation, border issues, energy and transport.⁴⁵¹ However, despite all of these progress and efforts, successful formation of customs union is still far from complete because Kyrgyzstan's synchronous membership in WTO creates certain difficulties for creating common customs tariffs. The problem is that Kyrgyzstan has already negotiated external customs duties with third countries under WTO and unilateral change of its customs duties might result in breach of its obligations under articles I and II of General Agreement on Tariff and Trade (GATT).

GATT Article XXIV allows WTO member states to create regional trade agreements in the form of free trade areas and customs unions, provided that certain conditions are satisfied. However, under the current situation it is not clear whether Kyrgyzstan's unequal treatment is justified under WTO rules.

WTO Dispute Settlement System

World Trade Organization⁴⁵²

UNDERSTANDING ON RULES AND PROCEDURES

GOVERNING THE SETTLEMENT OF DISPUTES

Members hereby agree as follows:

Article 1

Coverage and Application

1. The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the "covered agreements"). The rules and procedures of this Understanding shall also apply to consultations and the settlement of disputes between Members concerning their rights and obligations under the provisions of the Agreement Establishing the World Trade Organization (referred to in this Understanding as the "WTO Agreement") and of this Understanding taken in isolation or in combination with any other covered agreement...

⁴⁵¹ Trade Policy Review, WT/TPR/S/170, p. 47.

⁴⁵² http://www.wto.org/english/docs_e/legal_e/legal_e.htm

Article 2

Administration

1. The Dispute Settlement Body is hereby established to administer these rules and procedures and, except as otherwise provided in a covered agreement, the consultation and dispute settlement provisions of the covered agreements. Accordingly, the DSB shall have the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements. With respect to disputes arising under a covered agreement which is a Plurilateral Trade Agreement, the term “Member” as used herein shall refer only to those Members that are parties to the relevant Plurilateral Trade Agreement. Where the DSB administers the dispute settlement provisions of a Plurilateral Trade Agreement, only those Members that are parties to that Agreement may participate in decisions or actions taken by the DSB with respect to that dispute...

4. Where the rules and procedures of this Understanding provide for the DSB to take a decision, it shall do so by consensus.⁴⁵³

Article 3

General Provisions

1. Members affirm their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947, and the rules and procedures as further elaborated and modified herein.

2. The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

3. The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.

⁴⁵³ The DSB shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting of the DSB when the decision is taken, formally objects to the proposed decision.

4. Recommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements.

5. All solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements, including arbitration awards, shall be consistent with those agreements and shall not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements.

6. Mutually agreed solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements shall be notified to the DSB and the relevant Councils and Committees, where any Member may raise any point relating thereto.

7. Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful. The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred. In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements. The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement. The last resort which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis vis-a-vis the other Member, subject to authorization by the DSB of such measures.

8. In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge...

10. It is understood that requests for conciliation and the use of the dispute settlement procedures should not be intended or considered as contentious acts and that, if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute. It is also under-

stood that complaints and counter-complaints in regard to distinct matters should not be linked.

11. This Understanding shall be applied only with respect to new requests for consultations under the consultation provisions of the covered agreements made on or after the date of entry into force of the WTO Agreement...

12. Notwithstanding paragraph 11, if a complaint based on any of the covered agreements is brought by a developing country Member against a developed country Member, the complaining party shall have the right to invoke, as an alternative to the provisions contained in Articles 4, 5, 6 and 12 of this Understanding, the corresponding provisions of the Decision of 5 April 1966 (BISD 14S/18), except that where the Panel considers that the time-frame provided for in paragraph 7 of that Decision is insufficient to provide its report and with the agreement of the complaining party, that time-frame may be extended. To the extent that there is a difference between the rules and procedures of Articles 4, 5, 6 and 12 and the corresponding rules and procedures of the Decision, the latter shall prevail.

Article 4

Consultations

1. Members affirm their resolve to strengthen and improve the effectiveness of the consultation procedures employed by Members.

2. Each Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of any covered agreement taken within the territory of the former...⁴⁵⁴

5. In the course of consultations in accordance with the provisions of a covered agreement, before resorting to further action under this Understanding, Members should attempt to obtain satisfactory adjustment of the matter.

6. Consultations shall be confidential, and without prejudice to the rights of any Member in any further proceedings.

7. If the consultations fail to settle a dispute within 60 days after the date of receipt of the request for consultations, the complaining party may request the establishment of a panel. The complaining party may request a

⁴⁵⁴ Where the provisions of any other covered agreement concerning measures taken by regional or local governments or authorities within the territory of a Member contain provisions different from the provisions of this paragraph, the provisions of such other covered agreement shall prevail.

panel during the 60-day period if the consulting parties jointly consider that consultations have failed to settle the dispute.

8. In cases of urgency, including those which concern perishable goods, Members shall enter into consultations within a period of no more than 10 days after the date of receipt of the request. If the consultations have failed to settle the dispute within a period of 20 days after the date of receipt of the request, the complaining party may request the establishment of a panel.

9. In cases of urgency, including those which concern perishable goods, the parties to the dispute, panels and the Appellate Body shall make every effort to accelerate the proceedings to the greatest extent possible.

10. During consultations Members should give special attention to the particular problems and interests of developing country Members.

11. Whenever a Member other than the consulting Members considers that it has a substantial trade interest in consultations being held pursuant to paragraph 1 of Article XXII of GATT 1994, paragraph 1 of Article XXII of GATS, or the corresponding provisions in other covered agreements⁴⁵⁵, such Member may notify the consulting Members and the DSB, within 10 days after the date of the circulation of the request for consultations under said Article, of its desire to be joined in the consultations. Such Member shall be joined in the consultations, provided that the Member to which the request for consultations was addressed agrees that the claim of substantial interest is well-founded. In that event they shall so inform the DSB. If the request to be joined in the consultations is not accepted, the applicant Member shall be free to request consultations under paragraph 1 of Article XXII or paragraph 1 of Article XXIII of GATT 1994, paragraph 1 of Article XXII or paragraph 1

⁴⁵⁵ The corresponding consultation provisions in the covered agreements are listed hereunder: Agreement on Agriculture, Article 19; Agreement on the Application of Sanitary and Phytosanitary Measures, paragraph 1 of Article 11; Agreement on Textiles and Clothing, paragraph 4 of Article 8; Agreement on Technical Barriers to Trade, paragraph 1 of Article 14; Agreement on Trade-Related Investment Measures, Article 8; Agreement on Implementation of Article VI of GATT 1994, paragraph 2 of Article 17; Agreement on Implementation of Article VII of GATT 1994, paragraph 2 of Article 19; Agreement on Preshipment Inspection, Article 7; Agreement on Rules of Origin, Article 7; Agreement on Import Licensing Procedures, Article 6; Agreement on Subsidies and Countervailing Measures, Article 30; Agreement on Safeguards, Article 14; Agreement on Trade-Related Aspects of Intellectual Property Rights, Article 64.1; and any corresponding consultation provisions in Plurilateral Trade Agreements as determined by the competent bodies of each Agreement and as notified to the DSB.

of Article XXIII of GATS, or the corresponding provisions in other covered agreements.

Article 5

Good Offices, Conciliation and Mediation

1. Good offices, conciliation and mediation are procedures that are undertaken voluntarily if the parties to the dispute so agree...

3. Good offices, conciliation or mediation may be requested at any time by any party to a dispute. They may begin at any time and be terminated at any time. Once procedures for good offices, conciliation or mediation are terminated, a complaining party may then proceed with a request for the establishment of a panel...

6. The Director-General may, acting in an *ex officio* capacity, offer good offices, conciliation or mediation with the view to assisting Members to settle a dispute.

Article 6

Establishment of Panels

1. If the complaining party so requests, a panel shall be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB's agenda, unless at that meeting the DSB decides by consensus not to establish a panel...⁴⁵⁶

Article 8

Composition of Panels

1. Panels shall be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member.

2. Panel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience.

⁴⁵⁶ If the complaining party so requests, a meeting of the DSB shall be convened for this purpose within 15 days of the request, provided that at least 10 days' advance notice of the meeting is given.

3. Citizens of Members whose governments⁴⁵⁷ are parties to the dispute or third parties as defined in paragraph 2 of Article 10 shall not serve on a panel concerned with that dispute, unless the parties to the dispute agree otherwise...

5. Panels shall be composed of three panelists unless the parties to the dispute agree, within 10 days from the establishment of the panel, to a panel composed of five panelists. Members shall be informed promptly of the composition of the panel...

8. Members shall undertake, as a general rule, to permit their officials to serve as panelists.

9. Panelists shall serve in their individual capacities and not as government representatives, nor as representatives of any organization. Members shall therefore not give them instructions nor seek to influence them as individuals with regard to matters before a panel.

10. When a dispute is between a developing country Member and a developed country Member the panel shall, if the developing country Member so requests, include at least one panelist from a developing country Member.

11. Panelists' expenses, including travel and subsistence allowance, shall be met from the WTO budget in accordance with criteria to be adopted by the General Council, based on recommendations of the Committee on Budget, Finance and Administration...

Article 10

Third Parties

1. The interests of the parties to a dispute and those of other Members under a covered agreement at issue in the dispute shall be fully taken into account during the panel process.

2. Any Member having a substantial interest in a matter before a panel and having notified its interest to the DSB (referred to in this Understanding as a "third party") shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report...

⁴⁵⁷ In the case where customs unions or common markets are parties to a dispute, this provision applies to citizens of all member countries of the customs unions or common markets.

Article 13

Right to Seek Information

1. Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member. A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information which is provided shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information.

2. Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group. Rules for the establishment of such a group and its procedures are set forth in Appendix 4.

Article 14

Confidentiality

1. Panel deliberations shall be confidential.

2. The reports of panels shall be drafted without the presence of the parties to the dispute in the light of the information provided and the statements made.

3. Opinions expressed in the panel report by individual panelists shall be anonymous....

Article 16

Adoption of Panel Reports

1. In order to provide sufficient time for the Members to consider panel reports, the reports shall not be considered for adoption by the DSB until 20 days after the date they have been circulated to the Members.

2. Members having objections to a panel report shall give written reasons to explain their objections for circulation at least 10 days prior to the DSB meeting at which the panel report will be considered.

3. The parties to a dispute shall have the right to participate fully in the consideration of the panel report by the DSB, and their views shall be fully recorded.

Article 17

Appellate Review

Standing Appellate Body

1. A standing Appellate Body shall be established by the DSB. The Appellate Body shall hear appeals from panel cases. It shall be composed of seven persons, three of whom shall serve on any one case. Persons serving on the Appellate Body shall serve in rotation. Such rotation shall be determined in the working procedures of the Appellate Body....

13. The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel.

Article 19

Panel and Appellate Body Recommendations

1. Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned⁴⁵⁸ bring the measure into conformity with that agreement.⁴⁵⁹ In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.

Article 21

Surveillance of Implementation of Recommendations and Rulings

1. Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members.

2. Particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement.

3. At a DSB meeting held within 30 days⁴⁶⁰ after the date of adoption of the panel or Appellate Body report, the Member concerned shall inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB. If it is impracticable to comply immediately with the

⁴⁵⁸ The “Member concerned” is the party to the dispute to which the panel or Appellate Body recommendations are directed.

⁴⁵⁹ With respect to recommendations in cases not involving a violation of GATT 1994 or any other covered agreement, see Article 26.

⁴⁶⁰ If a meeting of the DSB is not scheduled during this period, such a meeting of the DSB shall be held for this purpose.

recommendations and rulings the Member concerned shall have a reasonable period of time in which to do so...

6. The DSB shall keep under surveillance the implementation of adopted recommendations or rulings. The issue of implementation of the recommendations or rulings may be raised at the DSB by any Member at any time following their adoption. Unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time pursuant to paragraph 3 and shall remain on the DSB's agenda until the issue is resolved. At least 10 days prior to each such DSB meeting, the Member concerned shall provide the DSB with a status report in writing of its progress in the implementation of the recommendations or rulings.

7. If the matter is one which has been raised by a developing country Member, the DSB shall consider what further action it might take which would be appropriate to the circumstances.

8. If the case is one brought by a developing country Member, in considering what appropriate action might be taken, the DSB shall take into account not only the trade coverage of measures complained of, but also their impact on the economy of developing country Members concerned.

Article 22

Compensation and the Suspension of Concessions

1. Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements. Compensation is voluntary and, if granted, shall be consistent with the covered agreements.

2. If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time determined pursuant to paragraph 3 of Article 21, such Member shall, if so requested, and no later than the expiry of the reasonable period of time, enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation. If no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time, any party having invoked the

dispute settlement procedures may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements.

3. In considering what concessions or other obligations to suspend, the complaining party shall apply the following principles and procedures:

(a) the general principle is that the complaining party should first seek to suspend concessions or other obligations with respect to the same sector(s) as that in which the panel or Appellate Body has found a violation or other nullification or impairment;

(b) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to the same sector(s), it may seek to suspend concessions or other obligations in other sectors under the same agreement;

(c) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to other sectors under the same agreement, and that the circumstances are serious enough, it may seek to suspend concessions or other obligations under another covered agreement;...

(f) for purposes of this paragraph, “sector” means:

(i) with respect to goods, all goods;

(ii) with respect to services, a principal sector as identified in the current “Services Sectoral Classification List” which identifies such sectors;⁴⁶¹

(iii) with respect to trade-related intellectual property rights, each of the categories of intellectual property rights covered in Section 1, or Section 2, or Section 3, or Section 4, or Section 5, or Section 6, or Section 7 of Part II, or the obligations under Part III, or Part IV of the Agreement on TRIPS;

(g) for purposes of this paragraph, “agreement” means:

(i) with respect to goods, the agreements listed in Annex 1A of the WTO Agreement, taken as a whole as well as the Plurilateral Trade Agreements in so far as the relevant parties to the dispute are parties to these agreements;

(ii) with respect to services, the GATS;

(iii) with respect to intellectual property rights, the Agreement on TRIPS.

4. The level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment....

⁴⁶¹ The list in document MTN.GNS/W/120 identifies eleven sectors.

8. The suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached. In accordance with paragraph 6 of Article 21, the DSB shall continue to keep under surveillance the implementation of adopted recommendations or rulings, including those cases where compensation has been provided or concessions or other obligations have been suspended but the recommendations to bring a measure into conformity with the covered agreements have not been implemented.

9. The dispute settlement provisions of the covered agreements may be invoked in respect of measures affecting their observance taken by regional or local governments or authorities within the territory of a Member. When the DSB has ruled that a provision of a covered agreement has not been observed, the responsible Member shall take such reasonable measures as may be available to it to ensure its observance. The provisions of the covered agreements and this Understanding relating to compensation and suspension of concessions or other obligations apply in cases where it has not been possible to secure such observance.⁴⁶²

Article 23

Strengthening of the Multilateral System

1. When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.

2. In such cases, Members shall:

(a) not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination

⁴⁶² Where the provisions of any covered agreement concerning measures taken by regional or local governments or authorities within the territory of a Member contain provisions different from the provisions of this paragraph, the provisions of such covered agreement shall prevail.

consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding;

(b) follow the procedures set forth in Article 21 to determine the reasonable period of time for the Member concerned to implement the recommendations and rulings; and

(c) follow the procedures set forth in Article 22 to determine the level of suspension of concessions or other obligations and obtain DSB authorization in accordance with those procedures before suspending concessions or other obligations under the covered agreements in response to the failure of the Member concerned to implement the recommendations and rulings within that reasonable period of time.

Article 24

Special Procedures Involving Least-Developed Country Members

1. At all stages of the determination of the causes of a dispute and of dispute settlement procedures involving a least-developed country Member, particular consideration shall be given to the special situation of least-developed country Members. In this regard, Members shall exercise due restraint in raising matters under these procedures involving a least-developed country Member. If nullification or impairment is found to result from a measure taken by a least-developed country Member, complaining parties shall exercise due restraint in asking for compensation or seeking authorization to suspend the application of concessions or other obligations pursuant to these procedures.

2. In dispute settlement cases involving a least-developed country Member, where a satisfactory solution has not been found in the course of consultations the Director-General or the Chairman of the DSB shall, upon request by a least-developed country Member offer their good offices, conciliation and mediation with a view to assisting the parties to settle the dispute, before a request for a panel is made. The Director-General or the Chairman of the DSB, in providing the above assistance, may consult any source which either deems appropriate.

Article 25

Arbitration

1. Expeditious arbitration within the WTO as an alternative means of dispute settlement can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties.

Article 27

Responsibilities of the Secretariat

1. The Secretariat shall have the responsibility of assisting panels, especially on the legal, historical and procedural aspects of the matters dealt with, and of providing secretarial and technical support.

2. While the Secretariat assists Members in respect of dispute settlement at their request, there may also be a need to provide additional legal advice and assistance in respect of dispute settlement to developing country Members. To this end, the Secretariat shall make available a qualified legal expert from the WTO technical cooperation services to any developing country Member which so requests. This expert shall assist the developing country Member in a manner ensuring the continued impartiality of the Secretariat.

3. The Secretariat shall conduct special training courses for interested Members concerning these dispute settlement procedures and practices so as to enable Members' experts to be better informed in this regard.

APPENDIX 1

AGREEMENTS COVERED BY THE UNDERSTANDING

(A) Agreement Establishing the World Trade Organization

(B) Multilateral Trade Agreements

Annex 1A: Multilateral Agreements on Trade in Goods

Annex 1B: General Agreement on Trade in Services

Annex 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights

BILATERAL INVESTMENT TREATIES

Doubtless, investment is an important determinant of economic growth of the country. Readiness of an investor to invest in the economy of a state depends on many economic, political, legal, social and other factors that determine the conditions of investment risk and security. One of the main reasons for the lack of direct foreign investment in developing and transitioning countries is the insecurity and instability of its judicial system, which includes such problems as corruption, non-enforcement of judgments, insufficient legal framework and others. Therefore, investors in transitioning States in particular seek to have an effective dispute resolution mechanism which offers a neutral substantive law, speedy and fair trial.

Bilateral Investment Treaties (BIT) are agreements between states aimed at solving these problems, which serve as a special tool and mechanism to promote and attract foreign direct investment. BITs provide stable legal re-

gime, incentives for investors and effective dispute settlement mechanism. The content of BITs varies depending on economic and political factors. Nevertheless, there are several key issues that are governed by a typical BIT: (1) conditions of admission and regulation of foreign investment in the host country; (2) provision of government guarantees and incentives to encourage investment; (3) provision of protection and guarantees against potential total or partial expropriation of investments by host state; (4) methods and mechanisms for the settlement of investment disputes.

Today, BITs enjoy wide recognition among many countries. Majority of BITs are concluded between developed and developing countries. Due to the fact that BITs are designed to protect investments made by investors of one State in the territory of another State scope of BITs primarily depends on the definition of the term “investments.” To date, no universal definition of investment exists. Definition of investments varies depending on investment policy of States, economic interests and forms of investment. Typically, many BITs contain broad definition of investment covering various forms of capital in order to provide the greatest degree of protection.

One of the dispute settlement options provided by such agreements is Investor-State arbitration under the auspices of International Centre for the Settlement of Investment Disputes (ICSID) established and governed by the Convention on the Settlement of Investment Disputes between States and nationals of other States. Investor-State Arbitration is a mechanism whereby foreign investors can avoid filing a claim against host State in its courts, where the State is likely to enjoy a home court advantage. Thus, the main purpose of the Convention is to remove investment disputes from the jurisdiction of national courts and transfer them into consideration to a specialized neutral international dispute settlement body.

***Convention on the Settlement of Investment Disputes
Between States and Nationals of Other States, 1965***⁴⁶³

The Contracting States

Considering the need for international cooperation for economic development, and the role of private international investment therein;

Bearing in mind the possibility that from time to time disputes may arise in connection with such investment between Contracting States and nationals of other Contracting States;

⁴⁶³ 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States 575 UNTS 159, 4 ILM 532 (1965).

Recognizing that while such disputes would usually be subject to national legal processes, international methods of settlement may be appropriate in certain cases;

Attaching particular importance to the availability of facilities for international conciliation or arbitration to which Contracting States and nationals of other Contracting States may submit such disputes if they so desire;

Desiring to establish such facilities under the auspices of the International Bank for Reconstruction and Development;

Recognizing that mutual consent by the parties to submit such disputes to conciliation or to arbitration through such facilities constitutes a binding agreement which requires in particular that due consideration be given to any recommendation of conciliators, and that any arbitral award be complied with; and

Declaring that no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration,

Have agreed as follows:...

Article 1

1. There is hereby established the International Centre for Settlement of Investment Disputes (hereinafter called the Centre).

2. The purpose of the Centre shall be to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention....

CHAPTER II - JURISDICTION OF THE CENTER

Article 25

1. The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

2. “National of another Contracting State” means:

(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute..., and

(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute....

3. Consent by a constituent subdivision or agency of a Contracting State shall require the approval of that State unless that State notifies the Centre that no such approval is required.

4. Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre....

Article 27

1. No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute....

SECTION 6: RECOGNITION AND ENFORCEMENT OF THE AWARD

Article 53

1. The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention....

Article 54

3. Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.

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